
(2018) 05 OHC CK 0024
In the Orissa High Court
Case No : SA No.322 of 1999

DINABANDHU SAHOO .DEAD. AND OTHERS APPELLANT
Vs
PRAVAKAR SAHOO AND OTHERS RESPONDENT

Date of Decision : 04-05-2018

Acts Referred:

Partition Act, 1893 — Section 4

Citation : (2018) 05 OHC CK 0024

Hon'ble Judges : DR. A.K. RATH

Bench : Single Bench

Advocate : K.M. Dhal, Buddhimanta Swain

Final Decision : Dismissed

Judgement

Dr. A.K.Rath, J.

1. Defendant no.3 is the appellant against a reversing judgment.

2. Plaintiff-respondent no.1 instituted the suit for a declaration that the sale deed no.1235 dated 5.6.1995 executed by defendants 1 and 2 in favour of defendant no.3 is null and void, declaration of half share of the property over suit land, re-transfer of the suit land in favour of the plaintiff, recovery of possession and perpetual injunction. Case of the plaintiff was that he and Banchhanidhi are sons of Joginath Sahu. Banchhanidhi died leaving behind his widow Hemalata and son Ranjan. The plaintiff and defendant nos.1 and 2 were members of the undivided Hindu joint family. There was partition of the agricultural property on 20.3.1989. But then, there was no partition of the homestead by metes and bounds. They are in joint possession of the homestead. Defendants 1 and 2 alienated suit plot no.2187, khata no.331 of mouza-Gholpur in favour of defendant no.3 by means of a registered sale

deed. No consideration was paid. Defendant no.3 approached the plaintiff on 19.6.1995 to vacate the suit plot stating that he had purchased the suit

plot from defendant nos.1 and 2. The plaintiff is in possession of the same. He spent a sum of Rs.15000/- for changing the roof of the house.

Defendant no.3 is a stranger to the family. With this factual scenario, he instituted the suit seeking the reliefs mentioned supra.

3. Defendants 1 and 2 filed a joint written statement denying the assertions made in the plaint. According to them, all the properties had been

partitioned. Plaintiff and defendants 1 and 2 had half share each. Defendants 1 and 2 were in possession of the suit property. They alienated the suit

property to the defendant no.3 for a consideration of Rs.5000/- and delivered possession of the property. The plaintiff had no authority to challenge the

sale deed dated 5.6.1995 executed in favour of defendant no.3. Defendant no.3 filed a written statement stating that the entire properties belonging to

the plaintiff and defendant nos.1 and 2 had been partitioned by metes and bounds on 20.3.1989. Defendant nos.1 and 2 had the authority to sell their

share in the property. Defendants 1 and 2 were living separately in mess and property since March, 1989.

4. On the inter se pleadings of the parties, learned trial court struck twelve issues. Parties led evidence, both oral and documentary. Learned trial court

held that there was previous partition between the parties on 20.3.1989. The homestead including the suit land had been partitioned. The plaintiff and

defendant nos.1 and 2 did not constitute an undivided Hindu joint family, when the suit plot was alienated by defendant nos.1 and 2 to defendant no.3.

The sale deed dated 5.6.1995, vide Ext.A, is legal and valid. Consideration was paid. The plaintiff was not in possession of the suit land. He had not

made any construction. Held so, it dismissed the suit. Felt aggrieved, plaintiff filed Title Appeal No.11 of 1997 before the learned District Judge,

Cuttack. Learned appellate court concurred with the finding of the court below with regard to the previous partition and alienation of the property

thereafter. The sale deed was legal and valid. However, it held that "It is true that the dwelling house belonging to the undivided family of plaintiff

and defendant nos.1 and 2 had already been partitioned since the year 1991 but the object and the purpose for which Sec.4 of the Partition Act has

been introduced is to be considered and the provision of Sec.4 deserves liberal construction because the very object of the partition is to preserve the

integrity of the dwelling house. The right of pre-emption under Sec.4 of the Partition Act is available to a cosharer of an undivided family dwelling

house when he himself files a suit for partition and the stranger purchaser is arraigned as defendant and irrespective of the fact whether stranger

purchaser had actually applied for partition or for separate allotment of his share or not. The whole purpose of the provision of Sec.4 is to keep out

dwelling house from the access of stranger, if the persons owning that dwelling house are willing to keep it to themselves by purchase for the same

value as strangers offer or for a reasonable price that may be settled by court. Held so, it allowed the plaintiff to purchase the suit land including the

house thereon from defendant no.3 on payment of Rs.7000/- towards consideration and directed defendant no.3 to execute the sale deed in respect of

the properties. It is apt to state here that during pendency of the appeal, appellant no.1 died, whereafter his legal heirs have been substituted.

5. The second appeal was admitted on the following substantial questions of law;

1. Whether the appellate court is justified in deciding the appeal by applying the provision of Sec.4 of the Partition Act on the basis of which no

issue was framed by the trial court wherein the defendants have been deprived of leading evidence on that point ?

2. Whether the appellate court is justified in allowing the appeal in part after confirming all the findings of the trial court as per the issues framed from

the pleadings of the parties in the suit ?

3. Whether the appellate court is justified to decide the appeal without considering the evidence led by the D.W.4 who has deposed by giving boundary

of the suit land which clearly reveals that the suit land is not ancestral and dwelling house of the plaintiff and is meant for shop room only ?

4. Whether the appellate court is justified by giving the benefit of Sec.4 of the Partition Act to the plaintiff in view of the clear finding of the trial court

that there has been previous partition between the parties in respect of the homestead land (suit land) and that the plaintiff defendant no.1 and

defendant no.2 do not constitute an undivided joint Hindu Family and there has been severance of joint family status ?

Whether the learned appellate court has erred in law in holding that the right of pre-emption under Sec.4 of the Partition Act is available to a co-sharer

of an undivided family dwelling house on coming to a conclusion that there was

previous partition of the joint family property between the co-sharers

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6. Heard Mr. K.M. Dhal along with Mr. Buddhimanta Swain on behalf of Mr. D. Dhal, learned counsel for the appellants. None appeared for the respondents.

7. Mr. Dhal, learned counsel for the appellants submitted that both the courts below concurrently held that there was partition of the property including

the suit property between the plaintiff and defendant nos.1 and 2. The suit property fell to the share of defendant no.1. Thereafter, defendant nos.1

and 2, to press the legal necessity, alienated the suit schedule property in favour of defendant no.3 by means of a registered sale deed for a valid

consideration. Sec.4 of the Partition Act has no application to the facts of the case.

8. Sec.4 of the Partition Act, which is the hub of the issue, is quoted below;

??4. 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.

(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.

9. In *Alekha Mantri v. Jagabandhu Mantri and others*, AIR 1971 Orissa 127, this Court held that Sec.4 of the Partition Act would also be applicable

where the suit for partition was brought by a member of the undivided family against the stranger transferee and it is not necessary that the latter

should have filed the suit.

10. There were divergent views of different High Courts with regard to scope and ambit of Sec. 4 of the Partition Act. The same has been set at rest

by the apex Court in the case of *Ghantesher Ghosh (supra)*. The apex Court held

thus:

â??A mere look at the aforesaid provision shows that for its applicability at any stage of the proceedings between the contesting parties, 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 coowner 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 concerned co-owner;

(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 5 share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling houseâ??.

11. In *Babulal v Habibnoor Khan (Dead) by L.Rs. and others*, AIR 2000 SC 2684, the apex Court taking a cue from *Ghantesher Ghosh (supra)* held

that one of the basic conditions for applicability of Sec. 4 as laid down by the aforesaid decision and also as expressly mentioned in the Section is that

the stranger/transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. Before

Sec. 4 of the Partition Act can be pressed in service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had

arisen for him to move under Sec.4 of the Act because of the stranger transferee himself moving for partition and separate possession of the share of

the other co-owner which he would have purchased. It was further held that if the ratio of *Alekha Mantri (supra)* is held to take the view that a

stranger purchaser who does not move for partition of joint property against the remaining co-owners either as a plaintiff or even as a defendant in the

partition suit claiming to be as good as the plaintiff nor even as a successor of the decree holder seeks execution of partition decree, can still be

subjected to Sec.4 of the Partition Act proceedings, then the said view would directly conflict with the decision of this Court in Ghantesher

Ghosh's case (supra) and to that extent it must be treated to be overruled.

12. Thus the inescapable conclusion is that Sec.4 of the Partition Act shall come into play 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 subject to fulfilment of other conditions mentioned therein. If the

dwelling-house has been partitioned, Sec.4 of the Partition Act shall not come into play. Otherwise also a co-sharer cannot maintain the suit for

partition as held by the apex Court in the decisions cited supra. The substantial questions of law are answered accordingly.

13. A priori, the impugned judgment is set aside. The appeal is allowed. Consequently the suit is dismissed. There shall be no order as to costs.