CALCUTTA HIGH COURT

Boto Krishna Ghose

Vs.

Akhoy Kumar Ghose

Letters Patent Appeal No. 13 of 1946

(R.P. Mookerjee and P.N. Mitra, JJ.)

09.09.1949

JUDGMENT

P.N. Mitra, J.

1. This is an appeal under clause 15, Letters Patent, from a judgment of Chakravartti, J. It is on behalf of defendant 1 in a suit for partition of a dwelling house and certain other properties. Our learned brother in concurrence with the Courts below has rejected the appellant's prayer under Section 4, Partition Act, to buy up the plaintiff's share in the dwelling house and it is the propriety of this decision that is in question before us in this appeal.

2. The facts, which are not now in dispute, are these. One Fakir Ghose and his three brothers Dwarik, Tarini and Ambika held a raiyati holding under a gaati tenure which was owned by one Kalidhan Debi, and their dwelling house stood on a portion of this holding. The ganti tenure was purchased by Fakir. He thereafter died leaving two sons Upen and Nabin as his heirs, who obtained by inheritance each an eight annas share of the ganti and a two annas share of the holding including the homestead. On 12th June 1920, Upen sold his undivided share in both the tenures and the holding including the homestead to one Troilakya who was a stranger to the family. After this sale, Upen left the homestead and Troilakya came to occupy the hut or huts in which Upen used to live. Thereafter, on 11th July 1921, Nabin, the other son of Fakir, sold to the plaintiff Akshoy Kumar Ghosh his undivided share of the tenure and the holding together with the homestead. On 3rd January 1923 Upen, however, repurchased the properties he had sold to Trailokya and came again to live in his old huts in the homestead.

3. The plaintiff brought the present suit on 4th March 1940, for partition of the tenure and the holding including the dwelling house except certain khas lands which had previously been partitioned between the parties. Upen was then dead and his share had devolved on his sons defendant 1 and his brothers. They were joined as defendants, as also the heirs of the brothers of

Fakir. In his written statement defendant 1 made a prayer under Section 4, Partition Act for buying up the plaintiff's share in the dwelling house. The learned Munsif refused it on two grounds. Firstly, he said the plaintiff Akshoy was an agnatic relation of the family and a neighbor and therefore not a stranger to the family, and as such the section could not be invoked against him. Secondly, he held that as Upen had sold away his share to a stranger, defendant 1 as the heir of Upen cannot claim pre-emption at a subsequent period against the purchaser of another co-sharer's interest, viz. the plaintiff in the present case. On appeal by defendant 1, for lower appellate Court put this ground of rejection of the claim of defendant 1 in this way. It said that as Upen had sold away his share to a stranger, there was no joint family property at the date of the plaintiff's purchase, and re-purchase by Upen of his share subsequently did not convert the property again into joint family property. The lower appellate Court did not allude to the ground that the plaintiff was an agnatic relation of the defendants and therefore not a stranger, but assigned an additional reason of its own that as the co-sharers had separate huts of their own, there was no common dwelling house which could attract the operation of Section 4, Partition Act.

4. Defendant 1 appealed to this Court. Chakravartti, J., pronounced against both the special grounds relied on by the Courts below. Our learned brother held that the fact that the plaintiff was an agnatic relation of the defendants did not exclude the operation of Section 4 as against him, nor did the other fact that the co-sharers had separate huts of their own destroy the integrity of the dwelling house, as the sites of the huts and of the homestead as a whole were undivided property of the co-sharers. Our learned brother, however, elaborated what may be called the common ground relied on by the Courts below and proceeded to affirm their decision on a construction of Section 4, Partition Act, which negatived both the liability of the plaintiff to have any claim made against him and the competence of defendant 1 as the son of Upen to make any claim under it. The appellant has contended before us that properly construed the section is wide enough to embrace both him and the plaintiff within its ambit.

5. Section 4(1), Partition Act, which is the relevant provision, is in these terms :
Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, it any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

6. Upon the terms of this sub-section Chakravartti, J. has observed as follows :
They require that the sale must be of a share of a dwelling house belonging to an undivided family and the offer to buy the share must be made by a member of that family who is himself a share-holder, when the purchaser of that share, not being a member of the family, brings a suit for partition. The right is not given to any other person, nor against the purchaser of a share of any other kind of property. As Chakravartti, J., has pointed out, the section requires that the

purchase must have been of a share in a dwelling house belonging to an undivided family, and our learned brother's conclusion is that this requirement is not fulfilled in the present case, because, as our learned brother puts it, when the plaintiff purchased the share of Nabin on 11th July 1921, after Upen's sale to Trailokya but before the re-purchase by him, the plaintiff purchased a share of a dwelling house, not belonging to an undivided family but belonging to an undivided family and another person, viz., Trailokya. In our learned brother's view, therefore, the plaintiff is not a person against whom a claim under Section 4 can be made.

7. This view, it will be seen, makes the plaintiff immune from any claim being made against him not merely by defendant 1 but also by the other co sharer members of the family. But our learned brother has observed :

I am, however, prepared to hold, as was held in the Allahabad case of *Masitullah v. Umrao*[1], and the Patna case of *Sheodhar Prasad Singh v. Kishun Prasad Singh*[2], that after a member of an undivided family has sold off his share in the family dwelling house, the remainder of the house can still be regarded as a dwelling house belonging to an undivided family, such family being constituted of the remaining members. This view of the section would make the sale by Nabin a sale of a share of a dwelling house belonging to an undivided family, but it would still not warrant a claim by defendant 1, a son of Upen, to purchase the plaintiff's share. Under this view, the dwelling house of which a share was sold to the plaintiff would be the hence minus Upen's share, and the undivided family to which the house belonged would be the family minus Upen and his heirs. Since a claim against the purchaser could be maintained only by 'any member of the family, being a share-holder' it could be maintained by a member of the residuary family owning the residue of the house, who had himself a share, but no claim can be maintained by defendant 1 who is not a member of that family and who has no share in the residue of the house which, in the present view, must be taken to be the dwelling house.

8. This view of a dwelling house minus Upen's share belonging to a family minus Upen, therefore, leads to this result that while it confers a right on the remaining co-sharer members of the family to make a claim against the plaintiff and in that sense brings him within the terms of the section, it at the same time puts Upen and his heirs outside its ambit disqualifies them from making any application under it. This view, however, is incompatible with the position that the plaintiff purchased a share of a dwelling house belonging to an undivided family and another person. The plaintiff is either a person who has purchased a share of a dwelling house belonging to an undivided family, or he is not such a person. The plaintiff cannot, in our opinion, be once regarded as not being such a person for the purpose of shutting out the claim of defendant 1, and again regarded as being such a person for the purpose of admitting against him the claim of the other co-sharer members of the family.

9. The facts in the two cases referred to by our learned brother were that in one of them the stranger purchaser of a share and in the other some members of the family had actually got his or their share partitioned off by metes and bounds from the rest of the house which was left

undivided amongst the remaining co-sharers. It could be truly said in those cases that after the partition the rest of the house constituted a dwelling house belonging to an un-divided family. Those cases, in our opinion, do not lend any countenance to the fiction of a notional dwelling house from which a share not actually partitioned off is to be regarded as separated.

10. This notion of a residuary dwelling house belonging to a residuary family, therefore, does not commend itself to us, and putting it aside, we have to consider whether the proposition laid down by our learned brother that the plaintiff is not the purchaser of a share of a dwelling house belonging to an undivided family and is, therefore, not

[1] AIR 1929 All 414 : (119 I. C. 523)

[2] AIR 1941 Pat 4 : (190 I. C. 117)

amenable to the jurisdiction under Section 4, is correct.

11. The question turns upon what meaning is to be attributed to the expression share of a dwelling house belonging to an undivided family. It may be pointed out that this expression was used in Para. 2 of Section 44, Transfer of Property Act and seems to have been adopted from there into Section 4, Partition Act which takes up the law from where the former section leaves it. The expression, therefore, presumably has, or ought to have, the same meaning in the two enactments.

12. As has been pointed oat by Chakravartti, J. the word family as used in this expression, has been held not to be limited to a body of persons who are descended from a common ancestor, but to include a group of persons, related in blood, who live in one house or under a common management, *Khirode Chandra Ghoshal v. Sarada Prosad Mitter*[3], Our learned brother has also pointed out that undivided family has been held to mean simply a family not divided qua the dwelling house, in other words, a family which owns a dwelling house and has not divided it. It does not mean Hindu joint family or even joint family. The members need not be joint in mess (*Latifunnessa Bibi v. Abdul Rahman*[4], and the cases cited therein). The essence of the matter, therefore, is that the house itself should be undivided amongst the members of the family who are its owners. The emphasis is really on the undivided character of the house, and it is this attribute of the house which imparts to the family its character of an undivided family. For the members of the family may have partitioned all their other joint properties and may have separated in mesa and worship, but they would still be an undivided family in relation to the dwelling house so long as they have not divided it amongst themselves.

13. If in this state of things a member of the Family transfers his share in the dwelling house to a stranger, the position that arises is that para. 2 of Section 44, Transfer of Property Act comes into operation and the transferee does not become entitled to joint possession or other common or part enjoyment of the house, although he would have the right to enforce a partition of his share. The object of this provision is to prevent the intrusion of strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share to a stranger. The factual position then is that it is still an undivided dwelling house, the

possession and enjoyment of which are confined to the members of the family, the stranger transferee being debarred by law from exercising his right to joint possession which is one of the main incidents of co-ownership of property. Such a dwelling house can in our opinion still be looked upon as a dwelling house belonging to an undivided family, because the members of the family have not divided it amongst themselves and are in sole enjoyment and possession of it to the exclusion of the stranger transferee who has only a right to partition. and so long as the dwelling house has not been completely alienated to strangers as was the case in *Vaman Vishnu v. Vasudeo Norbhat*[5], successive transfers by other co-sharer members of the family do not alter the factual position in this respect, because the remaining member or members of the family have the right to hold exclusive possession to the exclusion of the stranger alienees. So long as that situation lasts, the dwelling house, in our opinion, continues to be a dwelling house belonging to an undivided family. The other view that as soon as a co sharer transfers his

[3]12 CLJ 525 : (7 I. C. 436) [5]23 Bom 78

[4] 38 C. W. N. 46 : (AIR 1934 Cal 202)

share to a stranger the dwelling house cases to be a house belonging to an undivided family would lead to this result that as against a purchaser in the position of the present plaintiff the prohibition contained in Para. 2 of Section 44, Transfer of Property Act against joint possession of the house by a stranger purchaser would be rendered nugatory, because he could claim that what he had purchased was not a share in a dwelling house belonging to an undivided family and that he did not, therefore, come within the mischief of the section at all. If, then, for the purposes of Section 44, Transfer of Property Act the expression share in a dwelling house belonging to an undivided family has to be interpreted in the way we have construed it above, we do not think there would be any justification for placing a different interpretation upon the self-same expression when used in the piece of complementary legislation enacted in Section 4, Partition Act. As we have said before, Section 4, Partition Act, carries forward the law laid down in Section 44, Transfer of Property Act, and after the latter section has protected the family dwelling house from the intrusion of strangers into it, the former steps in to secure that no portion of it may pass into the possession of a stranger by giving an opportunity to the members of the family to buy him up and keep it for themselves when a suit is brought for partition of the house.

14. The Courts have not hesitated to put a liberal construction upon the Partition Act and to interpret its provisions in such a way as would promote and fulfil the object of this piece of legislation which is to preserve the integrity of the family dwelling house and to enable the members of the family to keep it for themselves as far as possible. A good illustration is the case of *Satyabhama v. Jatindra Mokan*[6], where in a suit for partition brought by a stranger purchaser some co-sharer members of the family were allowed to buy up other stranger purchasers, who were defendants in the action but had asked for an allotment in the house to be given to them on the partition, the reason advanced being that to deny this right to the co-sharer members of the family would be to defeat the object which the Legislature had in enacting the Partition Act. and in the recent case of *Abu Isa Thakur v. Dinabandhu Banik*[7], the plaintiff, who was a co-sharer member of the family, was allowed to buy up certain stranger purchasers who were defendants in the partition suit and who do not appear even to have asked for an allotment for themselves in the

house.

15. We think that the interpretation we are placing upon the expression share in a dwelling house belonging to an undivided family accords with and gives effect to the real meaning and intention of the Legislature in enacting Section 44, Transfer of Property Act and Section 4, Partition Act. and this construction has this additional merit that it dispenses with the necessity of resorting to the fiction of a notional dwelling house belonging to the remaining co-sharer members of the family alone for the purpose of investing them with the right to proceed under Section 4, against a purchaser in the position of the present plaintiff. Our conclusion, therefore, is that the plaintiff has purchased a share of a dwelling house belonging to an undivided family and an application under Section 4, Partition Act is maintainable against him.

16. We have now to deal with the grounds upon which Chakravartti, J. pronounced against the competence of defendant 1, to make an application under Section 4. The first

[6]49 CLJ 136 : (AIR 1929 Cal 269)

[7]51 C. W. N. 639 : (AIR 1947 Cal 426)

ground sufficiently appears from the passage we have quoted above from our learned brother's judgment, and it was further developed by him in this way : In my opinion, the word 'family' in the phrase 'any member of the family, being a share-holder must mean that particular undivided family, referred to in the beginning of the section, to which the dwelling house belonged, and the 'share-holder' must be a holder of a share in that house. Since, if the share sold to the plaintiff be at all a share of a dwelling house belonging to the undivided family, the family must be the family minus Upen and the dwelling house the house minus Upen's share, defendant 1, being no member of the one and having no share in the other, has no right under the section to buy off the plaintiff.

17. As we have observed before, this ground of disqualification of defendant 1, is derived from the theory of a residuary dwelling house belonging to a residuary family ; but whether it is a product of that doctrine or whether it is a corollary of the proposition that the plaintiff is not the purchaser of a share of a dwelling house belonging to an undivided family, it loses its force now that we have expressed our dissent from both of them. The other ground was formulated by our learned brother in these terms : When Upen re-purchased his share, it was in his hands, as it is in the hands of defendant 1 and his brothers, not a share held qua a member of the undivided family owning the house, but it share of ancestral property re-acquired from a person to whom Upen had sold it.

18. The ties of blood which bound Upen to the other members of the family were not severed when he sold his share, and the section itself appears to us to recognize that a person may be a member of the family although he may not be owning a share in the dwelling house. It confers the right to apply on any member of the family being a share-holder; the additional qualification of being a share-holder would not be necessary if the in tend meet of the section was that

membership of the family was equivalent to co-ownership of the house. Nor can we find anything in the section which disqualifies a member who, having previously alienated his share, has re-acquired it and is owning it at the time he makes his claim under Section 4. The qualification of the applicant, in our opinion, has to be judged with reference to his position at the date of the application. A member of the family not himself having a share [e.g. the son of a co-sharer in a Dayabhag family, the father being alive up to the date of the application under Section 4] may for the first time purchase a share from another member of the family, or a share-holder member may sell his share to another member or even to a stranger and may re-purchase it from the vendee, but if he shows that he is a co-sharer member of the family at the date of his application he, in our opinion, establishes his competence to make the application. The test is satisfied so far as defendant 1 is concerned, and be is competent to make a claim under Section 4.

19. Certain equitable considerations in favor of the plaintiff and against defendant 1 were adverted to by Chakravartti, J. and were advanced in argument before us by the respondent, but the matter has to be dealt with on the terms of the statute, and if the plaintiff comes within the mischief of the section and the appellant establishes his competence to apply under it, no room is left for the application of purely equitable considerations in the decision of the question before the Court.

20. An attempt was made before us by the respondent to support the judgment of Chakravartti, J. on a ground which was decided against, him by our learned brother, viz. that as the co-sharers had separate huts of their own, there was no common dwelling house to which the section could be attracted. We have already briefly alluded to the reasons which led our learned brother to reject that contention and it is sufficient for us to say that we entirely agree with our learned brother's decision upon this point and the reasons upon which it is based.

21. It remains to mention that the decision of Chakravartti, J. that there is an excess area of .04 acres in the possession of the plaintiff and that the excess should be taken into account in making the partition has not been challenged by way of any cross-appeal by the plaintiff, and the direction given by Chakravartti, J. in this behalf stands.

22. The result is that this appeal is allowed with costs against the contesting respondents and defendant 1's prayer under Section 4, Partition Act is granted. Necessary directions in this behalf will be given by the trial Court to the commissioner appointed to make the partition. Defendant 1 appellant will also get his costs from the contesting respondents of the second appeal before Chakravartti, J. and of the appeal to the lower appellate Court. The parties will bear their own costs of the trial Court up to the preliminary decree. Future costs will be in the discretion of the Court dealing with the case.

R. P. Mookerjee, J.

23. I agree.

Appeal allowed.