Usha Batra vs.m/s Ombir Creation Private Limited & Ors

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SooperKanoon Citation : sooperkanoon.com/1218318

Court : Delhi

Decided On : Oct-01-2018

Appellant : Usha Batra

Respondent : M/S Ombir Creation Private Limited & Ors

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment reserved on: September 27, 2018 Judgment delivered on: October 01, 2018 + FAO(OS) 216/2017 USHA BATRA Through: Mr. Akshay Makhija with Ms. Seerat ..... Appellant versus Deep Singh & Mr. Ankit, Advs. M/S OMBIR CREATION PRIVATE LIMITED & ORS .....

... RESPONDENTS
Through: Mr. A.K. Singla, Sr. Adv. with Mr. Rajesh Bansal, Mr. Vijay K. Gupta, Mr. Amit Khemka & Mrs. Ritu Bansal, Advs. CORAM: HON'BLE THE CHIEF JUSTICE HON'BLE MR. JUSTICE V. KAMESWAR RAO

JUDGMENT
V. KAMESWAR RAO, J1 The appellants who are the legal heirs of the defendant no.3 in CS (OS) 650/2008 have preferred this intra-court appeal against the order dated 6th July, 2017 passed by the learned Single Judge, on the ground the learned Single Judge had denied them the right of preemption and directed them and the representative of the respondent No.1 to be present in the court to facilitate inter se bidding, if required.

2. Some of the relevant facts are that on 7th April, 2008, a FAO (OS) 216/2017 Page 1 of 17 Suit for Partition of property bearing No.43-A, Rajpur Road, Civil Lines, Delhi - 54 measuring 1400 Sq. Yds. was filed by respondent no.4 Sh. Girdhari Lal Batra. On 10th July, 2015, a preliminary decree was passed holding the shares of the plaintiff and defendants 1 to 3 as under: Plaintiff in the suit / respondent no.4 herein 1/3rd share Defendant No.1 in the suit / Respondent No.3 herein 2/9th share (a) Girdhari Lal Batra (b) Krishan Lal Batra (c) Bihari Lal Batra (d) Anil Kumar Batra (through LRs). Defendant No.2 in the suit / Respondent No.3 herein 2/9th share Defendant No.3 in the suit / Appellants herein 2/9th share.

3. On 29th May, 2016, defendant no.3 namely Anil Kumar Batra passed away. The legal heirs of defendant no.3 the appellants herein have been impleaded as parties before the court. It is averred by the appellants that a legal notice purporting to be a caveat was received by them from respondent no.1 M/s. Ombir Creation Pvt. Ltd. on 6th December, 2016.

4. It is their case that they were not aware of the pendency of the Suit. It was only after they received a legal notice FAO (OS) 216/2017 Page 2 of 17 purporting to be a caveat dated 3rd December, 2016, that they got alerted. On enquiries from their uncle, it came to their knowledge that the Suit for Partition is pending before this court and that they (uncles) had entered into some transaction with M/s. Ombir Creation Pvt. Ltd., respondent no.1 herein. It is their case that details of the transactions entered into by the respondent nos. 2 to 4 (their uncles) with respondent no.1 were not divulged to them. In fact, respondent nos. 2 to 4 in order to defraud them had failed to bring them on record even though they are the legal heirs of Late Anil Kumar Batra upon his demise on 29th May, 2016. It was on 4th January, 2017, the appellants filed an IA being 186/2017 under Order XXII Rule 4 CPC. The IA was allowed in terms of the following order: (ii) Vide the same order dated 10th July, 2015, it was further directed that the interim order earlier in force restraining the parties from alienating, encumbering or parting with possession of the property No.43-A, Rajpur Road, Civil Lines, Delhi110054 though shall continue but shall not come in the way of the plaintiff, defendant no.1 and defendant no.2, if agree to sell the property to any buyer, selling the property. (iii) The counsel for the plaintiff, defendant no.1 and defendant no.2 state that they have sold the portions

of the property in their respective possession to M/s Ombir Creations Pvt. Ltd. (iv) Though the plaintiff, defendant no.1 and the defendant FAO (OS) 216/2017 Page 3 of 17 no.2, in my opinion, under the order dated 10th July, 2015 could not have done so without involving the defendant no.3 and if at all could have sold their share as identified in the preliminary decree and not the portions in their possession but the fact remains that today the said M/s Ombir Creations Pvt. Ltd. has become the owner of the remaining 7/9th share in the property i.e. besides the 2/9th share of the legal heirs of the defendant no.3. (v) It is informed that the legal heirs of defendant no.3 are also in possession of a portion of the property.

5. The counsel for the said M/s Ombir Creations Pvt. Ltd. appears and states that an opportunity be given to M/s Ombir Creations Pvt. Ltd. to negotiate with the legal heirs of the defendant no.3 also.

6. Till further orders, the legal heirs of defendant no.3 as well as the said M/s Ombir Creations Pvt. Ltd. who is now substituted in this suit in place of plaintiff, the defendant no.1 and defendant no.2, are directed to maintain status quo qua title, construction and possession of the property. 5. The order reveals that a representation was made by the counsel for the respondent nos. 2 to 4 herein (plaintiff, defendant no.1 and defendant no.2) that they have sold the portions of the property in their respective possession to M/s. Ombir Creation Pvt. Ltd./ respondent no.1 to the extent of
th share in the property, i.e., their share, leaving
th share of the defendant no.3, late Anil Kumar Batra. From the order, it also transpires that M/s. Ombir Creation Pvt. Ltd. has been substituted in the suit in place of respondent nos. 2 to 4 (plaintiff, defendant no.1 and FAO (OS) 216/2017 Page 4 of 17 defendant no.2). It appears that IA No.7335/2017 was filed by M/s. Ombir Creation Pvt. Ltd. with the following prayers and it is in this application, the impugned order has been passed by the learned Single Judge. In the facts and circumstances of the case mentioned above, it is therefore, most respectfully prayed that: a) by invoking the inherent powers of the Court under Section 151 of the Code of Civil Procedure, 1908 appropriate directions be issued to Defendant No.3 to transfer his 2/9th share in the suit property bearing No.43A, Rajpur Road, Civil Lines, Delhi and a final decree be passed in accordance with law. b) A Local

Commissioner be appointed to determine and demarcate the exact area owned by (LRs of Defendant No.3, i.e., 2/9th share in the suit property bearing No.43A, Rajpur Road, Civil Lines, Delhi and to determine the value thereof; c) LRs of Defendant No.3 be directed that after execution of the Sale Deed in favour of the Applicant Company, to hand over peaceful vacant possession of the same to the Applicant Company. d) the stay order dated 21st February, 2017 directing the status quo title, construction and possession of the property by this Honble Court may be recalled in the facts and circumstances of the case and in the interest of justice; and e) to pass such other order and orders as to which this Honble Court may deem fit and proper in the interests of justice. 6. It is the submission of Mr. Akshay Makhija, learned FAO (OS) 216/2017 Page 5 of 17 counsel appearing for the appellants that the learned Single Judge has not given an opportunity to the appellants to file their response to the application. That apart, the impugned order has been passed without giving an opportunity to the appellants to invoke their right of preemption under Section 4 of the Partition Act, 1893. According to the him, the conclusion of the learned Single Judge that the appellants should have invoked their right under Section 4 of the Partition Act, if any, between the period 10th July, 2015 to 21st February, 2017 is clearly erroneous as at the most, the right of the appellants to invoke Section 4 had accrued only when the appellants filed an application under Order XXII Rule 4 CPC, i.e., on 14th January, 2017, and not before that. He contended, that the appellants were not in the knowledge of the pendency of the suit before this court. That apart, the right under section 4 of the Partition Act comes into play only when the share of the dwelling house belonging to undivided family has been transferred to a person, who is not a member of such family. That apart it is also his submission that the right to invoke Section 4 of the Partition Act accrued to the appellants herein when M/s. Ombir Creation Pvt. Ltd., respondent no.1, not part of the family, requested for partition by metes and bounds by FAO (OS) 216/2017 Page 6 of 17 means of an application, being I.A. 7335/2017 and it continues till the decree is passed and the same is executed. Mr. Makhija has submitted that the impugned order hurts the appellants as the learned Single Judge even though has stated However, in the facts and circumstances of this case, legal heirs of defendant no.3 are permitted to come up with an offer within two weeks to purchase the share of applicant - Ombir

Creations Limited at market rate, but in the subsequent paragraph has stated Let authorized representative of applicant and the legal heirs of deceased defendant no.3 be present in the court on the next date of hearing to facilitate inter se bidding, if required. According to him, the aforesaid conclusions of the learned Single Judge are contradictory. In any case, it is his submission that the later part of the order could not have been passed as long as the right of the appellants herein under Section 4 of the Partition Act subsist. Mr. Makhija has relied upon the judgment of the Supreme Court in the case of Ghantesher Ghosh v. Madan Mohan Ghosh and Ors. (1996) 11 SCC446in support of his submissions.

7. On the other hand, Mr. A.K. Singla, learned Sr. Counsel appearing for the M/s. Ombir Creation Pvt. Ltd. / respondent no.1 stated that appellants do not have the right to FAO (OS) 216/2017 Page 7 of 17 invoke Section 4 the Partition Act, 1893 inasmuch as the partition had already taken place in terms of the award rendered by the sole Arbitrator Mr. Gurdayal Batra on 5th December, 1985 with regard to the property in question. According to him, the award was made rule of the court, as such the same has attained finality between the parties. He draws our attention to the plaint in CS(OS) 650/2018 with regard to his submission that the relief was only with regard to partition of the property by metes and bounds. He has also drawn our attention to the contents of the written statement filed by Late Anil Kumar Batra wherein in reply on merits to Paras 7 and 8 of the plaint, the following has been stated: that the contents paras 7 and 8 of the plaint reproducing some portions of the said award are not denied. However, it is submitted that said award cannot be enforced as is being sought to be enforced. It is further submitted that parties are enjoying their respective shares in the aforesaid property. 8. According to him, even the predecessor in interest of the appellants Late Anil Kumar Batra had conceded to the fact that the partition has been effected and the parties are enjoying their respective shares in the aforesaid property. According to him, learned Single Judge was right in concluding that the right of the appellants to invoke Section 4 of the Partition Act, 1894 FAO (OS) 216/2017 Page 8 of 17 subsisted between the dates 10th July, 2015 till 21st February, 2017. He also stated, the appellants, even when their right subsisted, were not appearing before the court for the reasons best known to them. He justified the order passed by the learned Single Judge calling upon the appellants to participate in the inter se

bidding, if required.

9. Having heard the learned counsel for the parties, the issue which falls for our consideration is in a very narrow compass, that is whether the learned Single Judge could have denied the appellants the right under Section 4 of the Partition Act, 1893 by passing the following order: - However, in the facts and circumstances of this case, legal heirs of defendant no.3 are permitted to come up with an offer within two weeks to purchase the share of applicant - Ombir Creations Limited at market rate. Let authorized representative of applicant and the legal heirs of deceased defendant no.3 be present in the court on the next date of hearing to facilitate inter se bidding, if required. The plea of Mr. Makhija was that even though the 10. learned Single Judge has permitted the appellants who are the legal heirs of defendant no.3 to come up with an offer within two weeks to purchase the share of applicant M/s. Ombir Creation Pvt. Ltd., the same has been nullified in the later part of the order, FAO (OS) 216/2017 Page 9 of 17 as reproduced above, by observing to facilitate inter se bidding. This according to him, amounts to denial of the benefit of Section 4 of the Partition Act. The plea of the learned counsel for the respondent no.1 is that the award by which the partition has been effected has attained finality as the share of each of the parties, including the predecessor in interest of the appellants had been determined by the Sole Arbitrator, which in other words depicts that property has been divided and no application under Section 4 shall lie.

11. Mr. Makhija is justified in relying upon the judgment of the Supreme Court in Ghantesher Ghosh (supra), wherein the Supreme Court was concerned with the case, wherein the facts were, the premises in question which was a residential house owned by one Kalipada Ghosh and on his death his three surviving sons became owners of 1/3rd share each. On 7th September, 1948, one of the sons Kamal Krishna died leaving behind him his widow Smt Radha Rani. Thus, she inherited 1/3rd undivided share of her husband in the said dwelling house. On the coming into operation of the Hindu Succession Act, 1956, Smt Radha Rani became the full owner of 1/3rd share of her deceased husband in the said house. She filed a suit for partition FAO (OS) 216/2017 Page 10 of 17 on 5th September, 1960 claiming separation of her 1/3rd share in the said house amongst other

properties. A preliminary decree was passed in favour of Smt Radha Rani on 31st August, 1971. Accordingly, she became entitled to partition and separation of her 1/3rd share in the said dwelling house. She made an abortive attempt to get the final decree executed but therein she did not get any relief of actual possession for a number of years. In the meanwhile, on 8th October, 1979 she executed and got registered a gift deed in favour of her brother, the appellant before the Supreme Court gifting 1/3rd undivided interest in the said dwelling house as decreed to her pursuant to the final decree for partition. Armed with that gift deed the appellant-donee, who obviously was a stranger to the joint family, filed execution petition on 14th December, 1981 for executing the final decree obtained by his predecessor-in-interest, namely, the Smt. Radha Rani. Pending the execution proceedings taken out by the appellant-donee, one of the judgment-debtors Pran Krishna, original first defendant died in July 1983. In his place, his son Respondent 1, Madan Mohan Ghosh was brought on record before the Supreme Court as his legal heir in the execution proceedings. The executing court by its order dated 17th January, FAO (OS) 216/2017 Page 11 of 17 1985 issued a writ of possession by appointing a Pleader Commissioner to undertake the task of suggesting partition of the suit house by metes and bounds. Then in September 1985, pending the execution proceedings original judgment-debtor defendant No.2 Gaur Mohan died. It appears that thereafter the real contest remained between the appellant on the one hand and Respondent 1 on the other. Respondent No.1 filed an application on 12th December, 1986 before the executing court under Section 4 of the Act for enforcing his claim of pre-emption against the appellant-stranger transferee of 1/3rd undivided interest of the original title-holder Smt. Radha Rani. The executing court by its order dated 13th August, 1987 dismissed the said application of respondent 1 on the ground that the said application was not maintainable, after the final decree was passed in the partition suit. The said view of the executing court was not approved by the Division Bench of the Calcutta High Court in the revision application. They took the view that the said petition under the Act was maintainable as still the final decree had not got fully executed and satisfied by actual division of the property by metes and bounds and delivery of actual possession to the stranger transferee who had taken out the execution proceedings. By its FAO (OS) 216/2017 Page 12 of 17 order dated 17th

December, 1990, the High Court directed the executing court to dispose of the application of respondent 1 under Section 4 of the Act on merits with a further direction to complete the said proceedings within six months.

12. The issue before the Supreme Court was whether Section 4 can be validly pressed into service by any of the co-owners of the dwelling house belonging to the undivided family at the stage of execution of the final decree. The issue was answered in the affirmative by the Supreme Court and in Paras 15 and 17, it held as under: 15. In Boto Krishna Ghose v. Akhoy Kumar Ghose [AIR1950 Cal 1

54 CWN660 , it was held by another Division Bench of the Calcutta High Court that a dwelling house of an undivided family has a linkage with the dwelling house which belongs to the family and which is not divided and that such dwelling house may be owned by members of such family who need not be joint in mess and that house itself should be undivided amongst the members of the family who are its owners. The emphasis is really on the undivided character of the house, and it is this attribute of the house which imparts to the family its character of an undivided family. For the members of the family may have partitioned all their other joint properties and may have separated in mess and worship, but they would still be an undivided family in relation to the dwelling house so long as they have not divided it amongst themselves. In this connection, it has been further observed as follows: If in this state of things a member of the family transfers his share in the dwelling house to a stranger, the position that arises is that para 2 of Section 44, T.P. FAO (OS) 216/2017 Page 13 of 17 Act comes into operation and the transferee does not become entitled to joint possession or other common or part enjoyment of the house, although he would have the right to enforce a partition of his share. The object of this provision is to prevent the intrusion of strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share to a stranger. The factual position then is that it is still an undivided dwelling house, the possession and enjoyment of which are confined to the members of the family, the stranger transferee being debarred by law from exercising his right to joint possession which is one of the main incidents of co-ownership of property. Such a dwelling house can in our opinion still be looked upon as a dwelling house belonging to an

undivided family, because the members of the family have not divided it amongst themselves and are in sole enjoyment and possession of it to the exclusion of the stranger transferee who has only a right to partition. And so long as the dwelling house has not been completely alienated to strangers as was in Vaman Vishnu Gokhale v. Vasudeo Morbhat Kale [ILR23Bom 73]. , successive transfers by other co-sharer members of the family do not alter the factual position in this respect, because the remaining member or members of the family have the right to hold exclusive possession to the exclusion of the stranger alienees. So long as that situation lasts, the dwelling house, in our opinion, continues to be a dwelling house belonging to an undivided family. the case The aforesaid decision also shows that so long as decree for partition of a family dwelling house does not get fully executed and the shares of co-owners do not get separated by metes and bounds and the co-owners are not put in actual possession of their respective shares, the dwelling house remains to be common dwelling house of joint family and so long as that attribute remains, Section 4 would continue to be attracted. (emphasis supplied). We may now deal with the decision of the Division Bench of the Patna FAO (OS) 216/2017 Page 14 of 17 High Court which has also directly spoken on the point. In Harendra Nath Mukharjee v. Shyam Sunder Kuer [AIR1973 Pat 1

1973 Pat LJR20 Mukharjee, J., speaking for the court had to consider this very question in the light of the scheme of Section 4 of the Partition Act. It was held that application under Section 4 could be made at any stage of the suit. Simply because an application had been filed after the passing of the final decree, it could not be said that it was not maintainable on the ground that the executing court could not go behind the decree. It was not a case of going behind the decree. It was further observed that the family continued to be undivided qua dwelling house till possession was delivered to the members of the family in execution of the final decree for partition and as such, the application under Section 4 was maintainable after passing of the final decree and before the possession of the dwelling house in question was delivered to the stranger transferee. The aforesaid decisions of the Calcutta High Court in the cases of Satya Narayan Chakravarty [1974 Cal WN871 and Boto Krishna Ghose [AIR1950 Cal 1

54 CWN660 as well as the decision of the Division Bench of the Patna High Court in the case of Harendra Nath Mukharjee[AIR1973 Pat 1

1973 Pat LJR20 lay down the correct legal position. x 17. As a result of the aforesaid discussion, it must be held that Section 4 of the Act can validly be pressed in service by any of the co-owners of the dwelling house belonging to the undivided family pending the suit for partition till final decree is passed and thereafter even at the stage of execution of the final decree for partition so long as the execution proceedings have not effectively ended and the decree for partition has not been fully executed and satisfied by putting the shareholders in actual possession of their respective shares. Beyond that stage, however, Section 4 will go out of commission. x x x 13. So, in view of the conclusion of the Supreme Court, the submission of the learned counsel for the respondent no.1 that the FAO (OS) 216/2017 Page 15 of 17 sole Arbitrator having determined the share of each of the parties to the arbitration and the fact that the predecessor-in-interest of the appellants had conceded the fact that the parties are enjoying the respective shares in the aforesaid property would have the effect of property is divided (not undivided), does not appeal to this Court for the simple reason that the suit itself encompasses a prayer for partition of the suit property by metes and bounds, which means that in terms of the judgment of the Supreme Court as noted above, the property still remains common to the joint family and continues to have attributes of a joint family property. In fact a preliminary decree was passed holding the shares of the respondents 2 to 4 and the predecessor in interest of the appellants only on July 10, 2015, in the suit. If we were to accept the submission made by the learned counsel for respondent no.1, then there was no occasion for the original plaintiff to file a suit for partition by metes and bounds. So, the appellants right under Section 4 of the Partition Act subsist, which accrued to them only when Ombir Creation Pvt. Ltd had filed application being IA73352017 i.e. in July, 2017. So the conclusion of the Ld. Single Judge that the right to preemption could have been exercised by the appellants between July 10, 2015 till February 21, 2017 is FAO (OS) 216/2017 Page 16 of 17 clearly erroneous both on facts and in view of the law laid down by the Supreme Court as noted above. We accordingly, set aside the following observations of the learned Single Judge in the impugned order: Let authorized representative of applicant and the legal heirs of deceased defendant no.3 be present in the court on the next date of hearing to facilitate inter se bidding, if required 14. The parties shall appear before the learned Single Judge on October 22, 2018 when the appellants shall come up with an offer to purchase the share of respondent no.1 M/s. Ombir Creation Pvt. Ltd. at market rate.

15. The petition stands disposed of. No order as to costs. CM Nos. 25844/2017, 12461/2018 and 36489/2018 Dismissed as infructuous. V. KAMESWAR RAO, J CHIEF JUSTICE OCTOBER01 2018/jg FAO (OS) 216/2017 Page 17 of 17