

Yogendra Kumar Singh and anr. Vs. Mahendra Prasad @ Mahendra Lal and anr.

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Court : Patna

Decided On : May-13-2005

Judge : S. Nayer Hussain, J.

Acts : Transfer of Property Act - Sections 44; [Partition Act, 1893](#) - Sections 4

Appeal No. : Civil Revision No. 224 of 2001

Appellant : Yogendra Kumar Singh and anr.

Respondent : Mahendra Prasad @ Mahendra Lal and anr.

Advocate for Def. : Chitragupta Prasad, Adv.

Advocate for Pet/Ap. : Sukumar Sinha, Sr. Adv. and Abinash Kumar, Adv.

Disposition : Revision allowed

Prior history : S. Nayer Hussain, J. 1. Heard learned counsel for the parties. 2. The petitioners are plaintiffs of Title Suit No. 479 of 1993 which they had filed for partition of their moiety share purchased from opposite party No. 2 who admittedly had half share in the suit property whereas the other half share belonged to opposite party No. 1 3. The petitioners are aggrieved by order dated 15.12.2000 passed in the aforesaid suit at the stage of preparation of Final Decree by which the petition filed by

Judgement :

S. Nayer Hussain, J.

1. Heard learned counsel for the parties.

2. The petitioners are plaintiffs of Title Suit No. 479 of 1993 which they had filed for partition of their moiety share purchased from opposite party No. 2 who admittedly had half share in the suit property whereas the other half share belonged to opposite party No. 1

3. The petitioners are aggrieved by order dated 15.12.2000 passed in the aforesaid suit at the stage of preparation of Final Decree by which the petition filed by opposite party No. 1 under Section 4 of the Partition Act (hereinafter referred to as 'the Act' for the sake of brevity) was allowed and opposite party No. 1 was held to entitled to purchase the said portion from of plaintiffs.

4. The short fact of this case is that opposite party No. 1 is the son whereas opposite party No. 2 is another and both of them jointly purchased the entire suit property from the original owner by a registered sale deed dated 12.8.1955, Thereafter, one Hazari Sao (father of opposite party No. 1 and husband of opposite party No. 2) filed Title Suit No. 111 of 1982 for declaration that opposite party No. 2 had no title in the suit property as she was merely a Benamidar and in fact he (Hazari Sao) purchased the suit property alongwith opposite party No. 1. The said suit was dismissed on 3.7.1984 by the learned trial Court declaring the title of opposite party Nos. 1 and 2 on the basis of the said purchase. The said decree was challenged by late Hazari Sao in Title Appeal No. 128 of 1984 which was allowed by the learned appellate Court on 25.5.1987 and the suit was decreed. Against the decreed of the learned lower appellate Court opposite party No. 2 filed Second Appeal No. 211 of 1987 and this Court vide its judgment dated 20.4.1993 allowed the Second Appeal, set aside the decree passed in the Title Appeal and affirmed the decree of the learned trial Court.

5. Further fact of the case of that opposite party No. 2 sold her half share in the suit property to the petitioners by a registered deed dated 3.9.1993 whereafter the

petitioners filed Title Suit No. 479 of 1993 for partition of their half share impleading both opposite party Nos. 1 and 2 as defendants in the said Title Suit. The said suit for partition was decreed and a Preliminary decree for partition dated 5.7.1999 was prepared against which opposite party No. 1 had filed First Appeal No. 453 of 1999 which is pending in this Court.

6. It transpires that in the meantime the petitioners filed a petition on 4.8.1999 for preparation of the Final Decree. When opposite party No. 1 came to know about the same, he filed a petition dated 21.9.1999 under Section 4 of the Act read with Section 44 of the Transfer of Property Act stating that the plaintiffs-petitioners were admittedly strangers to the family of defendant Nos. 1 and 2 and the suit house was a dwelling house and hence the plaintiffs cannot enforce the decree of separation of dwelling house and opposite party No. 1 is ready to purchase the share of opposite party No. 2 which she had sold to the petitioners.

7. The plaintiffs-petitioners filed their rejoinder on 18.12.1999 contesting the claim of opposite party No. 1. The said petition of opposite party No. 1 has been allowed by the learned Subordinate Judge-IV, Patna, by his impugned order dated 15.12.2000 passed in Title Suit No. 479 of 1993.

8. The contention of the learned counsel for the petitioners is that the emphasis of Section 4 of the Act is on two terms, namely, 'dwelling house' and 'undivided family'. So far the question of 'undivided family' is concerned, his contention is that the property is self acquired property of opposite party Nos. 1 and 2 and hence it is neither an ancestral property nor a joint family property as except opposite party No. 1, no other member of the family including husband of opposite party No. 2 has any right, title or share in the same as has already been held by this Court in Second Appeal No. 211 of 1987. The learned counsel for the petitioners further submits that since it is self acquired property of opposite party Nos. 1 and 2, it cannot be assumed to be a property of undivided family and hence Section 4 of the Act applicable only to dwelling house belonging to an 'undivided family' is not applicable to the facts and circumstances of the case. The learned counsel for the petitioners further submits that the house constructed on the land purchased was not a 'dwelling house' as contemplated under Section 4 of the Act as a Mill is

running in a portion of the said house and there are several tenants in the said house who are residing therein whereas some other portions are being used for commercial purposes, hence in the aforesaid circumstances, the house in question cannot remain and has not remained a dwelling house. The learned counsel for the petitioners also submits that the learned Court below has completely over-looked the purposes of which Section 4 of the Act was enacted, namely, to save a co-sharer from harassment if some stranger is being introduced in the joint family property or ancestral property of an undivided family. But, here in the instant case none of the said circumstances are present and hence Section 4 of the Act will not be applicable. In the said circumstances, he submits that the impugned order of the learned Court below is illegal, arbitrary and perverse.

9. On the other hand, the learned counsel for opposite party No. 1 vehemently opposes the contentions of the learned counsel for the petitioners and submits that the description of the property in the sale-deed was specifically given in which right of residence, possession and easement was transferred and petitioner No. 1 himself deposing as PW 5 (Paragraph 65) admitted that the house is a residential house whereas no chit of paper has been produced by the petitioners to show that the house is used for commercial purposes. The learned counsel for opposite party No. 1 further contends that the building was erected by opposite party No. 1 and in that building he is living with his father and mother (opposite party No. 2) and hence it is clearly a 'dwelling house' of an 'undivided family'. He also submits that the partition suit filed by the strangers having been decreed by the learned trial Court, Section 4 of the Act was clearly attracted along with Section 44 of the Transfer of Property Act as in such matters the purchasers cannot be held to be entitled to joint possession or enjoyment of their dwelling house of the undivided family.

10. The learned counsel for opposite party No. 1 relies upon a decision of Division Bench of this Court in case of Aley Hassan v. Toorab Hussain and Ors., reported in AIR 1958 Pat 232, in which two sisters purchased the property jointly out of whom one sister sold her half share after the death of the other sister and the purchaser filed a Partition Suit whereafter the son of the deceased sister filed a petition under Section 4 of the Act, which was held to be maintainable. He also

relies upon another decision of the Hon'ble Apex Court in case of *Doraboawasji Warden v. Coomisorab Warden and Ors.*, reported in : [1990]1SCR332 , in which it was held that the provisions of Section 44 of the Transfer of Property Act and Section 4 of the Act were complementary and hence where the property was purchased by parents after whose death the suit was between the brothers, Section 4 of the Act will be applicable even if they have separated. The learned counsel for the opposite party No. 1 further relies upon two decisions of Calcutta High Court in case of *Mohiddin Molla v. Jitendranath Karmakar and Ors.*, reported in : AIR1976 Cal288 and in case of *Santosh Kr. Mitra v. Kalipada Das and Ors.*, reported in : AIR1981 Cal278 , out of which in the first case it was held that even if one shop in the suit premises was given to a tenant it would not change the nature of the dwelling house whereas in the second case it was held that even if one co-sharer resides elsewhere, the house will not lose its character of dwelling house even if a considerable portion is let out to tenants. In the aforesaid circumstances, the learned counsel for opposite party No. 1 submits that his petition under Section 4 of the Act was maintainable there was no illegality or jurisdictional error in the impugned order of the learned Court below.

11. After hearing the learned counsel for the parties and after perusing the materials on record, it is apparent that it is an admitted fact that opposite party Nos. 1 and 2 purchased the suit property jointly and each of them had moiety shares therein. It is also not in dispute that no other member of the family, including father of opposite party No. 1 and husband of opposite party No. 2, had any share or interest or title in the said property. Hence, the said self acquired property can not be legally held to be either a joint family property or an ancestral property or an undivided family. It is merely a self acquired property in which both the purchasers, namely, opposite party Nos. 1 and 2 had half shares and they had full right to use or to dispose of their portion/share in the said property, according to their own wish.

12. So far the decision of Hon'ble Apex Court in case of *Doraboawasji Warden*, (supra), is concerned, in that case the property was purchased by parents and that suit was between the brothers and hence the property involved in that case was clearly of the undivided family. So far as the decision of this Court in case of *Aley*

Hassan (supra), is concerned, in that case also one of the sisters had died and her son had filed a petition under Section 4 of the Act as the property involved was his ancestral property. So far as the decisions of Calcutta High Court in case of Mohiddin Molla, (supra), is concerned, only one shop of the suit house was in the tenancy of another person whereas the entries remaining house was in possession of the family and hence it clearly did not change its nature of dwelling house. So far the other decision of Calcutta High Court in case of Santosh Kr. Mitra, (supra), is concerned, the main issue involved was where one of the co-sharers was residing elsewhere, the property can be termed as a dwelling house of undivided family. In that circumstance, it was held that when a considerable portion is let out, it cannot in all circumstances lose its character of dwelling house.

13. In this connection, it may be pointed out that in all such matters every case has to be considered on its own facts and circumstances. Even if some portion of the house is let out which is not disturbing the residential portion of the dwelling house, the matter would be different. But when even a small portion of the suit house is let out to a stranger which affects the residential character of the dwelling house, definitely this would not be decided in the same spirit. Here, in the instant case not only a considerable portion of the suit premises is let out to the tenants, but a portion of the premises is being used for running of a Mill which is apparent from Paragraph 63 of the deposition of PW 5. In the said circumstances, it cannot be legally held that the suit premises is a dwelling house for the purposes of Section 4 of the Act. This enactment has been brought only to save a co-sharer from harassment if the other co-sharer transfers his share to a stranger and the co-sharer living in the dwelling house with his family including females and children may not face any hardship. But, here when already there are a number of tenants and commercial establishments in the suit house, the purpose is already not existing.

14. In the aforesaid circumstances, it is quite apparent that the house in question does not belong to the 'undivided family', nor it is strictly a 'dwelling house' for the purposes of Section 4 of the Act. However, these aspects of the matters have been completely over-looked by the learned Court below who has committed a

gross error of jurisdiction in allowing the petition of opposite party No. 1 under Section 4 of the Act.

15. In these circumstances, the impugned order of the learned Court below is set aside and this civil revision is allowed.

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