

ALLAHABAD HIGH COURT

Chaudhri Mohammad Sulaiman Khan

Vs

Amir Jan

(Dar, J.)

06.03.1941

JUDGMENT

Dar, J.

1. This is a plaintiff's appeal arising out of a suit for partition of a dwelling house in quasba Marehra, district Etah. There are two cosharers in the house and their shares are admitted. The only question in the case is whether the plaintiff is entitled to the partition of the house or whether the house should be valued and be sold to the defendant under Section 4, Partition Act. In case the house is to be sold there is no dispute as to the value of the share. It has been assessed at Rs. 500 and the finding has not been challenged. The trial Court has found in favor of the plaintiff that he was entitled to the partition. The defendant took up the matter in appeal and the appellate Court has found in favor of the defense, namely that the house is to be valued and its value should be paid to the defendant but the house should not be partitioned. The plaintiff has now made a second appeal to this Court and he has raised two points before me. Firstly he contends that on the facts found in the case Section 4, Partition Act, did not apply and the plaintiff as a cosharer was entitled to ordinary rights of a cosharer to have the house partitioned. The second point raised on his behalf is that in case the house is to be valued the price should be paid to him immediately or after the time fixed by the Court below and the decree of the Court below directing that the price could be recovered as a moneydecree is not correct. The decree he contends should have directed that in case the price is not paid by the time fixed by the Court the plaintiff would be entitled to a partition of the house.

2. As regards the question whether Section 4, Partition Act, applies to the case or not there is no dispute as to law which is applicable to the case. Section 4, Partition Act, enjoins that in case of a transfer of a dwelling house belonging to an undivided family the share of the transferee may be valued, and price may be paid to him. In a Pull Bench case of this Court, Sultan Begam v. Debi Prasad ('08) 30 All. 324, it has been explained that undivided family in Section 4, Partition Act, does not mean an undivided Hindu family but it applies to undivided families of all castes and communities and in order to comply with the condition laid down in the section all that is necessary is that the family should be undivided qua the dwelling house which is the subject-matter of partition and it is not necessary that the family should be undivided with regard to other properties also. This case has been followed or approved in several other cases, particularly in Nil Kamal v. Kamaksya Charan ('28) A.I.R. 1928 Cal 539, in which it also was held that it is not

necessary to attract the provisions of Section 4, Partition Act, that the members of the undivided family who claim the benefit of Section 4 may be actually residing in the house. Therefore in order to apply Section 1, Partition Act, it is not necessary that members of the family should actually be residing in the house, nor is it necessary that they should be undivided with regard to the rest of their property. In a recent case of the Bombay High Court in Bai Fatma v. Gulamnabi Hajibhai ('36) 23 A.I.R. 1936 Bom 197 a learned Judge of the Bombay High Court has taken the view that Section 4, Partition Act, does not apply to a case where the person who claims the benefit of Section 4, Partition Act, does not actually reside in the house, the subject-matter of partition, and has abandoned his intention of residing in that house. Whether this is consistent with what has been laid down in the Full Bench case of this Court and other cases in other High Courts it is not necessary to consider because in the case before me the person who is claiming the benefit of Section 4, Partition Act, is admittedly residing in the dwelling house which is in dispute and therefore the Bombay case has no application.

3. It is not disputed that the property in dispute is a dwelling house and its previous history may now be stated. At one time, it belonged to a man by the name of Alimuddin. After him it devolved by right of inheritance on his two daughters Wazir Jan and Ameer Jan. Alimuddin died some time ago and Wazir Jan was married also some time ago and she mostly resides with her husband who lives elsewhere and not in the dwelling house in dispute. There is no finding whether Wazir Jan visits this house or has abandoned it for ever. The other sister Ameer Jan undoubtedly lives in the house and has been living in it. Wazir Jan has now sold the house to Chaudhri Mohammad Sulaiman Khan, the plaintiff in the suit out of which this appeal has arisen, and Mohammad Sulaiman Khan as a purchaser of Wazir Jan's share has brought the suit for partition. It being admitted that the house being a dwelling house and Ameer Jan is living-in it the only question which remains to be considered is whether the house could be regarded as the house of an undivided family. In other words, whether Wazir Jan and Amir Jan, the two sisters who owned the house before the transfer, could be regarded as members of an undivided family. It is contended that when Mahomedan daughters marry they go to live with their husbands and they cease to be members of an undivided family.

4. I am not prepared to hold as a matter of law that two Mahomedan sisters married or unmarried cannot form an undivided family within the meaning of Section 4, Partition Act, In my opinion, the phrase 'undivided family' in the section is used in a very wide and general sense and two Mahomedan married daughters too may be regarded as members of an undivided family within the meaning of the Act if the house is undivided and if one of them permanently occupies the house and the other, though she lives mostly with her husband, has not permanently abandoned all intention of occupying the house should it be necessary to do so. I have already said that in cases decided by this Court and other Courts it has not been held that residence in the house is an essential condition to apply Section 4. Some of the cases in which Section 4 was applied were cases of married ladies and of daughter's sons, people who ordinarily do not reside together and were not in fact residing in houses, subject-matter of partition in those cases. In my opinion, Mt. Ameer Jan, the defendant, and Mt. Wazir Jan, the vendor of the plaintiff, might well be regarded as members of an undivided family within the meaning of Section 4, Partition Act, and the appeal therefore fails on the main point. The decree passed by the Court of appeal in favor of the defendant in this partition suit is to the following effect:

5. The decree of the lower Court is modified to this extent only, that the house will not be

actually partitioned but shall be retained by the defendant as sole owner. The defendant shall pay Bs. 500 as the price to the plaintiff's share in the house, together with the costs of the lower Court after deducting her costs of the appeal within three months from today. In the event of default the plaintiff shall be at liberty to execute this decree as decree for money against the defendant and this decree shall be a charge on half of the house.

6. In my opinion this is not a correct decree to pass under Section 4, Partition Act. In such cases ordinarily the purchaser should be asked to deposit in Court the purchase money by a time fixed by the Court, the time to be fixed and extended at the discretion of the Court. If the purchaser deposits the said purchase money within the time allowed by the Court, a decree should be passed in the suit in favor of the purchaser declaring that all rights of the plaintiff or persons claiming partition in the property in suit have been transferred by a court sale in favor of defendant on payment of the said sale price and the plaintiff's claim for partition is dismissed. If necessary a sale certificate may also be issued to the purchaser. In case the defendant or the purchaser makes default in payment of purchase money, a decree for partition be made in favor of plaintiff and the partition should be proceeded with.

7. I therefore allow the appeal in part and setting aside the decree of both Courts below, I remand the case to the trial Court with direction that it should be restored to its original number and be disposed of according to law. The trial Court will now fix a date giving three months time to defendant to deposit us. 500, the sale price of the house in suit. It will be open to Court to extend this time if it so thinks proper. If the amount is deposited within the time allowed by the Court, the trial Court will direct payment of purchase money to plaintiff and will declare by a decree that the plaintiff's rights in the house in suit have been transferred to the defendant by a court sale for Rs. 500 and the plaintiff's claim for partition stands dismissed. If default is made in payment of purchase money, the Court will pass a decree for partition of property and proceed with the partition of property in ordinary course. As the appeal has failed on the main point of contest and there was no opposition on the question of amendment of decree, the plaintiff-appellant will pay the defendant-respondent costs both in this Court and in the lower appellate Court. The costs of the trial Court will be in the discretion of the trial Court.