

ORISSA HIGH COURT

Paluni Dei

Vs

Rathi Mallick

Second Appeal No. 371 of 1963

(G.K. Misra, J.)

27.10.1964

JUDGMENT

Misra, J.

1. The sole point involved in this appeal is whether defendant 2 is entitled to any relief under Section 4 of the Partition Act (hereinafter referred to as the Act). Facts relevant for the appreciation of this point need only be mentioned. One Kelu had four sons-Kashi, Ananda, Nilei and Bholi. Paluni (defendant 2) is the daughter of Bholi. Chanda (defendant 1) is the widow of Dinei, son of Nilei, Keluni (defendant 3) is the widow of Kurup, son of Ananda. Defendants Nos. 4 and 5 are the sons of Kashi. Plaintiff purchased Ka schedule property from defendant No. 1 by a registered sale-deed, dated 14-11-1953 (Ex. I/a) Plots Nos. 85 and 543, in respect of which relief under Section 4 of the Act is claimed, constitute portions of Ka schedule land. The concurrent findings of both the Courts are that the plaintiff is a stranger purchaser and that defendant No. 2 is a resident of village Jagannathpur where she resides with her husband, but at times comes with her husband to village Bahuliapada to look after the properties which she has got from her parents and her husband is not a Gharjamai.

2. To appreciate the contention, Section 4(1) of the Act may be quoted –

"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, if any member of the family being a share-holder 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 share-holder and may give all necessary and proper directions in that behalf."

3. It is now settled by authorities that the family must be undivided qua the dwelling house. The concurrent finding is that the dwelling house is undivided and that the plaintiff is a stranger and not a member of the family. As the plaintiff-transferee has filed the suit for partition and defendant No. 2 is a share-holder undertaking to buy the share of the plaintiff the only question

for determination is whether defendant No. 2 is a member of the family.

4. Mr. Swain contends that defendant 2. n married daughter residing with her husband elsewhere, cannot be a member of the family of defendant No. 1. The term 'family' is not defined in the Act. It has been consistently held that it would neither be possible nor desirable to frame a comprehensive formula or an exhaustive definition to indicate the meaning of the term 'family' In *Khirode Chandra v. Saroda Prosad*¹, Sir Ashutosh Mukherjee's classical exposition of the meaning of the term 'family' cannot be improved upon. After a thorough discussion, their Lordships' conclusion was couched in the following :

'The word "family", as used in (in- Partition Act ought to be given a liberal' and comprehensive meaning, and it does include a group of persons related in blood, who live in one house or under one head or management. There is nothing in the Partition Act to support the suggestion that the term "family" was intended to be used in a very narrow and restricted sense, namely, a body of persons who trace their descent from a common ancestor'.

The facts of that case were that the owners of the property, who were fifth in descent from the founder, were daughters. All of them were married. Some of them lived with their husbands in the ancestral dwelling house, while others lived occasionally in the same place, and other times, in their house of their respective husbands. Two of the daughters transferred their interest to their husbands who were residing in the family dwelling house of their father-in-law. On these facts, their Lordships held that not only the daughters constituted an undivided family but their husbands, who were residing in the house, were also members of family, Their Lordships observed : When regard is had to Hindu social customs and manners, it is difficult to hold that the term "family" is not comprehensive enough to include such a body of persons. Indeed, in cases where there are no male children in the family and the daughters alone are entitled to the inheritance, their husbands very often live as members of the family, and they with their wives may not inappropriately be treated as the "family" some members of which have shares in the dwelling house." This decision is considered to be the leading authority on the question in issue. In *Latifunnessa Bibi v. Abdul Rahman*², which relates to a Mahomedan family, their Lordships observed that so far as that Court was concerned, 7 Ind Cas 436 (Cal) was the leading authority. The same principle has been followed in *Mahomed Sulaiman Khan v. Mt. Amir Jan*³, It was held in *Krishna Pillai v. Parukutty Amma*⁴, that married sisters in Hindu Mitakshara family owning a house in common belong to an undivided family though they - could never be deemed as members of the same joint Hindu family. His Lordship summarised the position by saying that a dwelling house belonging to an undivided family should include a house where a group of persons, related by blood, live, and that it is not necessary that they should descend from a common ancestor, or that they should constantly reside in the dwelling house, or that they should be joint in mess so long as the members have not abandoned their intention to reside in it. The same view has also been taken in *Aley Hassan v. Toorab Hussain*⁵,

5. A Division Bench of this Court in *Bihum Rewa v. Padmanav Swain*⁶, accepted the analysis of the concept of undivided family enunciated in 7 Ind Cas 436 (Cal). In that particular case , a widowed daughter, residing in the father's family and not receiving any maintenance from her husband's family, was regarded as a member of the undivided family of the father for

the purpose of Section 4 of the Act. Mr. Swain contends that their Lordships' conclusion would have been different if the widowed daughter would have been receiving maintenance from her husband's family, and that, as in this case, defendant 2 mainly resides with her husband and depends upon his income, she cannot be treated as a member of the undivided family. In that case, the widowed daughter had no interest in the dwelling house prior to her purchase and was thus not a share-holder. The right under Section 4 of that Act cannot be exercised unless the member of the family is also a share-holder. It was only to determine whether the widowed daughter was a share-holder, their Lordships examined the question of maintenance. On an analysis that the father has only a moral obligation to maintain a widowed daughter and that this is converted into a legal obligation in the hands of defendants 3 and 4 of that case, who were sons and inherited the property, their Lordships held, on the strength of the receipt of maintenance by her from the father's property, that the widowed daughter was a shareholder of the dwelling house in which she was residing. ILR (1956) Cut 148 affirms the principle in 7 Ind Cas 436 (Cal) though it is somewhat different in facts. The same view has been taken by another Bench of this Court in *Sushila Baral v. John Bunyan Baral*¹⁷. Mr. Swain placed reliance on *Bai Fatma v. Gulamnabi Hajibhai*⁸, This decision does not lay down good law (see *Rukia Bi v. Rajia Bibi*⁹). In AIR 1963 Madras 298, dealing with a case of Mahomedan family, there is some observation which would be pertinent to quote.

"It must also be noticed that under Section 4, it is not necessary that the co-sharer applying for relief should continue to be a member of the family." There is nothing in flu's decision which supports Mr. Swain's contention.

6. Mr. Swain next placed reliance on an un-reported decision of this Court in *Navana Pei v. Brundaban Barik*¹⁰. That case was referred to and distinguished in another unreported decision of this Court in *Hart Behera v. Sadananda Behera*¹¹. In the latter case it was observed that the former decision does not purport to lay down any general rule to the contrary that in no circumstance a married daughter or her husband, in whose favour a transfer has been made, can be treated as a member of the undivided family qua the dwelling house. The facts found in the present case are that defendant 2 is in possession session of the undivided dwelling-house belonging to her deceased father Bholi. Though she resides with her husband elsewhere, she at times resides in her father's house; and has not abandoned her intention to reside there. She is related by blood to the family of Nilei. She must, therefore, be treated a member of the undivided family qua the dwelling house of defendant 1. She, being a shareholder, is entitled to buy the share of the plaintiff-transferee. The judgment of the Courts below her claim is contrary to law and must be set aside.

7. In the result, the appeal is allowed with costs throughout.
Appeal allowed.

Cases Referred.

¹⁷ Ind Cas 436 (Cal)

² AIR 1934 Cal 20

³ AIR 1911 All 281

⁴ AIR 1952 Mad 33

⁵ AIR 1958 Pat 232

⁶ ILR (1956) Cut 148

⁷ ILR (1956) Cut 8

⁸ AIR 1936 Bom 197

⁹ AIR 1963 Mad 298

¹⁰ Second Appeal No. 34 of 1960 (Ori)

¹¹ Second Appeal No. 35 of 1962