

Probhat Kumar Dutt Vs. Rammohan Dutt and ors.

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Court : Kolkata

Decided On : May-01-1957

Reported in : AIR1958Cal177

Judge : Mallick, J.

Acts : [Partition Act, 1893](#) - Section 2; ;Hindu Law; ;[Transfer of Property Act, 1882](#) - Section 5

Appeal No. : Suit No. 3255 of 1955

Appellant : Probhat Kumar Dutt

Respondent : Rammohan Dutt and ors.

Advocate for Def. : S. Chatterjee and ;N.R. Bonnerjee, Adv. and ;S.K. Dutt in person

Advocate for Pet/Ap. : P.P. Ghose, Adv.

Judgement :

Mallick, J.

1. This is a suit for partition. The properties sought to be partitioned are two valuable immovable properties and some movables. Of the two immovable properties, premises No. 78/1 Nimtala Ghat Street is the family dwelling house for

the last 100 years. It is a four storeyed building on land measuring about 5 cottahs. The other immovable properties is premises No. 15, Pageyapatti Street, Calcutta, which is let out to tenants, yielding a very substantial rent. It is also a four storeyed building on land measuring about 3 cottas. There are 23 co-sharers having small fractional interests in the properties. Some of the co-sharers who are well off have acquired houses of their own and have left the family dwelling house. The remaining others are some how living in the family dwelling house. Plaintiff is comparatively well off and has his own separate house, but is living in the family dwelling house,

2. The shares of the parties in the two immovable properties are different. The reason of this difference is that some of the co-sharers have purchased the share of other co-sharers in premises No. 15, Pageyapatti Street. Shares of the parties have been stated in paragraphs 8 and 9 of the plaint and these are admitted shares.

3. Plaintiff has claimed that the defendant No. 1 is liable to render account of some Joint family funds realised by him. Defendant No. 1 by his counsel offered to pay Rs. 300/- to the plaintiff in full settlement without admitting his liability to account. This offer has been accepted by the plaintiff and the claim for accounts has been given up by the plaintiff. None of the other parties claim any account against one another.

4. Plaintiff has tendered evidence to prove the existence of some movable. The list of such movables has been tendered in evidence. All parties appearing, accept the position that beyond the movables set out in the list, there is no other movable jointly belonging to the parties. There is no further necessity of enquiring as to whether there are any other movables jointly belonging to the parties.

5. All the parties appearing agree that the premises No. 15, Pageyapatti Street cannot be conveniently partitioned and should be sold and the sale proceeds distributed amongst the parties according to their respective shares.

6. The only dispute in this case is whether the family dwelling house being premises No. 78/1, Nimtala Ghat Street should be directed to be sold or not. Mr. P.

P. Ghosh, learned counsel for the plaintiff, submitted that having regard to the number of shares and the size of the dwelling house, it is clear that the dwelling house cannot be conveniently partitioned in metes and bounds, and there is no other alternative than ordering a sale of the house to the highest bidder amongst the parties; the parties, either singly or some of them jointly, may be allowed to bid. According to Mr. Ghosh, this will do equities to the parties and in his submission the only way to do equity between the parties. It is conceded that in the instant case the Court has no Jurisdiction to direct a sale under the Partition Act, inasmuch as there is no request by the share-holders interested individually or collectively to the extent of one moiety in the properties to direct a sale. But it is urged that the Court has jurisdiction, apart from and independently of the provisions of the Partition Act, to order a sale amongst the parties and to direct that the property should be allotted to the party offering the highest bid. In support of this argument, Mr. Ghosh cited two recent authorities of this Court. In the case of Pannalal Dutt v. Hrishikesh Dutt, reported in 86 Cal LJ 144 (A), S. B. Sinha, J. laid down the above proposition, in the case of Narendra Nath Das v. Jnanendra Nath Das, reported in 90 Cal LJ 146 (B), Bachawat, J. laid down the same proposition and cited, with approval, amongst others, the above decision of S. B. Sinha, J. In the case of Nityagopal v. Prankrishna, reported in : AIR1952 Cal893 , Division Bench of this Court consisting of G. N. Das and Guha Ray JJ. held the contrary view. In a well considered judgment in the above case and after reviewing all the authorities including the decision of S. B. Sinha, J. noticed above and other decisions relied on by S. B. Sinha, J. in the above case, G. N. Das J., who delivered judgment in that case, expressed his opinion that apart from the Partition Act the Court has no power to direct a sale of a property in a partition suit. The Partition Act confers on the Court in a suit for partition a power of sale in certain specific cases, No general power of sale can be spelt out from' the provisions of the Partition Act, Section 37(2) of the Bengal, Agra and Assam Civil Courts Act, 1887, was not intended to get round the express terms of the Partition Act. The provisions of Section 396 of the Code of Civil Procedure, 1882 or the provisions contained in Order 26 of the present Code of Civil Procedure gave no such power of sale to the Court. No inference can be drawn of the existence of this power of sale from the general words of Order 20, Rule 18 of the present Code of Civil

Procedure. The case in which the above judgment was delivered by the Division Bench was a case of partition of a tank with some adjoining land. The trial Court recorded a finding that the property cannot be conveniently partitioned and directed a sale amongst the co-sharers. In appeal the lower appellate Court confirmed the decision and finding of the trial Court. This order of the trial Court, confirmed in appeal, was set aside by the Division Bench and while directing a partition of the land, the High Court directed the watery portion, that is, the tank, to be kept joint.

7. The other authorities cited by learned counsel may now be noticed. In the case of *Raj Coomari Dassi v. Gopal Chandra Bose*, reported in ILR 3 Cal 514 (D), a Division Bench of this Court expressed an opinion that the Court would be disinclined to order the property (a puja dalan) to be divided without giving the co-sharers who wish to keep it entire an opportunity of doing so. This case throws no light on the right of the Court to direct a sale of a property which cannot be conveniently partitioned.

8. In the case of *Basanta Kumar v. Motilal*, reported in 15 Cal WN 555 (Note) (E), a Division Bench of this Court consisting of Rampini and Sharafuddin JJ., held that:

'It is a well-known principle of equity which must be adopted in all partition cases that when it is convenient to divide a property, that property must be left in the possession of person in occupation and the other persons who can-not get actual possession compensated.'

The above decision in *Basanta Kumar's* case (E), was distinguished by Sir Ashutosh Mukherjee in the case of *Debendra Nath v. Haridas* reported in 15 Cal WN 552 (F). in *Basanta Kumar's* Case (E); the stranger purchaser was directed to be compensated and the family dwelling house was directed to be allotted to the members of the family and the case was Under Section 4 of the Partition Act. Sir Ashutosh Mukherjee seemed not to agree with the view that the principle of equity to be applied in all cases is that the person in possession should be allotted the portion of the joint property of which he is in occupation, while the other party may be compensated. In the particular circumstances of the case Sir Ashutosh

Mukherjee held that such an order would be inequitable and the proper order would be to direct a sale amongst the co-sharers to the highest bidder. In the case of *Ashanulla v. Kalikinkar*, reported in ILR 10 Cal 675 (G), a Division Bench of this Court consisting of McDonnell and Field JJ., held that when partition cannot be made without destroying the intrinsic value of the property, then a money compensation should be given. The subject-matter in the case of *Mohit v. Pranab*, reported in : AIR1930 Cal616 , heard and disposed of by S. K. Ghosh J. was a tank, which, according to the finding of the learned Judge, could not be conveniently partitioned amongst the cosharers in metes and bounds. There was no request for sale within the meaning of Section 2 of the Partition Act. It was held that the Court had no Jurisdiction to direct a sale under the Partition Act. Nevertheless, his Lordship directed a sale of the tank amongst the parties and the tank was directed to be delivered to the highest bidder.

9. It is to be noted that none of the authorities cited has held that apart from the provisions of the Partition Act the Court has power to direct a sale to outsider, but it is assumed that apart from the Partition Act, the Court has inherent power to order a sale amongst the parties to the highest bidder. In effect such an order for sale amongst the parties would amount to the allotment of the property to one of the cosharers, while the remaining cosharers were paid compensation. In other words, the Court proceeded on the basis that in the peculiar circumstances of the case in which the property cannot be conveniently partitioned, the only equitable way in which partition is to be effected is to allot the property to one of the parties and compensation to the rest. In *Basanta Kumar's case* (E) noted above, Rampini, J., seemed to think that when the property cannot be conveniently partitioned, the party in possession should be allotted the property, while the other cosharers should get compensation. Sir Ashutosh Mukherjee in *Debendra v. Haridas* (F), noticed above, expressed the opinion that the allotment to the cosharer in possession would not be equitable in all cases, but in his judgment it would be more equitable to allot the property to that cosharer who gives the highest bid. In that case the Court assumed Jurisdiction to order sale amongst the cosharers on the basis that it is the only way in which the partition of the property could be effected, where no such partition is otherwise possible in metes and bounds. In the case of *Nityagopal v. Prankrishna* (C), noticed before the question whether the

Court has any power to direct a sale, apart from the Partition Act, was specifically raised and G. N. Das J., who delivered the judgment, after a careful and sifting consideration of law and authorities, came to the clear conclusion that the Court has no jurisdiction, apart from the Partition Act, to direct a sale. With the reasoning of My Lord Justice G. N. Das I most respectfully agree. I hold in agreement with G. N. Das J., that the power of the Court to direct a sale in a suit for partition must be held to be limited to the cases provided for in the Partition Act.

The form in which the question was raised in Nityagopal's case (C), was never considered by Sir Ashutosh Mukherjee and other Judges in the cases noticed before, and I am apt to think that had the question been canvassed before Sir Ashutosh Mukherjee in the same form as it was canvassed before. G. N. Das J., Sir Ashutosh Mukherjee, S. B. Sinha, J., and Bachawat, J., would have come to the same conclusion as was arrived at by G. N. Das J.

10. It is no doubt true that no order for a sale can be made even if the property cannot be conveniently partitioned amongst the parties in metes and bounds, but cannot in such a case the property be allotted to one or more of the parties and the other parties to whom no allotment can be made in the circumstances be given monetary compensation? It seems to me that this Court in the various cases cited above was inclined to think that this can be done. The method that appealed to Rampini J., is to allot it to the co-sharer in possession, giving compensation to others. The method which appealed to Sir Ashutosh Mukherjee is to allot to the highest bidder amongst the co-sharers and compensation to the rest, thereby ensuring the highest compensation to those to whom no allotment could be made. I am apt to think that though the word 'sale' has been used by Sir Ashutosh Mukherjee, S. K. Ghosh, J., S. B. Sinha, J. and Bachawat J., they really meant allotment of the property to one of the parties and the procedure of sale was only to ensure the payment of highest compensation to those to whom the property could not be allotted. It seems to me that the word 'sale' has been considered not really as a sale in the sense of transfer to outsider who had no interest in the property but really an allotment to one of the co-sharers the whole Interest who had already a fractional interest in the property. This aspect of the question was not considered by G. N. Das, J., in the case above referred to and he gave his

decision on the footing that 'sale' means not only transfer of property right from the co-sharers to a third party but by one co-sharer to another. In the case of partition, however, when a property is allotted to one co-sharer exclusively, though it involves a transfer of interests or shares of the other co-sharers to the co-sharer to whom the property is allotted, such allotment is never considered to be a sale by one co-sharer to another. Be that as it may, without expressing my final opinion as to whether the Court has the power to direct a sale of a property that cannot be conveniently partitioned in metes and bounds or not, I propose to consider whether in the particular circumstances of this case, assuming I have got the power to direct a sale I should direct a sale of this property to the highest bidder amongst the parties. In deciding this question, I have to consider whether it would be just and equitable in the circumstances of this case to direct that the property should be allotted to the party giving the highest bid or should be allotted to those parties who are actually residing in the house and/or want to retain its joint character and compensate the rest who neither reside in the house nor want to retain interest in the Joint family house. I do not think that Sir Ashutosh Mukherjee In the case of *Debendra v. Haridas (F)*, laid down a rule universally applicable that there should be an order for sale in every case to do equity amongst the parties. In appropriate cases, in my judgment, the Court is entitled to dismiss those parties who do not want to keep the properties joint with compensation and allow others to retain the properties joint.

11. In this case, what are the facts? It is admitted before me that the house is the dwelling house of the family for more than a hundred years. Naturally, some of the co-sharers who are well off and could afford have gone out and set up their separate residences. The others who are still residing there are not comparatively well off and they have a sentimental attachment to the old family dwelling house. With the existing scarcity of accommodation, it would involve great hardship if the property is allotted to a rich co-sharer who gives the highest bid thereby compelling a large number of the less fortunate co-sharers to seek accommodation elsewhere. The plaintiff and the few others who are comparatively well off and who are asking for an order for sale have homes of their own. It would, therefore, do greatest good to the greatest number if the parties who are actually living in the house are allowed to live there in the same way as they have been

doing now and to pay compensation to those who want a sale. The compensation to be paid must be on the basis of a fair valuation to be effected by the Court. It would be highly inequitable if the comparatively poorer parties are made to pay exorbitant compensation to prevent the well off co-sharers to grab the property and oust them. Fair compensation a co-sharer is entitled to get in equity and not exorbitant compensation at the expense of the less fortunate co-sharers. (The rest of the judgment is not material for this report).

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