

FORM No.(J2)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

Hon'ble Justice Girish Chandra Gupta
And
Hon'ble Justice Shib Sadhan Sadhu

F.M.A. 2631 of 2007

Mihir Kumar Das

-v-

Smt.Ajanta Dutta & Others.

For the Appellant : Mr. Sudhis Dasgupta
Mr.Sibasis Ghosh
Mr.Rwitendra Banerjee
Mr.Shibasish Chatterjee

For the Respondents: Mr. Gopal Chandra Ghosh

Heard on : 25.08.2014, 11.09.2014 & 17.09.2014.

Judgment on: 30.10.2014

SHIB SADHAN SADHU, J.

JUDGMENT

- 1) The instant appeal is against an order dated 16.05.2007 passed by the Learned Civil Judge (Senior Division), 9th Court, Alipore, 24 Parganas (South) in Misc Case No.9 of 1999 arising out of Title Suit No.33 of 1997.

- 2) The factual background leading to this appeal stated in brief is as follows:-

The respondent Nos.1, 2 and 3 namely Smt. Ajanta Dutta, Smt Bipasa Raha and Smt. Monisha Chowdhury respectively had filed a suit (Plaintiffs of Title Suit No.33 of 1997) for partition of their eight (8) anas share in the suit property which is an undivided dwelling house originally owned by two brothers Dilip Kumar Dutta and Pradip Kumar Dutta. Dilip died leaving behind the respondents 1, 2 & 3 as his sole legal heirs while Pradip died leaving behind respondent Nos. 4 & 5 Smt. Gayatri Dutta and Sumit Dutta (defendant Nos.1 & 2 in Title Suit No.33 of 1997). The present appellant Mihir Kumar Das was made Proforma Defendant in that Title Suit No.33 of 1997. After closure of evidence in that suit he produced a certified copy of sale deed showing that he had purchased the share of Pradip in the suit property for Rs.1,80,000/-. Accordingly, he was transposed as defendant No.3. Thereafter, the suit was decreed in preliminary form declaring the eight (8) anas share of the plaintiffs i.e. present respondents 1,2 & 3 in the suit house.

3. During pendency of the suit the respondents 1, 2 & 3 filed an application under Section 4 of the Partition Act for enforcing their claim for pre-emption against the appellant stranger transferee in

respect of $\frac{1}{2}$ undivided interest of the original title-holder Pradip Dutta, predecessor-in-interest of the defendants 1 & 2 Smt. Gayatri Dutta and Sumit Dutta. The said application was contested by the appellant by submitting that it was not maintainable. The Learned Trial Judge after taking evidence and hearing the parties allowed the application under Section 4 of the Partition Act holding that the suit house is an undivided family dwelling house, that the $\frac{1}{2}$ share of it was transferred by one of the co-owners in favour of the appellant who is a stranger to the family and that the respondents 1,2 & 3 being the co-sharer members of the family are competent to claim pre-emption and so they are entitled to pre-empt the share of the appellant stranger purchaser and passed order accordingly. Being dissatisfied, the appellant has come up with the present appeal.

4. We have heard Mr. Sudhish Dasgupta, Learned Senior Counsel appearing for the appellant and Mr. Gopal Chandra Ghosh, Learned Counsel appearing for the respondents. Mr. Dasgupta contended that the respondents filed the suit for partition as plaintiffs and the appellant was made a defendant therein. Thus, it cannot be said that the appellant at all “sued for partition”. He vehemently contended further that Section 4 could only be invoked when the stranger transferee “sues for partition”.

Therefore, according to him one of such essential conditions for applicability of Section 4 being not satisfied, the Learned Trial Court erred in law in allowing the application under Section 4 of the Partition Act and accordingly, submitted that the impugned judgment is liable to be set aside on this count alone. He relied on the decisions reported in AIR 1957 Allahabad 356 (Sakhawat Ali V. Ali Husain and Others.); (2000) 8 Supreme Court Cases, 330 (Gautam Paul V. Debi Rani Paul and others); and (2002) 9 Supreme Court Cases 477 (Gyan Chand and another V. Sumat Rani and Ors.) in support of his contention.

5. On the other hand Mr. Ghosh in reply submitted that settled legal position is that to invoke Section 4 of the Partition Act, the transferee need not necessarily sue as plaintiff and the word ‘ to sue’ may be applied indifferently either to the defendant or the plaintiff and it signifies not only “ to protect” “but also to defend” or to do something which the law requires for the better prosecution or defence of the cause. He submitted further that the terminology “suing for partition” would not necessarily mean filing of a suit in the first instance by the transferee. He submitted yet further that if a stranger transferee enters the arena of contest at any stage and seeks to get his share separated as far as the subject matter of the litigation, namely, the dwelling house, is

concerned, he can be said to be suing for partition. Since the appellant in his written statement advocated for partition of the property in question by metes and bounds and in his evidence he became more eloquent and specific and prayed for partition of their 50% share in the suit house, he must be treated to have sued for partition and he can have no escape from the rigours of Section 4 of the Partition Act. Therefore, according to him, there was no infirmity in the findings recorded by the Learned Trial Judge as the conditions stipulated in Section 4(1) of the Partition Act were satisfied. He relied on the decisions reported in 2001 WBLR (SC) 135 (Gautam Paul V. Debi Rani Paul); AIR 1997 Supreme Court 471 (Ghantesher Ghosh V. Madan Mohan Ghosh and Others); 1989 (1) CLJ 439 (Kartick Chandra Basu & Another. V. Subal Chandra Mandal); (2000) 5 Supreme Court Cases 662 (Babulal V. Habibnoor Khan (Dead) by LRS. And Others) in order to attach legal sanctity to his submission.

6. In order to appreciate the rival contention advanced by the Learned Counsel for the parties, it would be necessary to reproduce the relevant provisions of Section 4 (1) of the Partition Act which is as follows:-

“Partition suit by transferee of share in dwelling house.-(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 shareholder 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.”

7. A perusal of the aforesaid Section 4(1) of the Partition Act clearly shows that 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 and if any member of the family undertakes to buy the share of such transferee then the Court shall make a valuation of such share and direct the sale of such share. The object of Section 4(1) of the Partition Act is to enable a member of the family to buy out a stranger transferee who seeks partition of a dwelling house.
8. The Hon’ble Supreme Court in Ghantesher Ghosh V. Madan Mohan Ghosh and Others (Supra) elaborately dealt with the provisions of Section 4 of the Partition Act and noticed that the following conditions must be satisfied:-

- (1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;
- (2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;
- (3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned;
- (4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and
- (5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the Court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house.

9. It also noticed that the beneficial object underlying the said provisions must also be kept in mind and observed:-

“ We have also to keep in view the avowed beneficial object underlying the said provision. Section 4 of the Partition Act read with Section 44 of the T.P. Act represents a well knit legislative scheme for insulating the domestic peace of members of undivided family occupying a common dwelling house from the encroachment of a stranger transferee of the share of one undivided co-owner as the remaining co-owners are presumed to follow similar traditions and mode of life and to be accustomed to identical likes and dislikes and identical family traditions. This legislative scheme seeks to protect them from the onslaught on their peaceful joint family life by stranger outsider to the family who may obviously be having different outlook and mode of life including food habits and other social and religious customs. Entry of such outsider in the joint family dwelling house is likely to create unnecessary disturbances not germane to the peace and tranquility not only of the occupants of the dwelling house but also of neighbours residing in the locality and in the near vicinity. With a view to seeing that such homogeneous life of co-owners belonging to the same joint family and residing in the joint family dwelling house is not adversely affected by the entry of a stranger to the family, this

statutory right of pre-emption is made available to the co-owners who undertake to buy out such undivided share of the stranger co-owner

10. The aforesaid decision of the Hon'ble Supreme Court in Ghantesher Ghosh V. Madan Mohan Ghosh (Supra) was followed by the Hon'ble Supreme Court in Gautam Paul V. Debi Rani Paul (Supra). It was also observed:-

“ There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers/outsideers can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus, before the right of pre-emption under Section 4 is exercised, the

conditions laid down therein have to be complied with. As seen above, one of the conditions is that the outsider must sue for partition. Section 4 does not provide the co-sharer a right to pre-empt where the stranger/outsider does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider any time he/she wants. Thus even though a liberal interpretation may be given, the interpretation cannot be one which gives a right which the Legislatures clearly did not intend to confer. The Legislature was aware that in a suit for partition, the stranger/outsider, who has purchased a share, would have to be made a party. The Legislature was aware that in a suit for partition, the parties are inter-changeable. The Legislature was aware that a partition suit would result in a decree for partition and in most cases, a division by metes and bounds. The Legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share. Yet the Legislature did not provide that the right for pre-emption could be exercised “ in any suit for partition”. The Legislature only provided for such right when the “transferee sues for partition.” The intention of the Legislature is clear. There had to be initiation of proceedings or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a

proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and claim for possession of that share. So long as the stranger/purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition.....”.

11. In the case of Sakhawat Ali V. Ali Husain (Supra) cited by Mr. Dasgupta it has been held that – “ The right of pre-emption can be claimed only if the transferee either sues for partition himself or makes the same claim when he is impleaded as a defendant in such a suit. Section 4 does not entitle a co-sharer to buy out the stranger transferee whenever he likes unless the transferee is claiming a partition of his share either as a plaintiff or as a defendant”.

In the case of Gyan Chand and Another V. Sumat Rani and Others (Supra) also referred to by Mr.Dasgupta the Hon’ble Supreme Court followed the judgment passed in Gautam Paul’s case (Supra).

12. It is, therefore, crystal clear that Section 4 of the Partition Act does not provide as a condition for its applicability that the stranger transferee must file a suit for partition. In other words, it is not necessary that he should have filed the suit. He being a defendant could have specifically claimed a share in the residential house. The acid test is whether the stranger purchaser has made a claim for partition of his share.
13. In the present case, the appellant Mihir Kumar Das in his Written Statement pleaded for partition of the property in question by metes and bounds. He gave evidence in support of his case and deposed as witness No.1 for the defendant. In his examination-in-chief he asserted in more loud and clear voice - "We have 50% share in the suit house and we pray for partition of our share in the suit house".
14. Thus, the clear picture reflected is that the appellant has not only asserted his share in the suit property but also emphatically demanded partition of the same. As such he can certainly be said to be suing for partition. Thus, the contention of the Learned Counsel for the appellant that as the appellant did not sue for partition the benefit of Section 4 of the Partition Act could not be given to the respondents cannot be accepted.
15. We, therefore, find no legal infirmity in the findings arrived at by the Learned Trial Judge and in our view he reached a correct

conclusion in the impugned judgment by allowing the application under Section 4 of the Partition Act in favour of the respondents 1, 2 & 3.

16. For all the reasons stated above, there is no merit in this appeal and it is, accordingly, dismissed but without costs.

(Girish Chandra Gupta J)

(Shib Sadhan Sadhu, J.)

Later

In case Lower Court Records have been received by this Court that would be sent down at once with a copy of this judgment.

(Girish Chandra Gupta J)

(Shib Sadhan Sadhu, J.)