

CALCUTTA HIGH COURT

Birendra Nath Banerjee

Vs.

Sm. Snehalata Devi

A.F.O.D. No. 17 of 1956

(P.N. Mookerjee and D. Basu, JJ.)

22.03.1966

JUDGMENT

P.N. Mookerjee, J.

1. This appeal is by defendant No. 4. It arises out of a suit for partition and is directed against the final decree for partition, made by the learned trial Judge. The relevant facts lie within a short compass and they are as follows :

2. The disputed property, which was holding No. 428, now premises No. 88, Dewan Dataram Mondal Ghat Road, within the Kamarhati Municipality and comprised an area of one bigha, five cottahs and odd, originally belonged to one Kedar Nath Chatterjee. On July 11, 1913, Kedar sold it to one Mihir Lal Banerjee, who died on January 11, 1930, leaving behind him surviving, as his heirs and legal representatives, six sons, Narendra, Amarendra, Surendra, Dhirendra, Jitendra and Birendra. Of these Surendra was defendant No. 1 in the instant suit, Dhirendra defendant No. 2, Jitendra defendant No. 3 and Birendra, the present appellant, defendant No. 4 Narendra died in the year 1934 and Amarendra died in 1941. Before their death, as aforesaid, Narendra and Amarendra had executed a mortgage in respect of their share in the disputed property, which was 1/6th each, making a total of 1/3rd for Rs. 1,000 to one Satya Charan Bose. This was on March 7, 1931. On November 2, 1943, Satya Charan died intestate, leaving his son Sasanka as his heir. On November 31, 1944, a preliminary decree for sale was passed in the mortgage suit (No. 40 of 1944 of the Court of the First Munsif, Sealdah) which was brought by Sasanka for enforcement of the above mortgage. In the said suit, the final mortgage decree was passed, on September 4, 1945 and, in execution of the same, the mortgaged property, namely, the undivided 1/3rd share of the disputed premises, which was inherited by Narendra and Amarendra from their father Mihir Lal Banerjee (deceased), was put up to sale and was purchased by the decree-holder Sasanka. On September, 1949, Sasanka sold the above purchased property to the present plaintiff, Snehalata Devi, and, on December 12, 1949, Snehalata instituted the present partition suit (No. 193 of 1949

of the Fifth Court of the Subordinate Judge at Alipore), in which the preliminary decree for partition was passed by the learned trial Judge on May 24, 1951. The said decree directed inter alia payment of costs by the defendant No. 1 Surendra to the plaintiff and, in execution of that part of the decree, the plaintiff put up Surendra's undivided 1/6th share in the disputed property to sale and the same was purchased by the added respondent Debendra Chandra Bhattacharya on March 11, 1955, the sale being confirmed on May 15, 1956. Thereafter, the final decree for partition was made by the learned trial Judge on June 7, 1955, after disposing of objections, filed by the defendants to the commissioner's report, and, against the said final decree, the present appeal was filed by the appellant (defendant No. 4) on August 11, 1955. The auction-purchaser Debendra Chandra Bhattacharya was added as a party respondent to the present appeal on September 19, 1961 and thereafter, the appellant made an application for pre-emption under Section 4 of the Partition Act in respect of the plaintiff's 1/3rd undivided share in the disputed property as also of Debendra's 1/6th undivided share in the same. This application was made on October 3, 1961.

3. In support of the appeal, Mr. Mukherjee raised certain contentions on the merits and submitted that the final decree for partition, as passed by the learned trial Judge, should be set aside, or, at least, varied in material respects. He next submitted that, in any event, his client should be allowed opportunity to pre-empt upon his aforesaid application under Section 4 of the Partition Act in respect of the plaintiff's 1/3rd undivided share in the disputed property and Debendra's undivided 1/6th share.

4. On the merits of the appellant's objections against the final decree, passed by the learned trial Judge, we are satisfied that the said objections have little substance and, if the matter had stood there, this appeal would have been dismissed. It appears, however, that the above application under Section 4 of the Partition Act is valid and effective for starting a proceeding under the said section and, in that view, the matter will have to go back to the learned trial Judge for further proceedings under that section and for a final disposal of the suit in accordance with law in the light of this judgment.

5. Mr. Mukherjee's objections to the final decree for partition, passed by the learned trial Judge, may be grouped under the following heads.

6. His first contention was that, as, in the course of the proceedings, the defendants also applied for partition on their shares and the Commissioner was appointed on that footing and made his report, allotting shares to the different parties and distributing owelty monies in accordance with the same when, eventually, the learned trial Judge refused the defendants' claim for having their shares partitioned in the instant suit as between themselves, the said report should have been rejected and a fresh commission should have been allowed by the learned trial Judge. This was the first contention, raised before the learned trial Judge in the defendants' objections to the Commissioner's report. It was rejected by him and, in our opinion, that was rightly done. The

Commissioner inter alia, allotted particular properties to the plaintiff in respect of the share, belonging to her, and, in terms of the Commissioner's report there will be no difficulty in maintaining the said allotment in favor of the plaintiff vis-a-vis the defendants all combined. It is unnecessary for this purpose to reject the Commissioner's report and issue a fresh commission. We would: accordingly, agreeing with the learned trial Judge, reject this objection of the appellant.

7. It was next urged that, for the plaintiff's allotment, she has been given a much greater frontage than she would be entitled to under the circumstances. A further part of the argument was that, if the said frontage is to be maintained, difficulties would arise in partitioning in future, the defendants' portion amongst themselves with appropriate or proper frontages. This contention was examined by the learned trial Judge in all its details and we are satisfied, from the materials before us, that no injustice would be done to the defendants if the plaintiff's allotment, as made by the Commissioner, be upheld. Enough frontage will be left for the defendants to have a partition amongst themselves and, in that view, we would agree with the learned trial Judge and reject this objection too of the appellant.

8. It was next urged that the learned trial Judge was in error in directing the payment of the entire owelty money jointly by all the defendants. We are unable to see what else could have been done under the circumstances. If the partition is to be made between the plaintiff as one unit and the defendants as the other, as it must be, in the circumstances of this case, in the light of what we shall say presently on the appellant's other objection, there can be no question that the owelty money has to be paid jointly by the defendants. This direction of the learned trial Judge also must, accordingly, be upheld and the appellant's objection to the contrary must be rejected.

9. Lastly, on this part of the case, comes the appellant's objection that the learned trial Judge was fully justified eventually withdrawing from the defendants the concession, earlier made by him, of having their shares partitioned as between themselves in the instant proceeding. It is clear, however, from the proceedings in the court below that when this opportunity was given to the defendants, they were directed to put in parts of the costs of commission. The present appellant along with defendants Nos. 1 and 3 eventually categorically expressed their unwillingness to have a partition of their shares as between themselves and they refused to comply with the learned trial Judge's order for deposit of costs. Costs were, no doubt, deposited by defendant No. 2 but he also, it seems from the records, was not willing in the end to have his share partitioned and indeed, he did not complain in any way against the order, which was passed by the learned trial Judge, withdrawing the above concession from him. As a matter of fact, defendant No. 2 actually prayed for withdrawal of the amount which was deposited by him on account of costs of commission and this prayer was granted by the learned trial Judge. In the circumstances we hold that the learned trial Judge was fully justified making a decree for partition only in favor of the plaintiff as against the defendants and the final decree, made by him, does not suffer from any defect, which will make it vulnerable on the merits.

10. It may be noted at this stage that the last of the above contentions was not actually made before the learned trial judge but it was a point, taken up in this Court, but, as we have said above, it has, in the circumstances of this case, little merit or substance in it.

11. Of graver importance, however, is the next question about the appellant's right to apply for pre-emption of the shares of the plaintiff and Debendra under Section 4 of the Partition Act. As we have said above, this application was made in this Court on October 3, 1961 and it was Vehemently opposed. There can be no question, however, that the plaintiff and Debendra are strangers and the instant partition suit was in respect of the ancestral dwelling house of the original co-sharers. The requisites under the section are thus prima facie satisfied but the appellant's application was opposed mainly on two grounds : (i) that the said application cannot be entertained at this stage, namely, in this appeal and (ii) that it was barred by limitation, as it was filed long beyond three years of the passing of the preliminary partition decree.

12. Having given the matter our best consideration, we are unable to uphold any or the above objections. It is well settled now that an application for pre-emption under Section 4 of the Partition Act can be made at any stage of the suit or, in other words, at any stage, while the suit is pending. There has, no doubt, been a final decree, passed in the instant case by the learned trial Judge, but that decree is under appeal to this Court and the matter is sub judice. The suit, therefore, must be held to be pending and, during its pendency, the above application has been filed. The objection to the said application, therefore, on the first of the above two grounds cannot be accepted.

13. In support of our view, it will be enough to refer to some of the leading authorities on the point, namely, *Pran Krishna Bhandari v. Surath Chandra Roy*¹, explaining the earlier decision of this Court in *Kshirode Chunder Ghosal v. Sarada Prosad Mitra*², *Smt. Satyabhama De v. Jatindra Mohan Deb*³, and *Dwarka Das v. Godhana*⁴,

14. Of the above again, the decision in 49 Cal LJ 136 : AIR 1929 Calcutta 269 (supra) may also be taken as an authority for the proposition that in regard to such an application, the right arises from day-to-day, while the partition suit is pending and no matter that the application has been made beyond three years of the date of the preliminary decree, it will still be in time. This is with regard to the second contention of the opposing respondents. The right of preemption under the aforesaid statutory provision is a right, given by the statute and on its wording, it subsists so long as the suit remains pending, or, in other words, so long as the suit has not been concluded or terminated by an effective final decree for partition. In the instant case, applying the above test, the plea of limitation in respect of the application must be rejected. The contesting respondents' second objection, also, to the appellant's above application must, accordingly, be overruled. That view will also be supported, by the decision of this Court in (1882) ILR 8 Cal 420.

15. On the above view, the instant appeal will be dismissed subject to this that, on the appellant's above application for preemption under Section 4 of the Partition Act, an appropriate proceeding under that section will have to be started now. For that purpose, the matter will go back to the learned trial Judge, who will take the necessary steps and, if, eventually, the said application be granted or effectively allowed and the appellant makes his purchase by right of pre-emption under the said section in terms thereof, the instant suit or proceeding will terminate by making the order for pre-emption in favour of the appellant in respect of the shares of the plaintiff and Debendra. If, on the other hand, the said application is eventually rejected by reason of the appellant's failure to avail himself of the right of purchase by pre-emption under the said section in terms of the said statutory provision, the present decree of the learned trial Judge will be affirmed and the plaintiff's suit will be disposed of accordingly.

16. There will be no order for costs in this Court; other costs will be in the discretion of the learned trial Judge, when he finally disposes of the matter.

¹22 Cal WN 515 : AIR 1919 Cal 1055

³49 Cal LJ 136 : AIR 1929 Cal 269

²(1910) 12 Cal LJ 525

⁴ AIR 1939 All 313 See also AIR 1941 Pat 4 and AIR 1943 Peshar 79

17. It is necessary to mention here that there was a cross-objection, filed by defendants Nos. 1 and 3, in which they sought to challenge the final decree, passed by the learned trial Judge, on grounds, similar to the appellant's objections to the same on the merits. It is enough to say that the said cross-objection would not be maintainable in law as the same cannot be directed against a co-respondent and, unless the claims, made by the cross-objectors in that cross-objection, be allowed to operate against the plaintiff respondent, the said objections would have no legal effect and would be of no avail. In this view, we dismiss the cross-objection but there will be no order for costs In the said cross-objection too.

18. Let copies of the appellant's application for pre-emption under Section 4 of the Partition Act and of the connected affidavits be sent down to the court below along with the records of the suit as quickly as possible.

D. Basu, J.

19. I agree.

Orders accordingly.