
(2008) 03 OHC CK 0040

In the Orissa High Court

Prahallad Ch. Mohanty and Another

APPELLANT

Vs

Surendra Nath Mohanty and Others

RESPONDENT

Date of Decision : 17-03-2008

Acts Referred:

Hindu Succession Act, 1956 — Section 22
Partition Act, 1893 — Section 4

Citation : AIR 2008 Ori 122 : (2008) 1 OLR 863

Hon'ble Judges : A.K. Parichha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.K. Parichha, J.—Defendant Nos. 12 and 13 have filed this appeal against the judgment and decree of learned 1st, Additional District Judge, Cuttack in Title Appeal No. 66 of 1994 reversing the judgment and decree passed by learned Civil Judge (Sr. Division), Jagatsinghpur in Title Suit No. 89 of 1987.

2. The present respondent No. 1 as plaintiff filed the above noted suit with a pleading that suit Schedules "A" & "B" properties are the joint family properties of the plaintiff and defendant Nos. 1 to 11, but Sebati, the wife of Birakishore, sold a part of the dwelling house of joint family described in Schedule "C" of the plaint to defendants 12 & 13 without any legal necessity and without the consent of the plaintiff, although defendants 12 & 13 being strangers to the family were not entitled to joint possession of the dwelling house. He prayed for partition of properties of the joint family, allotment of his share and a liberty to repurchase the Schedule "C" property as per Section 4(1) of the Partition Act from the stranger-purchasers. The defendants contested the suit pleading inter alia that there was a prior partition between Narahari and sons of Lokanath and the house sold by Sebati to defendants 12 & 13 fell to the share of Narahari in that partition. Sebati being the daughter-in-law and the sole heir of Narahari sold the suit house to defendants 12 & 13 for legal necessity and those purchasers constructed house and lived there. It was also pleaded by the defendants that

Narahari had alone purchased schedule "B" land and the plaintiff has no right over the same. They specifically pleaded that as there had been a prior partition the plaintiff is not entitled to claim partition.

3. From the pleadings of the parties, learned trial Court framed as many as 9 issues and on consideration of the evidence of the parties concluded that there was a prior partition between Narahari and sons of Lokanath, that Schedule "B" property was not acquired out of joint family income, that the Plot Nos. 502 and the house there on was not the joint property and the purchasers are in possession of the same; that plaintiff is not entitled to decree of repurchase of the house under the provision of Section 4 of the Partition Act; that the plaintiff having not challenged the validity of the sale deed cannot maintain his right of pre-emption. With such findings learned trial Court dismissed the suit of the plaintiff. The plaintiff carried appeal and the first appellate Court in the above noted title appeal reversed the judgment and decree of the trial Court with the findings that though there was a partition in the year 1935 in the family, the same was not complete one and that there was no previous partition by metes and bounds; that Sabik Plot Nos. 431, 502, 504, 505, 506 and 510 are liable for partition; that there was no right of pre-emption of the plaintiff over Plot No. 509. In consequence, plaintiff was allowed to enforce his right of preemption only in respect of Sabik Plot Nos. 502, 504, 505, 506 and 510 and defendants 12 & 13 were directed to resell the land purchased under Exts. H & J to the plaintiff. Aggrieved by the said judgment and decree defendants 12 & 13 have preferred the present appeal and plaintiff-respondent No. 1 has also filed the cross objection praying for declaration that Schedule "B" property is liable for partition and the plaintiff is entitled to pre-emption in respect of the suit property.

4. At the time of admission, the following substantial questions of law were formulated for consideration:

(i) Whether the suit for exercise of right u/s 22 of the Hindu Succession Act was barred by limitation, as the same was filed beyond one year of the sale? and;

(ii) Whether the lower appellate Court has committed an illegality in decreeing the suit without calling upon the plaintiff to deposit the consideration money along with cost?

But at the time of argument the second point noted above was not seriously pressed. On the contrary learned Counsel for the appellant raised the following question of law:

Whether the prayer of the plaintiff for repurchase of the part of the suit dwelling house from defendant Nos. 12 & 13 was maintainable when the stranger purchasers had not filed any suit for partition to carve out their share?

5. Mr. Ashok Mukharji, learned Counsel for the appellant submitted that the suit of the plaintiff was not maintainable as it was filed beyond the period of limitation prescribed under Article 97 of the Limitation Act, 1963. According to

him, the Courts below concurrently held that defendant Nos. 12 & 13 were in possession of the suit dwelling house after their purchase in the year 1977, so when the suit was filed by the plaintiff on 13.7.1987 which was beyond the period of limitation of one year, it was hit under Article 97 of the Limitation Act. On this score he cited the case of Tarak Das Ghosh Vs. Sunil Kumar Ghosh, . He also contended that right of pre-emption u/s 4(1) of the Partition Act can be availed by a coparcener only when the stranger purchaser files suit for partition or takes steps for carving out his share in the joint family dwelling house, but in the present case, neither defendant Nos. 12 & 13 had filed any suit for partition nor they had filed counter claim as defendants to carve out their share and therefore, the claim of pre-emption by the plaintiff was not maintainable. In support of such contention, Mr. Mukherji relied on the case of Babulal Vs. Habibnoor Khan (Dead) by LRs. and Others, .

6. Mr. C.R. Nanda, learned Counsel for the respondents on the other hand maintained that the suit of the plaintiff was not barred by limitation. According to him, the suit being one for partition, the limitation provided under Article 97 would not apply. Mr. Nanda also argued that a coparcener can exercise his right of pre-emption u/s 4(1) of the Partition Act, when one of the coparceners files a suit for partition arraying the other coparcener and stranger purchasers as defendants, as in a partition suit the defendants also stand at par with the plaintiff. In support of this contention, he relied on the Cases of Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others, ; Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, ; Alekha Mantri v. Jagabandu Mantri and Ors. AIR 1971 Ori127; Bhagirathi Jena and Another Vs. Parsuram Jena and Others, ; Gulamrasool Sarfuddin Malek and Others Vs. Dulhanbibi and Others, and Siba Prosad Bhattacharyya and Others Vs. Bibhuti Bhusan Bhattacharjee and Another, .

7. Section 4(1) of the Partition Act-read thus:

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.

From the language of this Section it is clear that the right of a member of the family who is a share holder accrues under the Section as soon as a suit for partition is filed by a stranger to the family and subsists during the pendency of the suit until it is terminated by an effective final decree of partition. Extending the scope, the apex Court in the case of Ghantesher Ghosh (supra) observed that the right of share holder-member of the family continues to subsist even after the final decree proceeding till the final decree is fully executed by an executive Court. In that case, the apex Court further observed that "suing for partition"

would not necessarily mean filing of a suit in the first instance by the stranger transferee, but if a transferee seeks to execute any final decree of partition in favour of his transferor co-owner, he can be said to have initiated a legal action for redressal of his decretal right as a stranger transferee. In *Alekha Mantri's* case (supra) the alienee of undivided share of a co-owner in a joint family house was arrayed as defendant No. 1 in the suit filed by one of the co-owners of the family for partition and separate possession of his undivided share. The question arose whether an alienee from the co-owner who was already defendant No. 1 could be subjected to proceeding u/s 4 of the Partition Act by the plaintiff. This Court held that Section 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 that it is not necessary that the latter should file the suit. This observation was given on the principle that a defendant in a partition suit stands on the same footing as that of plaintiff and can also claim his specific share. In the case of *Babulal* (supra), the apex Court however, ruled that the ratio noted in *Alekha Mantri's* case is not good law in view of *Ghantesher Ghosh's* case (supra). The observation of the apex Court is extracted hereunder:

If the ratio of the aforesaid decision 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 Section 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.

(emphasis provided)

8. This observation thus essentially propagates that ratio of *Alekha Manti's* case will not apply to the cases, where the stranger purchasers does not move for partition of the joint family property against the remaining co-owners either as 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.

9. In *Gulamrasool Sarfuddin Malak's* case the Full Bench of Gujarat High Court ruled that a member of an undivided family can avail the benefit of Section 4 of the Partition Act, even if the suit has been instituted by a member of that undivided family as plaintiff arraying the stranger transferee, as a defendant and even if such stranger transferee does not in terms claim the separation of his share in the property. This Court taking note of the above noted ratio and some previous decisions of this Court in the case of *Bhagirathi Jena and Anr.* (supra) also ruled that even if a stranger purchaser has not filed a suit for partition to carve out his share and having been arrayed as a defendant in a suit for partition filed by one of the members of the joint family has not specifically asked for carving out his share, yet the plaintiff can avail the right of pre-emption

contemplated u/s 4 of the Partition Act. A close reading of the above noted decision leads to an irresistible conclusion that in a suit filed by one of the members of the joint family for partition where the stranger purchaser has been arrayed as defendant, the plaintiff can ask for relief of repurchase of the property from the stranger purchaser. Such inference is legally acceptable as it is in consonance with the benevolent legislative scheme behind enactment of Section 4 of the Partition Act, which is 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 a stranger-outsider to the family may obviously be having different outlook and mode of life than the members of the joint family. In the present case, admittedly the suit for partition was filed by one of the members of the joint family arraying stranger purchasers as defendant Nos. 12 and 13. In such situation, the right of pre-emption noted in Section 4 of the Partition Act was available to the plaintiff in the suit.

10. Admittedly, the land was purchased by defendant Nos. 12 and 13 under registered sale deed in the year 1977 and the suit for partition was filed in the year 1987. The Courts below concurrently held that after the purchase defendant Nos. 12 and 13 are in possession of the portion of the suit dwelling house although learned first appellate Court held such possession to be illegal. In the suit, the plaintiff besides praying for partition of the suit property asked for a decree u/s 4 of the Partition Act for repurchase of the sold part of the house from defendant Nos. 12 and 13. The question is whether the limitation noted in Article 97 of the Limitation Act was applicable. Article 97 reads thus:

Description of Suit Period of Time from which period beings Limitation to run ____

____ 97 To enforce a right One year When the purchaser takes under of preemption the sale sought to be impeached, whether the right physical possession of the whole is founded on law or part of the property sold, or general usage or, where the subject matter or on special contract. of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered.

This Article says that when a purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, then the suit to enforce right of pre-emption should be filed within one year from the date of such physical possession.

11. In the case of Tarak Das Ghosh (supra) the meaning of right of pre-emption, the scope and ambit of Section 22 of Hindu Succession Act, 1956 and the applicability of Article 97 of the Limitation Act was considered and the following observation was noted as follows:

The dictionary meaning of the word "right of pre-emption" is the right of purchasing property before or in preference to other persons. Further the word

"pre-emption" is derived from "pre-emption" and pre-emption is thus an act of buying before another. Hence, it must be held that the right which is conferred by Section 22 of the Act is a right of pre-emption, for, here when one or several persons on whom an interest in any immovable property devolves on the death of a person dying intestate as heirs specified in Class I of the Schedule and when one of such heirs proposes to transfer his or her interest in the property, the other heirs are given a preferential right to acquire the interest proposed to be transferred. Here the right in question is one enabling a person to purchase the property in preference to others. When one of the heirs proposes to sell his interest in the property, which interest he got along with others as heirs belonging to Class-I, the other heirs will have a right to purchase the same in exclusion to stranger purchasers. The right is obviously, therefore, a right of pre-emption. Therefore, Article 97 applies to applications u/s 22. In the circumstances, of the case the application was barred by limitation as it was made at a time beyond the period prescribed by Article 97.

12. This observation is legally sound and is acceptable. So in a suit for pre-emption, Article 97 of the Limitation act would apply. In the present case, evidence is available and the Courts below have also concurrently held that the defendant Nos. 12 and 13 are in possession of the purchased part of the house since the date of purchase, i.e., from the year 1977, but the suit containing a prayer for repurchase was filed in the year 1987, which was clearly beyond the period of limitation prescribed in Article 97. That being so, the prayer of the plaintiff for liberty to repurchase the part of the dwelling house from defendant Nos. 12 and 13 described in Schedule "C of the plaint, was barred by limitation.

13. The substantial questions of law are accordingly answered. In consequence, the decree of partition granted by first appellate Court carving out the shares of the respective parties is confirmed, but the decree giving liberty to the plaintiff to enforce the right of pre-emption in respect of the properties sold to defendant Nos. 12 and 13 is set aside.

14. In the result, the appeal is allowed in part and the cross-objection is dismissed on contest, but without any cost.