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BABULAL

v.

HABIBNOOR KHAN (DEAD) BY LRS. AND ORS.

APRIL 26, 2000

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[S.B. MAJMUDAR AND U.C. BANERJEE, JJ.]

Partition Act, 1893 :

C *S. 4—Member of an undivided family—Share in family property, a dwelling house—One portion of house sold to a stranger—Suit for partition by the member—Stranger neither filing suit for partition nor was he made a party in partition suit filed by one of the members—Said member filing application u/s. 4 for purchasing the share transferred to stranger—Held, application not maintainable—Before s. 4 can be pressed in service by any of the co-owners of the dwelling house, it has to be shown that occasion had arisen for him to move u/s. 4 because of the stranger transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased—The condition is totally lacking in present case as purchaser was neither plaintiff nor defendant in the suit—In a partition suit defendants are as good as plaintiffs and court has to ascertain their respective shares in the joint property and subsequently has to separate them by metes and bounds.*

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Ghantesher Ghosh v. Madan Mohan Ghosh and Others, [1996] 11 SCC 446, relied on.

F *Alekh Mantri v. Jagabandhu Mantri & Ors., AIR (1971) Orissa 127, held, inapplicable.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1549 of 1980.

G *From the Judgment and Order dated 3.5.80 of the Madhya Pradesh High Court in C.R. No. 147 of 1977.*

S.K. Gambhir, Anil K. Sharma, (Awanish Sinha) for T.Y. Singh for the Appellant.

The following Order of the Court was delivered :

H *The short question posed for our consideration in this appeal on grant*

of special leave under Article 136 of the Constitution of India is as to whether application moved under Section 4 of the Partition Act, 1893 (for short 'the Act') by respondent No. 1, who was the decree-holder in the partition suit, was maintainable in law.

A few facts leading to this appeal are required to be noted at the outset to appreciate this controversy between the parties.

Respondent No. 1 had brought a suit for partition and separate possession of his 1/4th share in a dwelling house situated at Indore in the State of Madhya Pradesh. The said dwelling house consisted of two portions belonging to an undivided family. One portion out of the two portions of the house had been sold to non-applicant No. 3 before the High Court Babu Lal who was a stranger to the family and the rest portion of it had been bought in a court auction in execution of a mortgage decree by one Kundanbai, whose legal representative is the present appellant Babu Lal. The suit filed by respondent No. 1 was dismissed by the Trial Court, but, in appeal a preliminary decree was passed for partition and separate possession of plaintiff-respondent No. 1's share in the suit property. Pursuant to the said preliminary decree a Commissioner was appointed to effect partition by metes and bounds and to apportion mesne profits among the claimants. One Afzalnoor Khan, the younger brother of respondent No. 1, who was one of the defendants, did not raise any objection, with the result that a final decree in terms of the preliminary decree came to be passed on 5th September, 1967. On 5th May, 1968 respondent No. 1-original plaintiff initiated execution proceedings for effecting the partition by metes and bounds on spot. Certain objections were raised by the appellant. They were overruled and it was found by the Trial Judge on 7th November, 1973 that a supplementary final decree was yet required to be passed. In the meantime, the Commissioner submitted his report along with the site plans recommending the partition of the dwelling house.

It is pertinent to note that respondent No. 1 raised no objections to the said report of the Commissioner or the plans submitted by him. It was at the stage when the Court was about to close the proceedings by passing appropriate final orders that respondent No. 1 on 18th June, 1976 moved an application under Section 4 of the Act undertaking to buy the share of the appellant stranger transferee of the interest of other defendant Afzalnoor Khan. The said application was contested by the appellant by submitting

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A that it was not maintainable. The learned Trial Judge accepted the said objection by dismissing the application as not maintainable. The Trial Court took the view that the application under Section 4 of the Act was not maintainable as the appellant-transferee had not sued for partition. In a revision application moved under Section 115, Code of Civil Procedure,

B a learned Single Judge of the High Court took a contrary view and held that the application was maintainable as the object of the enactment was to enable member of a family to buy out a stranger transferee from one of the members. The Court further observed that as regards the transferee having not sued for partition, it was not necessary that the transferee as such should have filed a suit. For coming to that conclusion the learned Judge

C of the High Court relied on a decision of the Orissa High Court in the case of *Alekha Mantri v. Jagabandhu Mantri & Ors.*, AIR (1971) Orissa 127. Accordingly the application was held to be maintainable and the order of the Trial Court was set aside with a direction that the record may be sent to the Trial Judge for making a valuation of the transferee's share in such manner as he may think fit and proceed to deal with the matter as laid down in Section 4 of the Act.

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It is this decision of the High Court which has been challenged in the present appeal on grant of special leave, as noted earlier.

E Learned senior counsel for the appellant vehemently contended that on the express language of Section 4 of the Act, the application moved by the decree-holder respondent No. 1 was not maintainable. Section 4 of the Act reads as under :

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“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 by 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 of such shareholder, and may give all necessary and proper directions in that behalf.

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(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 sub-section (2) of the last, foregoing section.”

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It was submitted by Shri Gambhir, learned senior counsel for the appellant that one of the requirements of the Section is that such an application under Section 4 can be moved by one of the co-sharers of a dwelling-house provided a stranger/outsider/purchaser being one of the co-sharers moved for partition. That in the present case it has not so happened. The appellant had never moved for separating his share by metes and bounds even at the stage of execution of the final decree. He submitted the as the property has already stood partitioned from 1974 onwards and the Commissioner's report was not objected to by respondent No. 1, his application was not maintainable even on that ground.

The aforesaid contention of Shri Gambhir is well sustained in view of a decisions of this Court in the case of *Ghantesher Ghosh v. Madan Mohan Ghosh and Others*, [1996] 11 SCC 446. In the said case this Court has taken the view, speaking through one of us (S.B. Majmudar, J.) that before Section 4 can apply five conditions have to be satisfied as under :

- (1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;
- (2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;
- (3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned;
- (4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and
- (5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transfer share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided

A family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house."

B In para 5 of the Report it was observed that the real controversy between the parties is whether the appellant who was a stranger transferee of 1/3rd undivided interest of Smt. Radha Rani in the suit property can be said to have sued for partition so as to satisfy the remaining condition of the said provision even though the other conditions were found to be satisfied.

C Therefore, one of the basic conditions for applicability of Section 4 as laid down by the aforesaid decision and also as expressly mentioned in the Section is that the stranger/transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned.

D It is, of course, true that in the said decision it was observed that even though the stranger transferee of such undivided interest moves execution application for separating his share by metes and bounds it would be treated to be an application for suing for partition and it is not necessary that a separate suit should be filed by such stranger transferee. All the same,

E however, before Section 4 of the Act can be pressed in service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move under Section 4 of the Act because of the stranger transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased. This condition is totally lacking in the present case. To recapitulate, respondent No. 1-decree

F holder himself, after getting final decree, had moved an application under Section 4 of the Act. Appellant, who was a stranger purchaser, had not filed any application for separating his share from the dwelling house, either at the stage of preliminary decree or final decree or even thereafter in execution proceedings.

G Only on this short ground, therefore, the application under Section 4 of the Partition Act has to be treated as not maintainable as held by the Trial Court. The decision of the Orissa High Court in *Alekh Mantri's* case (supra) relied upon by the learned Single Judge also cannot be of any avail in view of the settled legal position discernible from the aforesaid decision of this

Court in the case of *Ghantesher Ghosh* (supra).

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It has also to be noted that in *Alekh Mantri's* case (supra) the alienee of undivided share of a co-owner in a joint family house was already defendant No. 1 in the suit filed by the plaintiff for partition and separate possession of his undivided share. The question before the Orissa High Court was whether alienee from the co-owner who was already defendant No. 1 could be subject to proceedings under Section 4 of the Partition Act by the plaintiff. The Court had to examine the question whether the person who had brought the suit for partition was himself not the stranger purchaser but one who was a member of the family and when he is seeking to purchase the share of the vendee from the co-owner alienating his share in favour of a stranger purchaser and when such a vendee was himself a party to the suit as defendant No. 1 could make such a vendee defendant answerable under Section 4 of the Act or not. In the background of this fact situation, the Court observed in para 13 of the report that Section 4 of the Partition Act would also be applicable where the suit for partition was brought by a member of the undivided family against the stranger transferee, and that it is not necessary that the latter should have filed the suit. He being a defendant could have specifically claimed a share in the residential house. Now, it must be noted that in a partition suit even defendants are as good as plaintiffs and the Court has to ascertain their respective shares in the joint property and subsequently has to separate them by metes and bounds. This decision obviously cannot apply to the facts of the present case where the alienating stranger purchaser of undivided interest of a co-owner in the suit house was neither plaintiff nor defendant in the suit. The Trial Court in the present case has clearly noted that the transferee Kundanbai or Babu Lal were not parties to the suit. Consequently, it could not be said that the transferee stranger purchaser of co-owner interest in the joint property was suing for partition either as a plaintiff or even as a defendant in the suit for partition. If the ratio of the aforesaid decision is held to take the view that a stranger purchaser who does not move for partition of joint property against the remaining co-owners either as a plaintiff or even as a defendant in the partition suit claiming to be as good as the plaintiff nor even as a successor of the decree holder seeks execution of partition decree, can still be subjected to Section 4 of the Petition Act proceedings, then the said view would directly conflict with the decision of this Court in *Ghantesher Ghosh's* case (supra) and to that extent it must be treated to be overruled.

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A The Civil Appeal is, therefore, allowed. The impugned judgment and order of the High Court are set aside and the judgment of the Trial Court is restored. With the result, the application moved by respondent No. 1-decree holder under Section 4 of the Act will stand dismissed. In the facts and circumstances of this case there will be no order as to costs.

B R.P. Appeal allowed.