

## **Ramzan Baksh And Anr. vs Nizamuddin And Ors. on 30 March, 1955**

**Equivalent citations: AIR1956ALL687, AIR 1956 ALLAHABAD 687, 1956 ALL. L. J. 508**

**Author: Raghubar Dayal**

**Bench: Raghubar Dayal**

### **JUDGMENT**

Mootham, C.J.

1. This is an appeal from a judgment and decree of the Additional Civil Judge, Bijnor, dismissing an appeal from the judgment and decree of the Munsif of Bijnor in a suit for partition.

2. The dispute between the parties relates to certain property which belonged to one Tafazzul Hussain. After Tafazzul Husain's death one of his heirs sold his undivided share in the property to the first appellant. Sometime thereafter the respondents, who are the remaining heirs, instituted the suit out of which this appeal arises for partition of the entire property. They claimed that they were entitled under Section 4 of the Partition Act, 1893, to include in the property the subject of the suit the share of the first appellant upon payment to him of the value of his share.

The appellant raised several defences. He contended, first, that after the death of Tafazzul Husain the heirs partitioned the latter's property and that he had acquired the share which had been allotted to his vendor in this partition; alternatively he denied that Section 4 of the Partition Act had any application as the property in which he had acquired a share was not a dwelling house, and because he had not himself sued for partition.

3. The lower appellate Court has found as a fact that there was no previous partition, and that finding has not been challenged before us.

4. The lower appellate Court has not dealt with the question whether the property in which the first appellant acquired an undivided share was a dwelling house in a satisfactory manner. All that it says on this point is "The property in suit falls within the definition of dwelling houses for the purpose of Section 4, Partition Act. It was a chopal and in the sale deed in favour of defendant No. 1 Ex. 5 it has been described as Haveli.

It belonged to a family undivided qua the Dwelling house and the plaintiffs are admittedly members of that family".

The reference by the learned Judge to the description of the property in the sale deed is not accurate. We have examined the deed in quesand the property is described therein as "One haveli, with its main door facing north, in dilapidated condition, at present lying as waste land . . . ."

5. We find it difficult to understand how a piece of waste land can be dwelling house, and there appears to be no evidence from which can be inferred that the description of the property in the sale d'eed was erroneous. The point appears not to have received due consideration in either of the lower Courts, and rather strangely no specific mention of it is made in the grounds of appeal. In the circumstances we are reluctant to decide the appeal on this ground; we think it fails (sick) also on the question of law.

6. Section 4(1) of the Partition Act reads as follows:

"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 share-holder 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 a share-holder and may give all necessary and proper directions in that behalf."

The plaintiffs in the partition suit are the re-maining members of the undivided family. The transferee has been made a defendant to that suit; he has not applied to be treated as a plaintiff for the purpose of partition. In similar circumstances in *Rukmi Sewak v. Mt. Munesari*, 1953 All LJ 13: (AIR 1953 All 332) (A) *Mushtaq Ahmad, J.* held that there was no sound basis for making a distinction between a case in which the transferee is the plaintiff and one in which he or she is a defendant and that where the transferee was a defendant he was to be treated as a plaintiff for the purpose of the suit. The correctness of that decision is challenged in this appeal.

7. Sub-section (1) of Section 4 of the Partition Act provides that the provisions of that section shall apply if and when the transferee sues for partition, and the object of the section is clearly to prevent the intrusion of strangers into the dwelling house of an undivided family.

This situation cannot arise when the family ceases to be undivided and prima facie Section 4 will have no application when the suit for partition is brought by a member of the family. This is the view of the Bombay High Court in *Balshet Gopalshet v. Miransaheb*, 23 Bom 77 (B) and *Khanderao Datta-traya v. Balkrishna Mahadev*, 46 Bom 341: (AIR 1922 Bom 121) (C) and of the Madras High Court in *Butchi Ramayya v. G. Venkata Subbarao*, AIR 1950 Mad 214 (D).

8. It is however a well known principle that a party to a partition suit, whether plaintiff or defendant, is for many purposes at the same time a plaintiff as well as a defendant, and the Calcutta High Court has held that if the defendant transferee claims a share in the dwelling house and to be

treated as suing for partition he could properly be treated as plaintiff for the purposes of Section 4 : see *Satyabhama v. Jatindra Mohan*, AIR 1929 Cal 269 (E), a view which has been followed by the Nagpur High Court in *Laxman v. Mt. Lahana Bai*, AIR 1937 Nag 4 (F). The Patna High Court, and the Calcutta High Court in a latter case, appear however to have taken a wider view and to have held that provisions of the section apply even in a case where the suit for partition is brought by the co-sharers and the transferee is merely in the position of a defendant : *Sheodhar Prasad v. Ki-shun Prosad*, AIR 1941 Pat 4 (G), *Abu Isa Thakur v. Dinabhandhu Banik*, AIR 1947 Cal 426 (H).

9. The circumstances in the last mentioned case were however very unusual. Certain property comprising a home-stead, tank and garden at one time belonged to two brothers. The sole heir of the one brother sold her share in the property to the defendants who constructed certain huts on the land and cut down some of the trees. The sole heir of the other brother thereupon instituted a suit against the defendants for a declaration that he was entitled to purchase the share of the defendants or, in the alternative, for partition.

The lower appellate Court had confirmed the decree of the trial Court declaring that the plaintiff was entitled to purchase the defendants' share on payment of Rs. 1000/- and that in the event of that amount not being deposited the plaintiff's right to purchase will stand rejected but the prayer for partition would be allowed.

Section 4 of the Partition Act appears to have been relied on by the defendants as a defence to the claim of the plaintiffs for partition, and the decision of the High Court may be based on the view that the claim of the plaintiffs should not be defeated by giving a narrow construction to Section 4. The learned Judge, after pointing out that the object of the section is to prevent the intrusion of strangers into the dwelling house of an undivided family, says-

"This object would be frustrated if a stranger purchaser forces himself into the dwelling house of an undivided family and drives the other co-owner to the a suit as plaintiff and then figuring as a defendant is allowed to defeat the claim for pre-emption under Section 4 of the Act on a narrow and literal, interpretation of the section. In a suit for partition, the parties to the suit are in the position of counter claimants and it can very well be "predicated of a defendant in a suit for partition that he is suing for partition."

The facts of that case are however clearly distinguishable from those now before us, and it is unnecessary for us to venture upon an opinion as to whether the view of the learned Judge should be followed. That is a question which will require consideration when a case in which the facts are similar arises.

10. In the present case the defendant transferee has neither entered into possession of the dwelling house nor has he sought to claim a share therein. He is not, nor can he in our opinion be deemed to be, a transferee who sues for partition within the meaning of the section. We are unable to accede to the view that Section 4 should be construed as though the phrase 'a member of such family' and the expression "such transferee" are interchangeable and in our opinion *Rukmi Sewak v. Mst. Munesari*,

(A) was wrongly decided and must be overruled.

It may well be that if a defendant transferee applies for his share in the partition proceedings.

he may properly be deemed to be a transferee who sues for partition but that again is a matter which is not before us in this appeal. In our opinion Section 4 has no application in the circumstances of the present case and this appeal must be allowed. We accordingly set aside the decrees and judgments of the lower Courts with costs and dismiss the suit.