

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Soumen Sen

&

The Hon'ble Justice Ajoy Kumar Mukherjee

SAT 401 of 2019

CAN 1 of 2019 (old CAN 12603 of 2019)

Prabir Pandit

Versus

Jagabandhu Dey

(Through Video Conference)

Order dated : 07th March, 2022

Ajoy Kumar Mukherjee,J.(oral):

1. The report filed by the department shows that the appellant has received administrative notice. However, none appears on behalf of the appellant.

2. Feeling aggrieved with the judgment and decree dated 22nd August , 2019, passed by the learned First Appellate Court Paschim Medinipur in T.A. 57 /2018 modifying judgment and decree passed by learned Trial Court on 08.05.2018 in T.S. 20/2011,the defendant /Appellant wants for admission of the second Appeal.

3. Plaintiffs case in a nutshell is that suit plot No. 152 covering 11 decimal is the subject matter of the suit. Out of 11 decimal,6 decimal was purchased by the father of plaintiff namely Gostha Behari Dey and 5 decimal purchased by the plaintiff Jagabandhu Dey and his brother Balaram Dey by registered deed dated 23rd April, 1979 from one

Pulin Behari Maity .Plaintiff Jagabandhu constructed two storied house covering 5 decimal of land and father of the plaintiff i.e. Gostha Behari Dey also constructed two storied house in the aforesaid purchased portion and both building stands side by side. Plaintiff has been residing along with his family members in the building constructed by him and father also lives in the house built by him along with other members of his family. In the Record of Rights 03 decimal of suit property recorded in the name of plaintiff. Brother of the plaintiff Balaram Dey has suddenly sold out a portion of the building, built by plaintiff to the defendant by a registered sale deed but the defendant did not get possession of his purchased portion in the suit house. The defendant threatening to depose plaintiff from the suit property by dint of aforesaid purchase, though he is a stranger purchaser and he is not entitled to get possession of the same without partition, in view of provisions laid down in section 44 of Transfer of Property Act. Accordingly plaintiff prayed for declaration of his joint title in the suit property along with injunction restraining defendant from taking possession in the suit house.

4. Defendant contested the suit by filing written statement and denied all material allegations and defendant's specific case is that after purchase Balaram Dey and Jagabandhu Dey (plaintiff)

constructed *paka* building on their respective portion of the plot by an amicable arrangement. Balaram Dey declared to sale a portion of his house which is the extended portion of house i.e. '*challa*' and defendant who is a hawker by profession has purchased the same by a registered sale deed dated 17th February, 2011. Defendant's specific case is that the property in question was never undivided dwelling house of Jagabandhu and Balaram and as such plaintiff is not entitled to get protection under the provisions of section 44 of the Transfer of Property Act nor he is entitled to pre-empt under the provision of Hindu Succession Act. The defendant is a *bona fide* purchaser for valuable consideration. He accordingly prayed for dismissal of the suit.

5. Learned Trial Court framed as many as ten issues .Plaintiff in this case deposed as PW1 and he has also brought three other witnesses and original registered deed for the year 1979 is marked as exhibit 1 and record of rights and Dakhila receipt are marked as exhibit 2 and 3 . Certified copy of registered sale deed for the year 2011 is marked as exhibit 5. On the contrary defendant himself deposed as DW1 and he has also brought two other witnesses. He has also proved original deed for the year 2011 which is marked as exhibit E, *Khajna Dakhila* and record of rights in respect of his khatian No. 311/1 are marked exhibit.

6. Learned Trial Court after appreciation of both oral and documentary evidence came to the finding that from the documents filed by both the sides, it is clear that suit property is undivided and it was purchased by plaintiff and his brother Balaram Dey. It is also not disputed that defendant is a stranger purchaser in respect of the suit property. Learned Trial Court has also cited various relevant judgments and after discussing the same, came to the conclusion that whenever a stranger purchaser purchases the property which forms an undivided dwelling house then the only remedy for such purchaser is to file a suit for partition. Accordingly learned trial Court decreed the suit but refused to grant other prayers including payer for injunction.

7. Being aggrieved by said judgment dated 22.08.2019, plaintiff preferred appeal which came up for hearing before the learned Additional District Judge, First Appellate Court, Paschim Medinipur, Learned First Appellate Court also opined that admittedly Appellant and his brother Balaram Dey purchased 5 decimal of land by dint of exhibit 1 and it is also admitted that Appellant is in possession of the building standing on the suit property. Learned Trial Court acknowledging joint title of the Appellant decreed the suit in part in favour of plaintiff but curiously learned Trial Court refused to grant injunction. In this context learned First Appellate Court also came to the same finding that one

stranger purchaser cannot claim possession in the joint holding and his only remedy is suit for partition and to ask for allotment of his share in the property and in this context he further observed that the principles laid down in ***AIR 1992 Calcutta 44, 1990 (2) SCC 117, 2017 SCC online Calcutta 11516 and AIR 1952 Calcutta 253*** are squarely applicable to the facts and circumstances of this case. Accordingly learned First Appellate Court held that he has no hesitation to held that appellant being co-sharer in the suit property has every right to get order of injunction against respondents. Accordingly learned First Appellate Court modified the judgment and decree passed by the appellate court by declaring the plaintiff being co-sharer in the suit property having joint title with other co-sharers and defendants are restrained by order of permanent injunction from taking possession in the suit property.

8. Admittedly in the present case plaintiff is a co-sharer and defendant is a stranger purchaser. Section 44 of the Transfer of Property Act has been insulated for maintaining domestic peace of members of undivided family, occupying a common dwelling house, from the encroachment of a stranger transferee of the share of one undivided co-owner. Entry of such outsider in the joint family member dwelling house is likely to create unnecessary disturbance not german to the peace

tranquility. As the present suit property is an undivided family dwelling house, part of which has been transferred to the defendant, so section 44 of the Act attracts. The only manner in which an outsider can get possession of the property, purchased by him is by filing of suit for separation of his share along with prayer for delivery of possession. It is true that there is no bar for co-sharer to transfer his share in property belonging to undivided family but section 44 of the Transfer of Property Act has two limbs. Under the first limb the purchaser acquires the right to joint possession of the property along with the other co-sharer but the second limb prescribes “where the transferee of a share of a dwelling house belong to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him (transferee) to joint possession or other common or part-enjoyment of the house” .In view of above learned First Appellate Courts modification that, in addition to declaring plaintiff being a co-sharer in the suit property having joint title with other co-sharers but also to restrain the defendant by an order of permanent injunction from taking possession of the suit property, does not call for any interference .No substantial question of law involves in the present case. Therefore, prayer for admission of second appeal stands dismissed.

9. S.A.T. 401 of 2019 is dismissed. Consequently

CAN 1 of 2019 (old CAN 12603 of 2019) also stands dismissed.

There will be no order as to costs .

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

Let the copy of the order be send to the Learned Civil Judge (Junior Division), 3rd Court, Paschim Medinipur.

I agree

(Soumen Sen, J.)

(Ajoy Kumar Mukherjee, J.)