

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 67 of 2023
FAT 549 of 2019
Parbati Jana
versus
Anupama Sahoo & Others
With
FA 68 of 2023
FAT 603 of 2017
Parbati Jana
versus
Anupama Sahoo & Others

For the Appellant : *Mr. Mukteswar Maity,*
Mr. Prabir Rej,
Mr. Pranab Kumar Das.

For the Respondent No.1 : *Mr. Kapil Ch. Sahoo.*

For the Respondent
Nos.2(a) – 2(f) : *Mr. Shyamal Chakraborty,*
Ms. Manju Jaiswal,
Mr. Debajyoti Mondal.

Hearing is concluded on : *27th April, 2023.*

Judgment On : **8th May, 2023.**

Tapabrata Chakraborty, J.

1. The appeal being FA 67 of 2023 has been preferred by one Parbati Jana (in short, Parbati) challenging the order dated 31st March, 2015 passed by the learned Civil Judge (Senior Division) 1st Court, Contai, District–Purba Medinipur in Misc. Judicial Case No.31 of 2011 in connection with a partition being Title Suit No. 178 of 2009. By the order impugned in the appeal, the learned Court below was pleased to allow the application for pre-emption filed under Section 4 of the Partition Act, 1893 (in short, the Partition Act) by the defendant no.2, namely, Jayanta Kumar Panda (since deceased) (in short, Jayanta) directing him to submit the present market valuation of the case property assessed by the ADSR Contai-I and to pay the said amount in Court within 60 days from the date of the order.

2. The other appeal being FA 68 of 2023 has been preferred by Parbati challenging the order dated 11th September, 2017 passed by the learned Civil Judge (Senior Division) 1st Court, Contai, District – Purba Medinipur in Misc. Judicial Case No.31 of 2011 by which the time to deposit the market valuation of the case property was extended till 10th November, 2017.

3. Shorn of unnecessary details, the facts are that one Taranath Panda (in short, Taranath) was the original owner of the subject plot no.704. On 24th February, 1989, he transferred a specific demarcated portion of 13 decimals of the said plot in favour of one Smt. Anupama Sahoo (in short, Anupama). After the death of Taranath, the remaining 10 decimals of land

in plot no.704 devolved upon his only son, namely, Jayanta and five daughters, namely, Kalyani Panda, Kajal Sau, Gita Maity, Chaina Panda and Jagadamba Panda, in equal share. Four daughters of Taranath thereafter transferred their share in plot no.704 to Jayanta on 7th November, 2006 whereas Kalyani Panda transferred 2 decimals of land in plot no.704 to Parbati on 16th May, 2007 and her name was duly incorporated in the record of rights. Parbati, thereafter, filed a suit for partition being Title Suit no.178 of 2009 against Anupama Sahoo and Jayanta *inter alia* praying for partition and demarcation of her portion in the subject plot being plot no.704, adjacent to plot no.703 of which she was the absolute owner. The defendant no.1 in the said suit, namely, Anupama also filed a counter-claim praying for declaration to be the absolute owner in respect of 'X' schedule property purchased from Taranath. Upon contest, the suit was decreed in preliminary form against the defendants in part declaring that Parbati had 1/6th share and Jayanta had 5/6th share in 10 decimals of land comprised in schedule 'Ka' excluding the property in 'X' schedule of the counter-claim. By the said judgment and decree, the counter claim of Anupama was also decreed on contest against Parbati and Jayanta declaring that Anupama is the absolute owner in possession of the land measuring 13 decimals in schedule 'X'. After the partition suit was decreed in preliminary form on 31st May, 2011, Jayanta filed the application under Section 4 of the Partition Act. As both the appeals arise out of the same Misc. Judicial Case No.31 of 2011, with the consent of the parties and dispensing with all formalities, the same have been heard analogously.

4. Mr. Maity, learned advocate appearing for the appellant in both the appeals argues that the plot of land being no.704 is a vacant land and 1/6th share in the said plot was sold by Kalyani Panda to her by a deed no.1936 of 2007. She had been possessing the same by making a path and planting trees. The said portion is adjacent to her house situated at plot no.703. In the plot no.704 there is no undivided family dwelling house and Jayanta had no right to claim pre-emption applying the provisions of Section 4 of the Partition Act.

5. According to her, the 1/6th share in plot no.704 is a demarcated portion and Parbati is in possession of the same and the said portion is being used as a path way to her dwelling house at plot no.703. It is well-settled that so long as the stranger purchaser does not seek actual division and separate possession either in the suit or in execution proceedings, it cannot be said that he/she had sued for partition. Such proposition is applicable to the facts of the case since from the prayers in Title Suit no.178 of 2009, it would be explicit that Parbati had only sought for demarcation of her portion as she was possessing the same and any prayer for recovery would have been otiose. In support of such contention reliance has been placed upon the judgment delivered in the case of *Gautam Paul -vs- Debi Rani Paul and Ors.*, reported in 2001(1) RCR(Civil) 60.

6. He contends that Parbati purchased the demarcated portion in plot no.704 from Kalyani Panda, who was the married daughter of Taranath. Kalyani, was not residing along with the family members of Jayanta and she could not have transferred any portion of the dwelling house to Parbati. The

provisions of Section 23 of the Hindu Succession Act, 1956, *inter alia* provides that the right of any female heir to claim partition of a dwelling house shall not arise until the male heirs choose to divide their respective shares therein and that the female heir, if unmarried would only be entitled to a right of residence. In view thereof, the portion of land in plot no.704 sold to Parbati by Kalyani cannot be construed to be a part of the dwelling house. In support of such contention reliance has been placed upon the judgment delivered in the case of *Narashimaha Murthy -vs- Susheelabai and Ors.*, reported in 1996(3) SCC 644.

7. According to Mr. Maity, the defendants in the partition suit had led no evidence to establish that the vacant passage was being utilised for enjoyment of the dwelling house on the subject plot and as such the application under Section 4 of the Partition Act was not maintainable. In support of such contention reliance has been placed upon the judgment delivered in the case of *Sankar Ghosh and Ors. -vs- Rakshit Kumar Ghosh and Ors.*, reported in MANU/WB/0128/2002.

8. He argues that Section 8 of the West Bengal Land Reforms Act, 1955 (in short, WBLR Act) came into force with effect from 7th August, 1969 whereas Parbati purchased the plot on 16th May, 2007 and after mutation, separate khatian was opened in the name of Parbati as per provisions of the WBLR Act and as such the defendants could not have pursued their claim on the rudiments of Section 4 of the Partition Act. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Amal Kumar Ballav and Ors. -vs- Juran Krishna Mazumdar,*

reported in 2016(5) CHN(Cal) 566, *Dilip Kumar Dhara and Ors. –vs- Ranjit Kumar Mondal*, reported in AIR 2019 Cal 67, *Ardhendu Bhusan Halder (Dead) by L. Rs. –vs- Gangamoni Mondal*, reported in 1991(1) SCC 270 and *Sanjay Halder –vs- Budhan Rajak*, reported in 2016(2) CHN(Cal) 489.

9. He contends that the learned Court by the order dated 11th September, 2017 erred in law in extending the time to deposit the market value of the land which Jayanta failed to deposit within the period specified in the order dated 31st March, 2015. The impugned order being a non-speaking one is not sustainable in law.

10. *Per contra*, Mr. Chakraborty, learned advocate appearing for the defendant nos. 2(a) to 2(f), who are the heirs of Jayanta submits that Parbati preferred a suit for partition and the said suit was decreed in preliminary form declaring 1/6th share of the subject plot in favour of Parbati, who is a stranger to the family of Taranath and as such, she cannot claim possession in the dwelling house belonging to an undivided family. The ingredients of Section 4 of the Partition Act stand satisfied and as such Jayanta had every right to claim pre-emption and such prayer has been accordingly allowed and there is no infirmity in the impugned orders warranting interference in the present appeals.

11. According to Mr. Chakraborty, the argument of Mr. Maity is self-contradictory. On one hand Mr. Maity contends that Parbati has purchased a definite demarcated portion of plot no.704 and on the other hand Parbati claimed partition of the subject plot by filing the partition suit.

12. Mr. Chakraborty further submits that Parbati had purchased the portion of plot no.704 for an amount of Rs.20,000/- whereas the said portion had been assessed to be of Rs.3 lakhs and the said amount has already been deposited in Court.

13. Heard the learned advocates appearing for the respective parties and considered the materials on record.

14. It is well-settled that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of differences in the decision making process. The judgment is precedent for the issue on law that is raised and decided and not observations made in the facts of any particular case. The contents of the plaint need to be read as a whole and not in isolation. A particular clause cannot be taken up and highlighted. From the averments and the prayers in the plaint it is explicit that Parbati demanded actual division, separation and possession upon ascertaining her claim to a share in the property and as such the judgment delivered in the case of *Gautam Paul (supra)* has no manner of application. The judgments delivered in the cases of *Amal Kumar Ballav (supra)*, *Dilip Kumar Dhara (supra)* and *Ardhendu Bhusan Haldar (Dead) by L. Rs. (supra)* pertaining to Section 8 of the WBLR Act have no manner of application. The judgment delivered in the case of *Narashimaha Murthy (Supra)* interpreting the provisions of Section 23 of the Hindu Succession Act, 1956 is not applicable since Section 23 of Hindu Succession Act has been omitted by the Hindu Succession (Amendment) Act, 2005.

15. The order dated 31st March, 2015 impugned in FA 67 of 2023 has been rightly passed allowing Jayanta's application under Section 4 of the Partition Act since such claim satisfies the ingredients of Section 4 of the Partition Act. Parbati herself in course of cross examination admitted that Jayanta has a dwelling house in the schedule property.

16. The expression '*dwelling house*' is not merely the structure or building where the members of the family reside but it includes the land on which the structure or the building stands including all the appurtenant, courtyard, orchard, garage and other structures which are used by the members of the family as part of their residential house. The alleged demarcated portion of plot no.704 which the appellant claims is a part and parcel of the dwelling house and being a stranger purchaser she has no right whatsoever to resist the defendants' claim for pre-emption.

17. Parbati is not a member of Taranath's family. The issue that the portion of land transferred to her is a portion of the schedule property is evinced from the fact that she herself being the transferee had sued for partition. On a purported plea that the portion of land claimed is a common passage pertaining to the building on the adjacent plot which belongs to Parbati, she cannot claim any right over the dwelling house in plot no.704.

18. Records reveal that Jayanta filed an authenticated market value assessment slip and by an order dated 26th March, 2015, the Court directed the parties to comply with the decree but unfortunately thereafter Jayanta expired on 11th September, 2015 and his heirs filed a substitution application and in consideration of such facts the Court by the order dated

11th September, 2017 allowed the said application and directed the substituted legal heirs of Jayanta to deposit the assessed amount within 10th November, 2017. The Court in the order dated 11th September, 2017 detailed the reasons for exercising such discretion in favour of Jayanta's heirs and in our opinion the order impugned in the appeal being FA 68 of 2023 does not suffer from any infirmity warranting interference in appeal.

19. For the reasons discussed above, the appeals are dismissed and the judgment dated 31st March, 2015 and the order dated 11th September, 2017 are affirmed. Parties shall bear their own costs.

20. The learned Court below shall dispose of the Misc. Judicial Case No.31 of 2011, as expeditiously as possible, in accordance with law.

21. Let a copy of this judgment along with LCR be sent down to the learned Court below forthwith.

22. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)