

(1960) 11 OHC CK 0004
In the Orissa High Court
Case No : Second Appeal No. 232 of 1959

Kanduri Maharana

APPELLANT

Vs

Banchhu Maharana and Others

RESPONDENT

Date of Decision : 09-11-1960

Acts Referred:

Partition Act, 1893 — Section 4, 4(1)
Transfer of Property Act, 1882 — Section 44

Citation : AIR 1961 Ori 203

Hon'ble Judges : S. Barman, J

Bench : Single Bench

Advocate : Sankar Jena, L.K. Dasgupta and G.N. Sengupta, for the Appellant;
K.N. Swain, for the Respondent

Final Decision : Allowed

Judgement

S. Barman, J.—The plaintiff is the appellant, in this second appeal, from a decision of the learned District Judge of Cuttack, whereby he dismissed the plaintiff's appeal from a decision of the learned Munsif of Cuttack, and held that the plaintiff is not entitled to any relief u/s 4 of the Partition Act (Act IV of 1893) on the facts and in the circumstances hereinafter stated.

2. The suit property relates to one residential Gharbari plot in which the plaintiff and his brother the defendant No. 4 have jointly eight annas share and the defendant No. 1 had the remaining eight annas share therein, which ultimately was sold to the defendants Nos. 2 and 3 as hereinafter stated. A genealogical table showing the relationship of the parties, -- other than defendants 2 and 3, who are outsiders -- is set out as follows:

GOPAL MAHARANA | ----- | | Madha Bhagi | | Banchhu
(D.1) ----- | | Kanduri(Plaintiff) Panu(D.4).

The plaintiff's case, shortly stated, is this : There was no partition of the family by metes and bounds; there was, however, severance of the joint family being

separate only in mess and residence; the plaintiff and his brother, for convenience have been living on the western part of the Gharbari plot and defendant No. 1, the other co-sharer residing on the eastern portion of the plot. The facts leading to the present litigation are these: In 1928 defendant No. 1 executed a registered mortgage bond in respect of his undivided eight annas share in favour of one Nidhi Swain; the said Nidhi Swain enforced the mortgage by filing a suit for sale, and in 1946 he purchased the said undivided share of defendant No. 1 in the suit property in execution of a mortgage decree in Execution Case No. 128 of 1956; on September 19, 1947 the said Nidhi Swain took formal delivery of possession (Ex. A -- sale certificate), on March 5, 1948, Nidhi sold the said undivided eight annas share by a registered sale deed (Ext. 1) to defendants 2 and 3.

On June 23, 1954 the plaintiff filed this suit for partition and also for relief to buy up the share of defendants 2 and 3 on a reasonable valuation in his right of pre-emption u/s 4 of the Partition Act. In the suit his brother Panu Maharana was made a party as pro forma defendant No. 4. The defence taken in the suit, was that there was a partition by metes and bounds 25 years ago and that Section 4 of the Partition Act had no application to this case.

3. The trial Court found that the defence plea of partition by metes and bounds is not true, because the story of alleged partition 25 years ago cannot be believed, having regard to the mortgage of undivided eight annas share by the defendant No. 1 in favour of Nidhi Swain as aforesaid in 1928, and the registered sale deed dated March 5, 1949 executed by Nidhi Swain in respect of the said undivided eight annas share in favour of the defendants 2 and 3 (Ext. 1); thus having regard to the fact that both the mortgage and sale were in respect of the undivided eight annas share, there could not have been any partition by metes and bounds.

With regard to the applicability of Section 4 of the Partition Act, the trial court found that the portion of the dwelling house, -- where the defendant No. 1 was living, -- was vacant as the house was dismantled; so, this being a vacant land, it could not be a part of the dwelling house; accordingly, although there was no partition by metes and bounds, Section 4 of the Partition Act was held not applicable to the case; in the result the trial Court passed a decree for partition of eight annas share in the property but relief u/s 4 of the Partition Act was disallowed.

The plaintiff filed an appeal to the lower appellate Court against the said decision of the trial Court, refusing relief u/s 4 of the Partition Act. The learned lower appellate Court dismissed the said appeal and held that the plaintiff is not entitled to any relief u/s 4 of the Partition Act on the grounds as stated in his judgment. Hence this second appeal.

4. The points as urged on behalf of the plaintiff appellant, are these : The learned lower appellate Court had no jurisdiction to go into the question of

existence or non-existence of a previous partition because the decree of the trial Court for partition, -- on the basis that there was no previous partition, -- was not challenged; assuming the learned lower appellate Court had such jurisdiction, even so, his finding regarding previous partition by metes and bounds is based on wrong inference because he has fallen into an error by not taking into consideration the said mortgage of 1928 and the sale deed of 1948 which were in respect of specified undivided share in the property; further, that the learned lower appellate Court overlooked the aspect that the suit property was a homestead plot, assuming a portion of the undivided dwelling house in the occupation of the defendant No. 1 had been dismantled; that Section 4 of the Partition Act cannot be rendered nugatory by the stranger transferees by pulling down the house and rendering the house site somehow vacant.

5. The only point, for consideration, in this appeal, is whether or not the plaintiff is entitled to relief u/s 4 of the Partition Act. This provision was presumably enacted to afford the benefits of the law of pre-emption to the other communities in India, so far as the dwelling house is concerned; thus, Section 4 is a logical sequel of Section 44 of the Transfer of Property Act and is only an extension of the privilege given to the share-holders by Section 44 of the latter Act; in order to attract the operation of Section 4 there must be a dwelling house in existence belonging to an undivided family; further, that a share thereof should have been transferred to a person who is not a member of such family; that the transferee should sue for a partition; and lastly that a member of the family being a share-holder claims or undertakes to buy the share of the stranger transferee; it is also incumbent upon the plaintiff to plead that there was in existence a dwelling house and he must prove that a share thereof was transferred to the defendant before he can claim privilege u/s 4.

It is well settled that where the finding of the Court is that there is no dwelling house belonging to the undivided family in existence at the date of transfer, the plaintiff is not entitled to the benefit of Section 4 of the Partition Act. As regards what "dwelling house belonging to an undivided family" exactly means, it is also settled position in law that the term "house" embraces, not merely the structure or building but includes all adjacent buildings, cartilage, garden, court-yard, orchard and all that is necessary for the convenient occupation of the house, but not that which is only for the present use and convenience of the occupier; it includes the land on which the structure of the dwelling house stands.

6. In the present case, it was strenuously urged on behalf of the defendants respondents that, -- having regard to the position that the site in question was a vacant piece of land and had nothing to do with the plaintiff's portion of the house, -- the plaintiff is not entitled to any relief u/s 4 of the Partition Act. This reasoning, adopted on behalf of the defendants-respondents and accepted by the learned lower appellate Court, overlooked the basic fact that there was a clear finding by the trial Court that there was no partition by metes and bounds, against which the defendants-respondents did not file any cross-appeal, and

therefore the said finding stands good; so the question of previous partition by metes and bounds was outside the scope of the appeal before the learned lower appellate Court who could not go into the said question, because the scope of appeal before him was limited to the only question whether the plaintiff is entitled to relief u/s 4 of the Partition Act.

Thus, on the position, -- that there was no partition by metes and bounds, -- the enjoyment by the members of the family of separate portion of the house property is not inconsistent with the mere severance of status without partition by metes and bounds. The learned lower appellate Court was clearly wrong in holding that there was partition by metes and bounds of the home-stead site, simply because the co-sharer members of the family were in possession of the different parcels of lands separately; he appears to have overlooked the legal position that it is not necessary to constitute an undivided family for the purpose of Section 4 that members of the family should constantly reside in the dwelling house; nor is it necessary that they should be joint in mess.

In the present case, the factual position, --as "appears from the judgment of the learned lower "appellate Court, -- is that there was a dwelling house, the eastern portion of which was in the possession of defendant No. 1 who was residing there, separate from the other members of the family. It is also clear that, -- both at the time of mortgage in 1928 and also in 1948 when the defendants 2 and 3 purchased the suit property under the sale deed (Ext. 1), -- there has been throughout a dwelling house with all its adjacent bari lands, garden, court-yard, etc. and all that is necessary for the convenient occupation of the house, all belonging to this still undivided family.

The learned counsel, on behalf of the defendants-respondents, however, takes the stand that the suit site belonged to the defendant No. 1 exclusively. Even so, if there was mere severance of status without partition by metes and bounds, separate possession in respect of the different portions of the undivided dwelling house is not enough to support the defendant's contention.

7. Furthermore the dwelling house was not excluded from either the mortgage of 1928 or from the sale deed (Ext. 1) under which the defendants purchased the property in 1948, Section 8 of the Transfer of Property Act provides that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof; such incidents include, where the property is land, inter alia, all things attached to the earth; thus the undivided dwelling house on the suit property, -- which was purchased by the defendants, -- was included in the sale deed; mere dismantling a portion does not make it cease to be a dwelling house, because it is clear that there was throughout a dwelling house belonging to an undivided family, at the time of transfer both in 1928 by mortgage of eight annas share, and also in 1948 by sale of the said eight annas share as aforesaid; the alleged dismantling or pulling down cannot change the character of the undivided dwelling house within

the meaning of Section 4.

8. I am, thus, of opinion that there was no partition of the family (by metes and bounds; and further that, in view of my finding, -- that a share of the dwelling house belonging to this undivided family, had been sold to the defendants Nos. 2 and 3 who are not members of this family, -- the plaintiff appellant is entitled to relief u/s 4 of the Partition Act.

9. In this view of the case, I set aside the decision of the learned lower appellate Court which is contrary to law; and I pass a preliminary decree for partition in favour of the plaintiff and direct that after making reasonable valuation of the eight annas share of the defendants Nos. 2 and 3, such share be sold to the plaintiff as prayed for in the plaint. This appeal is accordingly allowed with costs throughout.