

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.920 of 1997

IN

First Appeal No. 304 of 80

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1 (i) Ganesh Mishra

- (ii) (A) Pramod Kumar Mishra
(B) Shushil Kumar Mishra
(C) Sunil Kumar Mishra

- (iii) Manan Kumar Mishra
(iv) Arun Kumar Mishra

All son of late Sheo Chandra Mishra, R/O behind P.O.-Gopalganj,
District- Gopalganj.

2. Pushpa Devi, W/O Late Ramesh Prasad, village- Hajiapur, P.S. & District -
Gopalganj

.... Appellant/s

Versus

1. Mostt.Utima Kuer, widow of late Ranglal Sah
2. Prem Kumar, son of late Ranglal sah

Both resident of village- Hajiapur P.S. and District- Gopalganj presentg
opposite to Court campus.

3. Smt. Kamla Devi, W/O Hari Madhav Goel
4. Smt. Bimla Devi, W/O Raj Kumar

Both daughter of late Rang Lal Sah

Appellants.... Respondent/s

5. Rama Choudhary son of Khelawan Chaudhary

Resident of village- Dhama P.S. and District- Gopalganj.

6. Mukti Singfh, son of Kamla singh,

Resident of village- Sohahula P.S. and District- Gopalganj.

7. Bandhu dusadh, son of Gita Duesah

Resident of village- Hajiapur, P.S. and District- Gopalganj

(Second Party) Respondents.

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Appearance :

For the Appellant/s : Mr.Shashi Shekhar Dwivedi, Sr. Advocate
Mr. Prabhakar Dwivedi, Advocate
Mr. Radha Mohan Pathak

For the Respondent/s : Mr. Mritunjay Pd. Singh

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CORAM: HONOURABLE MR. JUSTICE V.N. SINHA

and

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE V.N. SINHA)

Date: 06-05-2015

Heard learned counsel for the appellants i.e. purchasers

from the plaintiff, also heard counsel for the defendants and respondent No. 6, father of purchaser from plaintiff.

2. Appellants by filing this Letters Patent Appeal, have challenged judgement dated 26.06.1997 passed by the learned Single Judge of this Court in F.A. No. 304/80 whereunder, learned Single Judge refused to interfere with the impugned Judgement and preliminary decree dated 25.03.1980 passed by the 3rd Additional Subordinate Judge, Gopalganj in Partition Suit No. 91 of 1976 granting half share each to the plaintiffs and the defendants in the suit property with further observation that the purchasers from the parties shall get share in the entitlement of their vendors.

3. By filing this Appeal, purchasers from the plaintiff have questioned these observations, made by the learned Trial Judge in the impugned judgement, which is quoted herein below:-

“As regards Gopalganj house purchasers’ from either party were not entitled to get possession in the house portion, if the parties were willing to pay the price to the purchasers as shown in their sale deeds.”

4. It is submitted on behalf of the appellants that occasion to apply Section 4 of the Partition Act had not arisen and the aforesaid observation was made by the learned Trial Judge and affirmed by the learned Single Judge is wholly uncalled for as none of the purchasers had filed any suit, as is required of them in terms of Section 44 of the Transfer of Property Act, 1982.

5. In this connection, learned counsel for the appellants has placed reliance on the judgement of the Supreme Court in the case of **Gautam Paul Vs. Debi Rani Paul and others (2000) 8 SCC 330**, paragraphs 20 and 23, which is also quoted herein below for ready reference:

“20. We have heard the parties and considered the rival submissions. In this Appeal the main questions which arise for consideration are:-

(a) Whether the Appellant could be said to be a member of the family within the meaning of Section 4 of the Partition Act?

(b) Whether in the absence of the transferee suing for partition a shareholder can invoke Section 4 and buy over such share?

For a consideration of these questions it would be appropriate to set out, at this stage, Section 4 of the Partition Act. Section 4 reads as follows:

"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.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the court shall follow the procedure prescribed by subsection (2) of the last foregoing section."

A mere perusal of this Section shows that for its

applicability the conditions as set out in Ghantesher Ghosh case (Supra) have to be fulfilled.”

“23. We are in agreement with this opinion.

There is no law which provides that co-sharer must only sell his/her share to another co-share. Thus strangers/outsideers can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of pre-emption, under Section 4, is exercised the conditions laid down therein have to be complied with. As seen above one of the conditions is that the outsider must sue for partition. Section 4 does not provide the co-sharer a right to pre-empt where the stranger/outsideer does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider anytime he/she wants. Thus even though a liberal Interpretation may be given, interpretation cannot be one which gives a right which the Legislatures clearly did not intend to confer. The Legislature was aware that in a Suit for Partition the stranger/outsideer, who has purchased a share, would have to be made a party. The Legislature was aware that in a Suit for Partition the parties are inter-changeable. The Legislature was aware that a Partition Suit would result in a decree for Partition and in most cases a division by metes and bounds. The

Legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share. Yet the Legislature did not provide that the right for pre-emption could be exercised " In any Suit for Partition". The Legislature only provided for such right when the "transferee sues for partition". The intention of the Legislature is clear. There had to be initiation of proceedings or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger/purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition. The interpretation given by the Calcutta, Patna, Nagpur and Orissa High Courts would result in nullifying the express provisions of Section 4, which only gives a right when the transferee sues for partition. If that interpretation were to be accepted than in all cases, where there has been a sale of share to an outsider, a co-sharer could simply file a suit for partition and then claim a right to purchase over that share. Thus even though the outsider may have, at no stage, asked for partition and for the delivery of the share to him, he would be forced to sell his share. It would give to a co-sharer a right to pre-empt and purchase whenever he/she so desired by the simple expedient of filing a suit for Partition. This was not the intent or purpose of Section 4. Thus the view taken by Calcutta, Patna, Nagpur and Orissa High Courts, In the aforementioned cases, cannot be said to be good law."

6. Learned counsel for the appellants placed further reliance on the judgement of the Supreme Court in the case of **Srilekha Ghosh (Roy) & another Vs. Partha Sarathi Ghosh (2002) 6 SCC 359 , paragraph-7**, which is quoted herein below for ready reference:-

“The condition for application of the statutory provision is that a dwelling house belonging to an undivided family must have been transferred to a person *who is not a member of such family and such transferee sues for partition*. If this pre-condition is satisfied then if any member of the family being a shareholder undertakes to buy the share of such transferee the Court is to make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder.”

7. Learned counsel for the defendant-respondents submitted that L.P.A. No. 905/1997 filed by the defendant against the impugned Judgment was dismissed under Order No. 2 dated 03.09.1997, as such, the present Appeal also arising out of the same Judgment, should meet the same fate.

8. Learned counsel further submitted that even otherwise stage for raising claim under Section 4 of the Partition Act having not arrived there was no occasion for the co-sharer to raise such claim and the observations though made by the learned Trial Judge and affirmed by the learned Single Judge can not be acted upon as till date the occasion to raise such claim by the co-sharer concerned has not arisen and the co-sharer may apply in terms of Section 4 of the

Partition Act as and when the occasion may arise.

9. Learned counsel for respondent No. 6 has submitted that he has no concern with either Gopalganj House or Hajiapur house, which is perhaps, the subject matter of this appeal as his son had purchased property from the plaintiff (s) in village- Saraiya.

10. Having heard counsel for the parties and appreciated the submissions noticed above it is evident that purchasers from the plaintiffs or the defendants having not filed suit as is required of them under Section 44 of the Transfer of Properties Act, there was no occasion for the Trial Court to make observation in paragraph-38, which is quoted above in light of the provisions of Section 4 of Partition Act, which is deleted and the impugned judgement of the learned Single Judge is modified to that extent.

11. With the aforesaid deletion/modification in the impugned judgment, the appeal is dismissed.

(V.N. Sinha, J)

(Nilu Agrawal, J)

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