ORISSA HIGH COURT

Alekha Mantri

Vs

Jagabandhu Mantri

Second Appeal No. 602 of 1964

(A. Misra and B.K. Patra, JJ.)

01.04.1970

JUDGMENT

B.K. Patra, J.

1. The short point for consideration in this appeal is whether Section 4 of the Partition Act, 1893 (hereinafter referred to as the Act) is at all attracted in a suit for partition brought, not by a stranger purchaser but by a member of the family who is a co-sharer. The facts which are no more in dispute may be stated. One Bhikari Mantri had two sons - Dama (D. 2) and Bhima. Bhima's wife is Pitei plaintiff No. 3 and her two sons are plaintiffs 1 and 2. Bhima died in 1953 while living joint with his brother and thereafter in 1954, the plaintiff and Dama (D. 2) effected a partition of their landed properties. But their ancestral dwelling house was left undivided, although their respective shares therein were specified in the registered partition deed dated 10-5-1954. On 11-5-1957, defendant No. 2 Dama executed a sale deed in respect of his share in the joint family house in favor of defendant No. 1. On toe strength of the sale deed so obtained, defendant No. 1 created disturbances in respect of the plaintiff's possession of the house. The latter therefore instituted a suit for partition of the undivided house and prayed therein to allow them to purchase the share of defendant No. 1 on a price to be fixed by the Court.

2. Defendant No. 1, who alone contested the suit averred that there was a partition by metes and bounds between the plaintiffs and defendant No. 2 not only in respect of the agricultural lands, but also in respect of this disputed family house, and that after partition, defendant No. 2 was living in that portion of the family house which was allotted to his share. After defendant No. 2 sold his share in the house to defendant No. 1, the latter remained in possession thereof and after some time demolished the old structure and constructed a new house on that plot of land. According to him therefore a fresh suit for partition in respect of the house is not maintainable. He also contended that he is an agnatic relation of the parties and not a stranger to the family and that therefore the plaintiffs are not entitled to avail themselves of the benefit of Section 4 of the Act.

3. The learned Munsif accepted the case of defendant No. 1 in toto and dismissed the suit. On appeal, the learned Additional Subordinate Judge recorded the finding that the disputed

homestead plots and house had not been partitioned by metes and bounds between the plaintiffs and defendant No. 2 and that consequently a fresh suit for partition in respect thereof is maintainable. Although he accepted the plea of defendant No. 1 that he is distantly related to the plaintiffs he held that he is not a member of that family. In view of these findings, he reversed the decision of the trial Court and passed a decree in favor of the plaintiffs for partition and allowed the plaintiffs under Section 4 of the Act to repurchase the share of defendant No. 1 in the family house. Defendant No. 1 has filed this Appeal. Although the grounds are mainly directed against the finding of the appellate Court that there was no partition by metes and bounds between the plaintiffs and defendant No. 2 in respect or the disputed family house, the learned Advocate appearing for the appellants conceded at the time of hearing that in view of the finding of fact recorded by the lower appellate Court, he cannot agitate this finding in second appeal.

4. The only point of law that was urged before us is that in view of the fact that in this case, the person who has brought the suit for partition is not the stranger purchaser but is one who is a member of the family, Section 4 of the Act is not applicable and consequently, the plaintiffs are not entitled to buy the share of the stranger purchaser, namely, defendant No. 1 in the dwelling house.

5. Section 4 of the Act so far as is relevant may be quoted :-

> "4 (1). 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 shareholder and may give all necessary and proper directions in that behalf."

For the application of Section 4, therefore, four conditions should be fulfilled, namely, (1) the house should be owned by an undivided family, (2) the share of a co-sharer therein should have been transferred to a person who is a stranger to the family, (3) the transferee should have sued for partition and (4) a member of the family being a share-holder claims and undertakes to buy the share of the stranger transferee.

6. It is no more in dispute in this Court that conditions (1), (2) and (4) have been satisfied in this case. But it is contended on the appellant's side that condition (3) has not been satisfied because the stranger purchaser has not sued for partition. The expression "sues for partition" occurring in sub-section (1) of Section 4 of the Act has been the subject matter of interpretation in several cases which have come up before the High Courts and there is a clear division of opinion on this point. The leading case which propounds what we may call the liberal view is a Bench decision of the Calcutta High Court in *Satyabhama De v. Jatindra Mohan Deb*[1], where it was held that a party in a partition suit whether a plaintiff or defendant is at the same time a plaintiff as well as a defendant. This view was reiterated in two subsequent decisions of that Court in *Abu Isa Thakur v. Dinabandhu Banik*[2], and *Haradhone Haldar v. Usha Charan Karmakar*[3], by this Court in *Banchhanidhi v. Balaram*[4], and *Kanduri Maharana v. Banchhu Maharana*[5], by the Patna High Court in *Sheodhar Prasad v. Kishun Prasad*[6], by the Nagpur High Court in *Laxman Dhondopant v. Mt. Lahana Bai*[7], and by the Allahabad High Court in *Rukmi Sewak v. Mt. Munesari*[8], Quite the contrary view was taken by the Madras High Court in *Butchi Ramayya v. Venkata Subbarao*[9],

and by the Bombay High Court in *Khanderao Dattatraya Wakde v. Balkrishna Mahadeo Pulambrikar*[10], The view of these two Courts is that where a member of the joint family being a share-holder in respect of the disputed house, himself sues the transferee of a share in the house for purchasing the share, his claim cannot be allowed because the suit for partition has not been filed by the transferee. These two conflicting views were, considered by a Full Bench of the Allahabad High Court in *Sakhawat Ali v. Ali Husain*[11], and their Lordships adopted, what we may with respect call a via media view. Their Lordships accepted neither the liberal view in its entirety nor did they go to the extent to which the Madras and Bombay High Court had gone in stating that unless the suit is brought by the transferee stranger, Section 4 of the Act would not be applicable. The Full Bench held that even where the transferee stranger does not himself file the suit for partition, but figures as a defendant in a suit for partition brought by any of the co-owners of the house, Section 4 of the Act will be applicable provided that in such a suit, the stranger defendant claims a partition of his own share. Recently our learned brother Ray, J., in *Sundari Bewa v. Ranka Behera*[12], had taken even a more stringent view than that of the Bombay and Madras High Courts in enunciating the principle that to attract the application of Section 4 of the Act it is not only necessary that the stranger purchaser should himself file the suit for partition but also that the family members themselves should not wish to disrupt their undivided status and dissolve the integrity of the property. In other words, the learned Judge's view is that only when there is a possibility of the undivided joint family continuing in the dwelling house that the law comes to the aid of such family, by compelling the stranger in a suit filed by him for partition to part with his interest in favor of the joint family or any one member thereof.

7. Section 4 of the Act is a logical sequel of or corollary to Section 44 of the Transfer of Property Act and is only an extension of the privilege given to the shareholders by Section 44. Section 44 of the Transfer of Property Act runs thus :-

> "44. Transfer by one co-owner:- Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer; the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house." The principle underlying the provision in para 2 of Section 44 is that it is inequitable to permit a stranger to intrude upon the privacy of an undivided family residence. But Section 44 of the T. P. Act left the stranger purchaser free to have his share carved out in a suit for partition. It is this mischief that was sought to be prevented by Section 4 of the Partition Act. The object underlying Section 4 of the Act is to prevent the transferee of a share in the family house, who is an outsider from forcing his way into the dwelling house in which other members of his transferor's family have a right to live. This being the object behind Section 4, any interpretation that is to be put thereon should without sacrificing or disregarding the terms thereof be the one which advances the object of the Act. In Stroud's Judicial Dictionary, the expression "To sue" has been defined thus:-

> "..... these words "to sue" may be applied indifferently either to the defendant or plaintiff,.....And the words "to sue" not only signify "to prosecute", but also "to defend", or to do something which the law requires for the better prosecution or defence of the cause." (p. 2912-3rd edn.)

Therefore, the expression "such transferee sues for partition" occurring in Section 4 of the Act can as well apply to a transferee defending a suit for partition and this is a interpretation which does not in anyway do any violence to the language of the section. Where, therefore, in a case the language of the section is capable of bearing two interpretations, the one that would further the object of the Act should in our opinion be preferred to the other. That apart, under certain circumstances the object underlying Section 4 of the Act is liable to be frustrated if we accept the narrow interpretation, namely, that to attract the applicability of Section 4, the stranger purchaser must have filed the suit for partition. Take, for instance, a case where the stranger purchaser forces himself into a dwelling house of an undivided family and drives the other co-owner to file a suit for partition as plaintiff. If the narrow interpretation is to be accepted, the plaintiff would not be able to avail himself of the benefit of Section 4 of the Act with the result that he would not be able to exclude the stranger from possession of a joint share of an undivided family house. This is an instance where the very object of Section 4 of the Act would be defeated by accepting the narrow interpretation.

8. Turning now to the decided cases on this point, reference has already been made to the fact that the view of the High Courts of Calcutta, Patna and Nagpur and the earlier decisions of this Court is that Section 4 of the Act applies as well to cases where the stranger purchaser figures as defendant in the suit for partition. It is true that in AIR 1929 Calcutta 269 and AIR 1937 Nagpur 4, the transferee defendant had applied for allotment of his share and the decisions in those two cases also rested on that circumstance on the ground that it brought the defendant-transferee technically within the phrase "sue for partition". But a careful reading of those two judgments would make it clear that although the presence of that additional circumstance was utilised to strengthen the view that the learned Judges had taken, yet the basic reason of the two decisions was that in a suit for partition the parties to the suit are in the position of counter-claimants and it can very well be predicated of a defendant in a suit for partition that he is suing for partition. If in a suit for partition each co-owner against another occupies in himself the role of a plaintiff as well as defendant, a view which is also accepted as correct by the Full Bench of the Allahabad High Court in AIR 1957 Allahabad 356 (FB) referred to already, it follows that the defendant in a suit for partition can as well be said to have "sued for partition" within the meaning of sub-section (1) of Section 4 of the Act. That being so, we do not see any justification to introduce a further limitation into Section 4 of the Act, as has been done by the learned Judges of the Full Bench, that in order to attract the operation of Section 4, the stranger defendant in a suit for partition brought by a member of the undivided family should have also claimed a partition of his own share in the dwelling house. With great respect we are unable to follow the Full Bench decision of the Allahabad High Court.

9. For the very same reasons, we are unable also to accept the extreme view propounded by the Madras and Bombay High Courts which have held that the right given to a share-holder under Section 4 of the Act to buy out transferee who is not a member of the family is available only in cases where the transferee sues for partition and cannot be extended to cases where the transferee

in a defendant even though as a defendant he may claim a share in partition.

10. Before we close we consider it neccessary to refer to the view expressed by Ray, J., in (1968) 34 Cut LT 379 a view which he reiterated in a recent decision in *Satyanarayan Patnaik v. Golak Behari Das*[13], The learned Judge's interpretation of Section 4 of the Act is that to attract the operation of that section it is necessary-

> (1) that the suit must have been filed by the stranger transferee; and
> (2) that the family members themselves do not wish to disrupt their undivided status, and are not desirous of dissolving the integrity of the property.

11. This view is contrary to the consistent earlier view held by this Court that Section 4 of the Act is equally applicable to all cases where a partition suit is brought and a stranger transferee is a party thereto and that it is immaterial whether the suit is brought by the transferee himself or he is arrayed as a defendant in the suit. It is argued that a single Judge of a High Court is bound to follow the decision or another single Judge of that Court on a particular point and, if, in any case, he entertains a different view, it is his duty to refer the matter to a larger Bench and that as instead of following this course our learned brother Ray, J., arrived at a decision contrary to the earlier view held by this Court, the decision of Ray, J., must be deemed to be contrary to law and should be disregarded. There appears to be considerable force in this submission. It is well established principle that a Single Judge of a High Court is ordinarily bound to accept as correct the judgments of Courts of co-ordinate jurisdiction or Division Benches and Full Benches of his Court and, if, in any case, he considers that a previous decision of the Single Bench on the same point requires reconsideration, the question instead of being decided by him should be referred to a larger Bench. We may, in this connection, quote a passage from the judgment of their Lordships of the Supreme Court in *Bhagwan v. Ram Chand*[14],

> "Before we part with this appeal, how-ever, we ought to point out that it would have been appropriate if the learned single Judge had not taken upon himself to consider the question as to whether the earlier decisions of the Division Benches of the High Court needed to be reconsidered and revised. It is plain that the said decisions had not been directly or even by necessary implication overruled by any decision of this Court, indeed, the judgment delivered by the learned Single Judge shows that he was persuaded to re-examine the matter himself and in fact he had substantially recorded his conclusion that the earlier decisions were erroneous even before his attention was drawn to the decision of this Court in Laxman Purshottam Pimputkar's case, (1964) 1 SCR 200 . It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the

learned Single Judge departed from this traditional way in the present case and chose to examine the question himself."

It is unnecessary to refer to the many other cases where the Supreme Court has reiterated this view. The latest observation is contained in *Dhanki Mahajan v. Rana Chandubha Vakhatsing*[15],

12. Adverting now to the merits of the view taken by Ray, J. we have already discussed and held on the first point that to attract the operation of Section 4 of the Act, it is not necessary that the suit must have been brought by the stranger transferee. Regarding the second point referred to above, we are unable to find anything in Section 4 of the Act to warrant reading into it a further limitation that the family members themselves should not have wished to disrupt their undivided status, and should not have desired the dissolution of the integrity of the property. We are, therefore, of the view that (1968) 34 Cut LT 379 and (1970) 36 Cut LT 77 have not been correctly decided.

13. Our conclusion, therefore, is that Section 4 of the Partition Act would also be applicable where the suit for partition is brought by a member of the undivided family against the stranger transferee, and that it is not necessary that the latter should have filed the suit or being a defendant he should have specifically claimed a share in the residential house.

14. We would accordingly uphold the decision of the learned Subordinate judge and dismiss this appeal with costs.

A. Misra, J.

15. I agree.

Appeal dismissed.

Cases Referred.

[1] AIR 1929 Cal 269
[2] AIR 1947 Cal 426
[3] AIR 1955 Cal 292
[4] AIR 1951 Oris180
[5] AIR 1961 Ori 203
[6] AIR 1941 Pat 4
[7] AIR 1937 Nag 4
[8] AIR 1953 All 332
[9] AIR 1950 Mad 2l4
[10] AIR 1922 Bom 121
[11] AIR 1957 All 356
[12](1968) 34 Cut LT 379
[13](1970) 36 Cut LT 77
[14] AIR 1965 SC 1767
[15] AIR 1969 SC 69