

02.05.2022
S/L No.19
KS

S.A.T. 241 of 2019
With
I.A. No. CAN 1 of 2019 (Old No.CAN 7439 of 2019)

Sri Sasti Charan Dutta & Ors.
-Vs.-
Sri Babulal Chatik & Ors.

Mr. Partha Pratim Roy
Mrs. Sohini Chakraborty
.....For the Appellants

The second appeal has come up for admission. The appellants are aggrieved by the judgment and agree dated May 27, 2019 passed by the Learned Additional District Judge, 3rd Court, Alipore in Title Appeal No.17 of 2017 (CIS Title Appeal No.70 of 2016) partly setting aside the decree dated 27th October, 2006 passed by the Learned Civil Judge (Senior Division), 7th Court at Alipore in Title Suit No.82 of 2000. In the title appeal the prayer of the appellants for preemption was rejected.

Mr. Partha Pratim Roy, learned advocate for the appellants submits that it is well-settled that when a partition suit is filed by co-sharer against the other co-

sharers the right to apply for preemption arise when the other co-sharers are claiming separate allotment of their share.

The appellants have filed an application under Section 4 of the Partition Act claiming preemption. Section 4 of the Partition Act clearly postulates that a co-sharer shall have a right to claim preemption when there is a partition suit filed by the transferee of share in respect of a dwelling house. The essential requirements are that the suit property should be the dwelling house of the co-sharers and one of the stranger purchaser seeks partition. These two ingredients need to be established before the Court could exercise his power and jurisdiction under Section 4 of the Partition Act. In the instant case, the appellants have failed to establish that the suit property is a dwelling house, in fact, the suit property is consisting of a pond belonged to the father of the plaintiff, Bholanath Dutta to the extent of his share and after his demise his share devolved upon the plaintiff no.1, and 3 and defendant nos.5 to 8 to the extent of 1/14th share each. The defendant nos.1 to 4 by virtue of transfer from Basudev Dutta and Manorama Dutta acquired half share in

the suit property the defendant nos.5 to 8 owned 4/14th share. The Learned Trial Judge has rejected the submission made on behalf of the appellants with regard to the applicability of Section 4 of the Partition Act on the ground that the suit was filed by the co-sharer/ plaintiffs and not by the stranger purchaser.

We have gone through the pleadings and the evidence, there is no evidence on record to show that the suit property was the dwelling house of the parties.

Mr. Roy, learned advocate for the appellants has relied upon Single Bench decision of *S.A. 17 of 1998 (Moloy Kumar Ghosh & Ors. Vs. Samarendra Kumar Ghosh)* reported at 2012 (3) ICC 668; 2012 (3) CLT 477 where after considering the several decisions of the Hon'ble Supreme Court on preemption under Section 4 of the Partition Act the following principles have been stated:-

“(1) In a suit for stranger purchaser for partition, a co-sharer of the undivided family dwelling house can apply for pre-emption under Section 4 of the Partition Act at any stage of the suit.

(2) But when a suit for partition is filed by a co-sharer against the other co-sharers and the stranger purchaser, the right to apply for pre-emption would only arise when the stranger purchaser seeks separate allotment of his share.

(3) So long no such step is taken, the co-sharer's petition filed under Section 4 of the Act, cannot be entertained.

(4) In Gautam Paul's case (supra), the Supreme Court has made it clear that in the meantime the right of the co-sharer shall be protected by the second part of Section 44 of the Transfer of Property Act and the stranger purchaser shall be resisted by injunction to take possession or even if he has taken possession, he can be evicted in an appropriate proceedings under the law."

One of the principles emerged is that when a suit for partition is filed by co-sharer against the other co-sharers and the stranger purchaser has the right to apply for preemption would only arise when the stranger purchaser seeks separate allotment of his shares. In the instant case, in the absence of the property being held to be a dwelling house and there has been no claim made by the stranger purchaser seeking separate allotment of his share, these condition not being fulfilled we do not find any reason to admit the second appeal on any substantial question of law. The second appeal fails.

Thus, the appeal and the connected application are dismissed.

There should be no order as to costs.

(Sugato Majumdar, J.)

(Soumen Sen, J.)