

(1960) 12 OHC CK 0016
In the Orissa High Court
Case No : Second Appeal No. 136 of 1959

Krushna Kar and Others

APPELLANT

Vs

Kanhu Charan Kar and Others

RESPONDENT

Date of Decision : 16-12-1960

Acts Referred:

Partition Act, 1893 — Section 4

Citation : AIR 1962 Ori 85

Hon'ble Judges : S. Barman, J

Bench : Single Bench

Advocate : R.N. Misra and R.S. Sahu, for the Appellant; J.C. Lenka, for the Respondent

Final Decision : Dismissed

Judgement

S. Barman, J.—The defendants 1, 2 and 3 are the appellants from a confirming decision of the 1st Additional Subordinate Judge, Cuttack whereby he affirmed a decision of the learned Munsif, Kendrapara and decreed the plaintiffs' suit for partition with a prayer u/s 4 of the Partition Act for buying up the portion of the dwelling house sold by defendant No. 1 to two stranger purchasers defendant Nos. 2 and 3.

2. A genealogical table,--showing the relationship of the parties, other than the purchaser defendants 2 and 3, who are outsiders,--is set out as follows :

_____			Madhu Rama			Girdhari
_____		_____			Pandu D.4	Raghu Maguri
_____		_____	Binayak			Punada Krushna P.2 D.1
_____		_____	Mangovinda Biswanath			P.3 P.4

The defendants 2 and 3 are purchasers from the defendant No. 1 and they are strangers to the family. The suit property is the joint family property of the family including the family dwelling house. The plaintiffs' suit is for partition, with a prayer for buying up the portion of the joint family property--including the

undivided family dwelling house,--sold by the defendant No. 1 to the defendants 2 and 3. The defence, taken in the suit, is that there were two prior partitions between the members of the family--the first partition having been between the two ancestors of the family,--Madhu and Rama, being the heads of me two brothers of the family.--as appears from the genealogical table; and the second partition is alleged to have been between the two sons of Rama--Raghu and Maguni. The purchasers defendants 2 and 3 filed a joint written statement and their vendor the defendant No. 1 filed a separate written statement; the defendant No. 4 did not file any written statement.

3. The trial court held that there was no previous partition as alleged and accordingly passed a decree for partition according to shares stated in his judgment; he further found that the defendant No. 1 had one anna share in the suit property; further that the plaintiffs are entitled to buy up the share in the undivided family dwelling house at a valuation to be subsequently made at the time of the final decree proceedings. In appeal, the learned lower appellate Court confirmed the decision of the trial court. Hence, this Second appeal.

4. The points,--urged on behalf of the defendants (appellants herein),--are that, in the absence of any existing dwelling house in the property, Section 4 of the Partition Act cannot apply; and further that in the present case there is no evidence of any existing dwelling house. In support of this contention, the learned counsel for the appellants relied on the Commissioner's report (Ext. C-I), where there is no reference to any dwelling house on the plot in question being plot No. 2531, nor any reference to the sale deed (Ext. D-I) executed by the defendant No. 1 in favour of the defendants 2 and 3; there is also no reference to there being any existing construction on the said plot No. 2531. Thus,--according to the purchaser defendants 2 and 3,--they only purchased a vacant land, and so the plaintiffs have no right to buy up the defendant No. 1's share u/s 4 of the Partition Act.

It is, however, clear from the sale deed that there is reference to "Gharbari" which means a homestead or dwelling house; so also in the Current Settlement record-of-right it is referred to as "Gharbari". The defendant No. 1 as D. W. 1 himself also said to the effect that there was "Gharbari" on the suit property. From evidence, it is clear that plots 2531 and 2763 are contiguous plots--plot No. 2531 containing an area of 6 acres 7 Kadis and 3 Biswas and is referred to as Gharbari; the adjacent plot No. 2763 is the Bari land contiguous to the Gharbari land. It is thus apparent that the family dwelling house was on plot No. 2531 and indeed the sale deed in favour of the purchaser defendant refers to both the plots. It is further clear that the Bari land on plot No. 2763 is necessary for enjoyment of the Gharbari on plot No. 2531 contiguous to each other.

The defendants-appellants, however, sought to repel this apparent position by the suggestion, that the alleged Bari land in plot No. 2763, being full of bamboos, was not a vacant site appertaining to the Gharbari plot No. 2531; and therefore it could not be said that the Bari land was necessary for enjoyment of

the Gharbari plot; and they further contended that there is no evidence of any dwelling house on plot No. 2531. I do not, however, accept the defendants-appellants' contention, on this point, either on facts or on law.

5. The well settled position in law is that the term "house" embraces not merely the structure or building but includes also adjacent buildings, curtilage, garden, court-yard, orchard and that is necessary for the convenient occupation of the house, but not that which is only for the personal use and convenience of the occupier; it includes the land on which the structure of the dwelling house stands; that the applicant u/s 4 of [the Partition Act is entitled to purchase from the stranger purchaser not merely the structure of the dwelling house but also the land on which it stands and further every appurtenant and accessory which may be deemed necessary to a full and complete enjoyment of the things sold.

In the present case, the disputed property admittedly includes both plot No. 2531 and plot No. 2763 contiguous to each other and it is clear that these plots form part of one undivided family dwelling house. In my opinion, the position is clear that the plaintiffs are entitled to relief u/s 4 of the Partition Act and it is not necessary that the matter needs further investigation by the Courts below, on remand as suggested by the learned counsel for the defendants appellants in course of hearing of this appeal.

6. Mr. R. N. Misra, learned counsel for the defendants appellants, further took the point that there must be an unconditional offer by the plaintiffs, from which they will not be permitted to resile, and it is only under such undertaking, that the court may make an order permitting the plaintiffs to buy up the share. Indeed, there is no dispute as to the position that the first condition for application of Section 4 is that the applicant should give an unconditional undertaking to buy up the share. In the present case, however, it is clear that the plaintiffs asked for reliefs u/s 4 of the Partition Act as prayed for in paragraph 7-Kha of the plaint, and I accept it as substantial compliance with the provisions of Section 4. Thus none of the defendants-appellants' contentions are acceptable.

7. In this view of the case, the decision of the Courts below is upheld. This appeal is accordingly, dismissed with costs.