

(1951) 10 AHC CK 0008
In the Allahabad High Court
Case No : Misc. Appeal No. 62 of 1947

Bhagirath	Vs	APPELLANT
Afaq Rasul and Another		RESPONDENT

Date of Decision : 29-10-1951

Acts Referred:

Partition Act, 1893 — Section 4

Citation : AIR 1952 All 207 : (1952) 22 AWR 126

Hon'ble Judges : Kidwai, J

Bench : Single Bench

Advocate : K.N. Tondon and S. Shukla, for the Appellant; M.M. Lal, for the Respondent

Final Decision : Dismissed

Judgement

Kidwai, J.—Three brothers Aizaz Rasul, Afaq Rasul and Mushtaq Rasul owned house No. 14 in mohalla Mobariz Nagar within the town of Unnao which they used as a family residential house. By a sale deed dated 13-9-1938, Aizaz Rasul sold his 1/3 share to Bhagirath. Thereafter, Aizaz Rasul delivered possession over a locked bothri inside the house to Bhagirath which naturally created difficulties in the way of the continued occupation of the house by the two other brothers and the females of their family. They accordingly left it and went to stay with the in-laws of one of them.

2. This state of affairs continued till 1946, when the vendee Bhagirath sued for partition of the house. The two brothers raised many pleas, one of which was that the house was the family residential house and that, therefore, they were entitled to the benefit of Section 4 Partition Act.

3. The trial Court held that the house was dilapidated and could not be called a residential house at all, much less a family residential house. It accordingly rejected the plea under the partition Act and decreed the suit for partition.

4. Afaq Rasul and his brother appealed and the learned civil Judge of Unnao held

that, though it was in a dilapidated condition, it was still the family residential house. He accordingly remanded the case with the direction that the Court should proceed u/s 4 Partition Act.

5. The plaintiff has come up in second appeal and his learned counsel has contended that the house has fallen down and cannot be used as a residential house at all. He, therefore, urges that Section 4 Partition Act does not apply.

6. In *Nil Kamal v. Kamakshya Charan* LR 109 Ind. Cas. 67 it was laid down by the Calcutta High Court that:

"the fact that a dwelling house has been blown down does not make it any the less a dwelling house so long as the members of the family have not abandoned it or at any rate given up the idea of using it as such."

7. In *Bai Fatma v. Gulamnabi Hajibhai* AIR 1936 (23) Bom 197 which was relied upon by the appellant's learned Advocate the learned Judge definitely said that it was not necessary for him to decide in the case whether the house in suit was a dwelling house within the meaning of that expression as used in Section 4 Partition Act. That decision is, therefore, not applicable.

8. It seems to me that the true principle for deciding such cases has been correctly appreciated by the learned civil Judge the question to be decided in each case is whether the family has abandoned all idea of occupying the house as residential house and not the state in which a house is. A person may not be able to reconstruct his house for a considerable length of time owing to poverty or owing as in this case, to disputes with strangers to the family regarding its occupation. The house may fall into a complete state of disrepair owing to these circumstances but it will nevertheless continue to be a family residential house if the members of the family intend to use it as such as soon as they can conveniently do so.

9. The learned civil Judge has discussed all the evidence and the entire circumstances go to show that the house in suit continues to be the family residential house of Afaq's family. The circumstances are :

"1. That the suit by the plaintiff is for partition of a house and not of its land or materials. Further the plaintiff has himself paid the house tax in respect of this house to the Municipal Board.

2. Though the report of the Commissioner shows that the house is in dilapidated state, as it was bound to be having regard to the fact that it has admittedly not been used for about eight years, the non-occupation was due to disputes between the plaintiff and the defendants.

3. That even the trial Court, which found in favour of the plaintiff, has not found that the house has ceased to be a house but that it "is almost a khandhal." No doubt this is due to the report of the Commissioner which shows that the walls are standing and that some of the roofs also exist though in a bad state of

repairs.

4. That the defendants have not built another house nor have they taken one on rent but are living in the house of the in laws of one of them which can only afford them temporary accommodation."

10. These circumstances have been held by the civil Judge to be sufficient to establish that the house continues to be a residential house. I agree with the conclusion arrived at by the civil Judge.

11. The result is that the appeal fails and is dismissed with costs. The stay order dated 23-4-1948 is vacated.