

PATNA HIGH COURT

Harendra Nath Mukharjee

Vs

Shyam Sunder Kuer

A.F.O.O. No. 17 of 1965

(Shambhu Prasad Singh and A.N. Mukharji, JJ.)

17.11.1972

JUDGMENT

Mukharji, J.

1. This appeal by defendant No. 3 of a partition suit arises out of an application filed by him under Section 47 of the Code of Civil Procedure .

2. Facts giving rise to this appeal, briefly stated, are as follows:-

Respondent No. 2 instituted Title Partition Suit No. 35 of 1954 in the court of the Subordinate Judge I, Patna against his brothers the appellant and defendants 1 and 2 for partition of the family property. A preliminary decree for partition was passed on 3-5-1955. The final decree was passed on 10-9-1959. On 18-9-1959, Execution Case No. 73 of 1959 was filed by respondent No. 2 for taking delivery of possession in accordance with the final decree. On 4-2-1962 he executed a sale deed in favour of Shyam Sunder Kuer, respondent No. 1 in respect of two rooms and 2 Kathas of land out of the family property which had been allotted to his share by the final decree. The appellant then filed before the executing court the petition from which this appeal has arisen on 13-9-1963 praying that he be allowed to purchase back the share of respondent No. 2 which he had sold to respondent No. 1. This prayer of the appellant was opposed by respondent No. 1

3. The learned Subordinate Judge who heard the parties on merit and demerit of the said application dated 13-9-1963 by the appellant rejected it. The grounds which the learned Subordinate Judge has given for rejecting the aforesaid prayer of Defendant No. 3 were:

(i) No suit by anybody far less by the purchaser or the transferee had been filed or was pending on the date of the application.

(ii) The sale deed in favour of Shyam Sunder Kuer, respondent No. 1, was executed long after the passing of the final decree when the partition suit has come to a close and that the undivided character of the family property ceased to exist.

4. Mr. S. C. Ghose, learned counsel appearing on behalf of the appellant has urged that there is

no substance in the reasons which the court below has given for rejecting the application of the appellant and that the court below was in error in not permitting the appellant to purchase back the property transferred to respondent No. 1 on payment of the proper price to be fixed by the Court.

5. On a perusal of Section 4 of the Partition Act (IV of 1893) (hereinafter to be referred to as 'the Act'), it will appear that four conditions should co-exist before an application under that section could succeed. The conditions are: (i) The house should be owned by an undivided family, (ii) The share of a co-sharer should have been transferred to a stranger to the family, (iii) The purchaser should have sued for partition, and; (iv) A member of the family being a share-holder claims or undertakes to buy the share of the stranger transferee. It is necessary to find if all these conditions have been fulfilled in the present case. There is no dispute that defendant No. 3 is a member of the family and that he claims to purchase the share of respondent No. 1 who is a stranger to the family and to whom another member of the family had transferred his share. So two of the conditions mentioned above appear to have been fulfilled in the instant case.

6. Sri Rameshwar Prasad II, learned counsel appearing for respondent No. 1 has, however, urged that in the instant case the suit for partition was instituted by a member of the family of the appellant and not by the transferee, respondent No. 1 and, as such, Section 4 of the Act is inapplicable in this case. This is also one of the grounds which the court below has given for rejecting the prayer of the appellant. In my opinion, the court below was in error in holding that Section 4 of the Act is inapplicable in this case as the suit for partition was not filed by the transferee. It may be observed that though on the language Section 4 of the Act applies to a suit for partition filed by a transferee, by judicial decisions this section has been extended to apply to a suit for partition filed by a member of the family as well. As an authority for this proposition, reference may be made to a Bench decision of this Court in the case of *Abinash Chandra v. Smt. Kamla Devi*, reported in¹ Section 4 of the Act cannot be read as precluding a member of the family from availing himself of the provision of this section if the stranger transferee has not filed the suit for partition. It is well established that this section has to be liberally construed. It is, therefore, immaterial that the suit for partition in the instant case has not been filed by the transferee; he would be deemed to have stepped into the shoes of the plaintiff of the partition suit whose share in the dwelling house he has purchased.

7. Sri Rameshwar Prasad No. II learned Counsel appearing on behalf of the respondent has further contended that in the instant case the respondent has acquired an ascertained portion of the property of the family and, as such, Section 4 of the Act will be inapplicable because no share of the co-sharer of the family was transferred. It will appear from the record that two rooms and 2 Kathas of land were transferred by the plaintiff of that suit to respondent No. 1 and on the basis of this circumstance, argument was advanced that no share in the dwelling house was transferred. Learned Counsel contended that for the applicability of Section 4 of the Act, it is necessary that an unascertained share in the dwelling house should have been transferred. In my opinion, such a narrow interpretation cannot be put to the expression 'share' used in Section 4 of the Act. The expression 'share' includes both ascertained and unascertained shares. It will not be proper to hold that Section 4 of the Act has no application to a case where specific portion of a dwelling house has been transferred.

8. It has further been contended on behalf of respondent No. 1 that in the present case no portion of the dwelling house has been transferred by a member of an undivided family and as such

Section 4 of the Act should be held to be inapplicable. This argument is based on the circumstance that two rooms and some land which are separate from the main dwelling house were transferred. There is no force in this contention of respondent No. 1. In the case of *Sheodhar Prasad Singh v. Kishun Prasad Singh reported in*² it has been held that expression "dwelling house" in Section 4 of the Act includes the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment. The land and the two rooms which have been sold by the plaintiff to respondent No. 1 clearly come within the expression "dwelling house" within the meaning of Section 4 of the Act.

9. The Court below appears to have rejected the prayer of the appellant for purchasing the property covered by the sale deed in favour of respondent No. 1 mainly on the ground that such a prayer cannot be entertained long after the passing of the final decree. The object of Section 4 of the Act is to prevent a stranger transferee from a co-owner of a dwelling house from forcing his entry into the undivided dwelling house against the wish of other co-sharers. Section 4 of the Act fixes no time limit within which an application is to be made. Bearing in mind the principle underlying the provision of Section 4 of the Act there does not appear any such basis for the contention urged on behalf of the respondent that an application under Section 4 of the Act could not be made after the passing of the final decree in the partition suit. An application under Section 4 of the Act can be made at any stage of the partition suit even after the passing of the final decree. In this connection, reference may be made to the case of *Prankrishna v. Surath Chandra Roy, reported in*³ In this case, a final decree was passed on 28-11-1913. Defendants 2 and 3 of the suit who were members of the family claimed to purchase the share sold. An argument was advanced before their Lordships of the Calcutta High Court that the Subordinate Judge had no jurisdiction to pass an order under Section 4 of the Act after the passing of the final decree. This contention was negatived by their Lordships of the Calcutta High Court in the aforesaid decision. In the case of *Niranka Sashi Roy v. Swarganath Banerjee, reported in*⁴ it has been held that "the right conferred by Section 4 may be exercised at any time before the final allotment takes place". Similar view has been expressed by a Bench of the Allahabad High Court in the case of *Dwarka Das v. Godhana, reported in*⁵ In the Allahabad case it was also held "the section itself fixes no stage up to which alone the application can be made. On the contrary, the language of the section shows that it can be made at any stage."

10. The Calcutta High Court in the case of *Satya Narayan Chakarvarty v. Vishwanath Paul, reported in*⁶ has expressly laid down that an application under Section 4 of the Act is maintainable after the passing of the final decree and before the possession of the allotted property is delivered to the stranger transferee in execution of the decree. This view is consistent with the scheme of Section 4 of the Act which aims at the preservation of homogeneity amongst the members of a family with respect to the dwelling house.

11. It has been urged on behalf of the respondent No. 1 that when a pleader commissioner has already effected partition of a dwelling house and allotted separate Takhtas to different members of the family and that the only thing that is required to be done is a formal delivery of possession to the members of the family in accordance with that allotment, the dwelling house cannot be said to belong to an undivided family at the time the transfer was made in favour of respondent No. 1 so as to attract the provision of Section 4 of the Act. The authorities have consistently observed that an undivided family means a family which is undivided qua dwelling house in question. It may be true that the dwelling house in the instant case has been divided by metes and bounds on paper by a pleader-commissioner who has allotted separate Takhtas to different members of the family and also by the Court passing the final decree but till actual delivery of

possession is not effected and the house divided at the spot in accordance with the report of the pleader commissioner and the final decree, the family cannot be said to be divided qua the dwelling house. In the eye of law the dwelling house should be deemed to be undivided amongst the members of the family until they get separate possession over their respective shares in accordance with the report of the pleader commissioner and final decree. As a matter of fact in the case reported in (1970) 74 Cal WN 871, it has been held that an application under Section 4 of the Act is maintainable before possession is delivered to the stranger purchaser. It is, therefore, manifest that the family continues to be undivided qua dwelling house till possession is delivered to the members of the family in execution of the final decree for partition and as such, the application is maintainable. There also does not appear to be any merit in the contention urged on behalf of respondent No. 1 that the executing Court by entertaining an application under Section 4 of the Act has gone behind the decree which it could not do. It is well settled in the case of *Mangal Persad v. Girja Kant Lahiri, reported in*⁷ that an application for execution of a decree was an application in the suit in which the decree was passed and as such the suit must be taken to be pending till the decree passed thereon was satisfied by execution. An application under Section 4 can be made at any stage of the suit. Simply because an application has been filed under Section 4 after the passing of the final decree, it cannot be said that it is not maintainable on the ground that the executing court cannot go behind the decree. Really it is not a case of going behind the decree. The decree-holder respondent No. 2 will get his share all right. He has already parted with portion of his share in the dwelling house in favor of respondent No. 1 who is not a party to the decree. Respondent No. 1 now will get price as fixed by the Court instead of the property purchased by him.

12. The view taken by me in the preceding paragraph also finds indirect support from the decision referred to below on Section 2 of the Act. Section 2 applies if "division of the property cannot reasonably or conveniently be made". In other words the section can be made applicable only before division has taken place. In *Bai Hira Kore v. Trikand Das Hirachand*⁸, it was held that an application under Section 2 was maintainable at the execution stage after passing of the final decree. Thus according to this decision division was not complete by passing of the final decree.

13. For the aforesaid reasons, I hold that the reasons which the court below has given for rejecting the application of the appellant are not sound. In my opinion, the partition suit should be deemed to be pending when the application dated 13-9-1963, was filed by the appellant before the court below, and the mere fact that the sale deed was executed by a member of the appellant's family after the passing of the final decree will be no justification to reject the prayer made by the appellant under Section 4 of the Act to repurchase the property sold to respondent No. 1 who is a stranger to the family. The appellant has succeeded in establishing his right to repurchase the property sold to respondent No. 1.

14. Hence, the appeal is allowed, the order passed by the Court below is set aside and the case is remanded to the lower Court for proceeding in this case under Section 4 of the Act in accordance with law. In the circumstances of the case, I direct that the parties should bear their own costs.

Shambhu Prasad Singh, J.

15. I agree.

Appeal allowed.

Cases Referred.

¹ AIR 1950 Pat 317

² AIR 1941 Pat 4

³ ILR 45 Cal 873

⁴ AIR 1926 Cal 95

⁵ AIR 1939 All 313

⁶(1970) 74 Cal WN 871

⁷(1880) 8 Ind App 123 (PC)

⁸(1908) ILR 32 Bom 103