

**PATNA HIGH COURT**

Aley Hassan

Vs

Toorab Hussain

A.F.A.D. No. 1307 of 1952

(Ramaswami, C.J. and Raj Kishore Prasad, J.)

25.11.1957

**JUDGMENT**

**Raj Kishore Prasad, J.**

1. The question which is involved in this appeal relates to the interpretation of Section 4 of the Partition Act (Act 4 of 1893) which states as follows:

"4. (1) Where a share of 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.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

2. It appears that the suit land was purchased by the two sisters, Musammat Ahmadi (defendant No. 1) and Musammat Akbari (defendant No. 2), who constructed the house of which the plaintiff sought partition of 8 annas share. It appears that both the sisters practised the profession of dancing and singing at first, but subsequently Musammat Ahmadi married defendant No. 3 and had a son, Toorab. Musammat Ahmadi died during the pendency of the suit in 1946, and Toorab was substituted in her place. It also appears that Musammat Akbari sold her 8 annas share in the holding on 29-10-1943, to the plaintiff, who is admittedly a stranger to the family. Both the

lower Courts held that Section 4 of the Partition Act applied to the case and defendants 1 and 3 were entitled to purchase the share of the plaintiff in the house under the provisions of that section.

3. The sole argument advanced by learned Counsel on behalf of the appellant is that Toorab being the son of Musammat Ahmadi was not a member of the undivided family to which the house belonged. It was argued by learned Counsel that the expression "family" should be confined to sisters and not to a sister's son who derived title through Musammat Ahmadi who died during the pendency of the suit. We are unable to accept this contention. The expression "family" in Section 4 of the Partition Act must be construed in a wide sense and ought not to be restricted to persons tracing their descent from a common ancestor. There is nothing in the language or the context of Section 4 of the Partition Act to suggest that the term "family" was intended to be used in a very narrow and restricted sense. The principle underlying the section appears to be to maintain the integrity of a body of people knit together by the tie of common residence. The expression "family" has been defined in the Oxford Dictionary, Volume I, 1936 Edition, in these terms:

"The body of persons who live in one house or under one head including parents, children servants etc ..... The group consisting of parents and their children whether living together or not; in wider sense all those who are nearly connected by blood or affinity".

4. In an early Calcutta case *Kshirode Chunder v. Saroda Prosad*<sup>1</sup>, Mookerjee J., referred with approval to a number of English authorities and summed up his own view as follows:

"The word "family" as used in the Partition Act, ought to be given a liberal and comprehensive meaning and it includes a group of persons related in blood, who live in one house or under one head or management."

5. A similar view has been taken in an Allahabad case, *Salim Ullah v. Faqir Ullah*<sup>2</sup>, If that is the right interpretation of the term "family" in Section 4 of the Partition Act, it follows that in this case the lower Courts have rightly treated that Toorab, son of Musammat Ahmadi, was a member of the undivided family within the meaning of Section 4 of the statute. It follows, therefore, that the lower Courts have rightly passed the order under Section 4 of the Partition Act in this case.

6. A question was raised in the course of argument whether the second appeal is competent from the order of the Munsif, holding that defendants Nos. 1 and 3 are entitled to purchase the share of the plaintiff under Section 4 of the Partition Act. On behalf of the respondents the decision of a Division Bench of this Court consisting of Fazl Ali C. J. and Reuben J., in First Appeal No. 17 of 1945, decided on 17-9-1946, was cited in order to show that such an appeal is incompetent. We do not, however, wish to express any definite opinion on this point in the present appeal. We

have proceeded upon the assumption that this second appeal is competent and have entered into the merits of the order under Section 4 which has been challenged by the appellant. For the reasons we have already given we hold that the order made by the lower Courts under Section 4 of the Partition Act is not vitiated by any error of law and, therefore, this second appeal is without substance and must be dismissed with costs.

Appeal dismissed.

Cases Referred.

<sup>1</sup>12 Cal LJ 525

<sup>2</sup> AIR 1948 All 142