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**Smt. Prabhawati Devi Vs. iind Additional District Judge, Ghazipur and Others**

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**SooperKanoon Citation :** [sooperkanoon.com/478944](http://sooperkanoon.com/478944)

**Court :** Allahabad

**Decided On :** Apr-27-1998

**Reported in :** 1998(3)AWC1724

**Judge :** G.P. Mathur, J.

**Acts :** [Partition Act, 1893](#) - Sections 4; [Transfer of Property Act, 1882](#) - Sections 44; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 11 and 115; [Constitution of India](#) - Article 226; Hindu Succession Act - Sections 23

**Appeal No. :** C.M.W.P. No. 19416 of 1991

**Appellant :** Smt. Prabhawati Devi

**Respondent :** iind Additional District Judge, Ghazipur and Others

**Advocate for Def. :** R.G. Padia, ;S.K. Verma, ;Siddarth Verma, Advs. and ;S.C.

**Advocate for Pet/Ap. :** A.K. Rai, ;S.N. Singh and R;.N. Singh, Advs.

**Judgement :**

**G.P. Mathur, J.**

1. The petitioner Smt. Prabhawati Devi filed Original Suit No. 53 of 1977 for partition of her 2/5th share in the property in dispute situate in mohalla Khodaipura in Ghazipur which was decreed on 4.9.1981 by the Civil Judge, Ghazipur and a

preliminary decree for partition was passed. Aggrieved by the judgment and decree, Rahat Ullah filed Civil Appeal No. 4 of 1982 and Syed Zainul Nabi filed Civil Appeal No. 11 of 1982 which were both dismissed by 1st Additional District Judge on 1.5.1986. Thereafter, proceedings for preparation of final decree were commenced wherein Rahat Ullah moved an application under Section 4 of the Partition Act. This application was allowed by the Civil Judge by the Judgment and order dated 20.11.1987 and it was directed that Rahat Ullah may take necessary steps for ascertaining the valuation of plaintiffs 2/5th share and plaintiff Smt. Prabhawati Devi was directed to execute a sale deed of her share in favour of the applicant. This order was challenged by the plaintiff Smt. Prabhawati Devi by filing a Revision which was dismissed by 2nd Additional District Judge on 1.2.1991. As the second Revision is barred on account of U.P. Amendment to Section 115, C.P.C., the plaintiff has preferred the present writ petition under Article 226 of the Constitution and has sought quashing of the orders dated 20.11.1987 and 1.2.1991.

2. Sri R. N. Singh, learned senior counsel for the petitioner has submitted that the impugned orders wherein the plaintiff has been directed to execute a sale deed of her 2/5th share in favour of Rahat Ullah is illegal as his plea which is based upon Section 4 of Partition Act, has not been examined on facts by any Court. It is urged that in order to attract Section 4 of Partition Act, it is necessary that a share in a dwelling house belonging to an undivided family should have been transferred to a person who is not a member of such family but in the present case a share in a dwelling house was not transferred as the house in dispute had been mortgaged and was also in occupation of a tenant. Dr. R. G. Padia, learned Senior Counsel for the respondent has, on the other hand, urged that in view of the earlier judgment and order dated 1.5.1986 of 1st Additional District Judge, it is not open to the petitioner to raise such a contention. It is urged that a finding has already been recorded in the aforesaid judgment and order that the respondent No. 3 is entitled to the benefit of Section 4 of the Partition Act which finding having become final, the plea of the petitioner is barred by principles of res judicata.

3. O.S. No. 53 of 1977 was filed by Smt. Prabhawati Devi wherein Rahat Ullah was arrayed as defendant No. 1, Smt. Hamidun Bibi was arrayed as defendant

No. 3 and was shown as defendant second set and Gayaram, Tribhuvandas, Ghulam Husain and Badrinath were arrayed as defendant Nos. 4 to 7 and were shown as defendants third set. During pendency of the suit, Tribhuvandas and Ghulam Husain died and their heirs were brought on record. The relief claimed in the suit was for partition of 2/5th share of the plaintiff and further a declaration that the defendant second set had no right or title over House No. 88 (which was part of the property in suit) and if in the opinion of the Court, defendant second set had a title over the same, the plaintiff may be allowed to get the same redeemed on payment of due money and she may be given actual possession thereof. The plaintiff had also claimed relief for recovery of Rs. 682 as rent and damages for her share in the property in suit which was in the tenancy of defendant Nos. 4 to 7. The suit was contested by the defendants first and second set and not by other defendants. Learned civil Judge by the judgment and decree dated 4.9.1981 decreed the suit in toto. Against the decree of the trial court, two appeals were preferred. Civil Appeal No. 11 of 1982 was filed by Syed Ziaul Nabi and Civil Appeal No. 4 of 1982 was filed by Rahat Ullah. Both the appeals were disposed of by a common judgment and order dated 1.5.1986 by the 1st Additional District Judge and Civil Appeal No. 11/1982 was dismissed with costs to the plaintiff. Civil Appeal No. 4 of 1982 was also dismissed and the decree passed therein is being reproduced below as it has a bearing on the controversy in dispute :

'Civil Appeal No. 4 of 1982 is dismissed subject to the modification that Sri Rahat Ullah may be given the benefit of Section 4 of Partition Act by the trial court on his application as such, which may be moved by him before the trial court at the time of preparation of final decree. He shall fulfil the required conditions of Section 4 of the Partition Act for getting its benefit before the trial court. If he fails to fulfil the required obligation of law under the provisions of said Act, the benefit would not accrue to him. The costs of this appeal shall be borne by the parties. Civil Appeal No. 11 of 1982 is dismissed with costs to the plaintiff-respondent Smt. Prabhawati Devi. Sri. Rahat Ullah shall bear his own costs of this appeal. Let a copy of this Judgment be placed on the record of Civil Appeal No. 11 of 1982.'

The question which requires consideration here is whether the decree passed in Civil Appeal No. 4 of 1982 conclusively determines the rights of the parties so as

to attract the provisions of Section 11, C.P.C. and preclude the plaintiff from showing that on the facts of the case, Rahat Ullah is not entitled to claim benefit of Section 4 of the Partition Act.

4. It may be pointed out that in the written statement, the defendants denied the plaintiff's case that she had any share in the property in dispute or that the plaintiff was entitled to redeem the share of defendant second set over House No. 88 on payment of due money or that she was entitled to claim relief for recovery of Rs. 682 as rent and damages. The issues framed in the suit have been quoted in the judgment and order dated 1.5.1986 of the 1st Additional District Judge and it shows that no issue regarding giving of benefit of Section 4 of Partition Act was framed. In fact, during trial of the suit, neither any plea was raised nor any Issue was framed nor any finding was recorded regarding applicability of Section 4 of the Partition Act. Certified copy of the decree of Civil Appeal No. 4 of 1982 has been filed on 10.4.1998 along with a supplementary affidavit by the respondents and this shows that no ground regarding applicability of Section 4 of the Partition Act had been taken in the grounds of appeal. It appears that during the course of hearing of appeal before the lower appellate court, an argument was raised on this point and it was in these circumstances that the learned Additional District Judge framed Point No.5 about the applicability of Section 4 of Partition Act. While examining a plea based on Section 4 of Partition Act, the basic question to be considered is whether it is a 'dwelling house'. The expression 'dwelling house belonging to an undivided family' has been borrowed from Section 44 of T. P. Act and it refers to the family dwelling house and does not mean any house for human dwelling belonging to an undivided family. A house which is in occupation of tenants or which has been mortgaged with possession to third party does not come within the ambit of the Section. In order to attract the provisions of the Act, it is necessary that the house either be actually in use of the family or that the conditions are such that it is still possible for the family members to return to the occupation of the house at some future date. In *Narshimaha Murti v. Susheelabai*, AIR 1996 SC 1826, while considering the provisions of Section 23 of Hindu Succession Act, it was held that a house tenanted brings in strangers and it ceases to be a dwelling house inhabited by members of the family. The case set up by the plaintiff as well as the judgment of Additional District Judge dated

1.5.1986, shows that the House No. 88 had been mortgaged. In fact, this question has been considered in the judgment under Point No. 4 and it was observed that the plaintiff could redeem the mortgage and recover possession of the property. The basic question as to whether the house in dispute was a 'dwelling house' has not at all been considered either by the trial court or by lower appellate court at the stage of passing of preliminary decree nor there is any finding on this point. As no finding had been recorded by any Court on this point, it is always open to the plaintiff to show at the subsequent stage when such a plea was raised at the stage of preparation of final decree that the property in dispute was not a 'dwelling house' so as to attract the provisions of Section 4 of the Partition Act and the bar of res judicata cannot be pleaded against her.

5. The judgment and decree dated 1.5.1986 passed in Civil Appeal No. 4 of 1982 cannot be interpreted to mean that a final adjudication had been made that Rahat Ullah was entitled to the benefit of Section 4 of the Partition Act. The following words in the operative portion of the order makes the position quite clear :

'Sri Rahat Ullah may be given the benefit of Section 4 of Partition Act by the trial court on his application as such, which may be moved by him.'

What the learned Additional District Judge meant was that Rahat Ullah may raise a plea based on Section 4 of Partition Act by moving an application at the time of preparation of final decree. On the facts of the case and the findings recorded by trial court and also in the aforesaid Judgment, it could not be held that any final adjudication had been made that Rahat Ullah was entitled to the benefit of Section 4 of the Partition Act. In fact, such an adjudication could not be made until the question whether the house in dispute was a 'dwelling house' or not had been examined after considering the evidence on record. There being no consideration of this basic question, the observation made by learned Additional District Judge can only mean that Rahat Ullah was given a right to raise a plea based on Section 4 of the Partition Act and not that any final adjudication to the effect that he was entitled to the benefit of the said section, had been made.

6. I am, therefore, of the opinion that the courts below erred in not examining the question on merits on the basis of the evidence but holding that the plea of the

plaintiff that Section 4 of the Partition Act was not applicable could not be entertained as being barred by principles of res judicata.

7. In the result, the writ petition succeeds and is hereby allowed. The order dated 20.11.1987 of the Civil Judge (Annexure-2) and order dated 1.2.1991 of the IInd Additional District Judge (Annexure-3) to the writ petition are quashed. The learned Civil Judge is directed to reconsider the application moved by Rahat Ullah claiming benefit of Section 4 of Partition Act on merits after considering the evidence adduced by the parties. No order as to costs.

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