

Jharkhand High Court

Arun Raisurana vs Jamshedpur Property Developers ... on 31 October, 2023

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
C.M.P. No. 222 of 2021

Arun Raisurana Petitioner/Defendant Versus

1. Jamshedpur Property Developers Private Limited

2. Reeta Kuhad

3. Tata Steel Limited Opp. Parties

Coram: HON'BLE MR. JUSTICE PRADEEP KUMAR SRIVASTAVA

For the Petitioner : Mr. Rahul Lamba, Advocate : Mr. Naveen Kumar, Advocate : Mr. Aditya Mohan Khandelwal, Advocate For the Res. No. 1 : Mr. Arvind Kr. Sinha, Advocate For the Res. No. 3 : Mr. R. K. Gupta, Advocate

C.A.V. on 19.09.2023 Pronounced on 31/10/2023

1. Instant petition under Article 227 of the Constitution of India has been filed by the petitioner for quashing the order dated 05.10.2020 passed by Civil Judge (Senior Division) Jamshedpur in Original Title (P) Suit No. 7 of 2015 (Annexure - 4) whereby and whereunder, the learned Civil Judge has rejected the application of petitioner filed under Section 4 of the Partition Act, 1893 read with Section 44 of the Transfer of Property Act, 1882 on the ground that the said application was pre-mature as no preliminary decree was passed till then in the said partition suit.

2. Heard learned counsel for both the parties.

3. Learned counsel for the petitioner has submitted that petitioner has its strong feeling and emotions attached to the suit property which is a dwelling house and a joint Hindu family ancestral property. The grandfather of the petitioner Mr. S. C. Raisurana along with Mr. K. C. Raisurana, who was the brother of petitioner's grandfather, had taken lease of the suit property in the year 1932 from respondent no. 4 Tata Steel Limited. The petitioner was born in the year 1953 in the said

dwelling house and has grown up and living with his family in the suit property and has many sweet memories with the suit property. It is further submitted that opposite party no. 1/plaintiff has allegedly acquired the shares of the various members of the joint family in the suit property and has filed a suit for partition of the suit property, which is registered as Original Title (P) Suit No. 7 of 2015 which is pending before the court of Civil Judge (Senior Division - I) Jamshedpur. The opposite party no. 1/plaintiff has no emotional attachment with the property under suit rather he is completely stranger to the joint family of the petitioner. It is further submitted that the petitioner, exercising his pre-emptory right to purchase the share of the opposite party no. 1 in the suit property, filed an application under Section 4 of the Partition Act, 1893. Learned counsel for the petitioner has placed reliance upon the judgment of Shub Karn Bubna @ Shub Karan Prasad Bubna vs. Sita Saran Bubna and Others reported in (2009) 9 SCC 689 and Ghantewar Ghosh vs. Madan Mohan Ghosh & Others (1996) 11 SCC 446.

4. Per contra, learned counsel for O.P. no. 1/plaintiff has strenuously argued that admittedly the plaintiff has purchased the share of six co-sharers out of seven i.e. 6/7 share of the premises in question vide two registered sale deed dated 05.12.2006 and 05.07.2008 and came into actual physical possession of 6/7 undivided share of the suit premises. The petitioner/defendant no. 1 in his written statement has challenged the suit on various grounds inter alia the maintainability of the suit and the plaintiff witnesses were also examined in the title suit. Admittedly, no preliminary decree has been passed in the suit meanwhile the petitioner /defendant no. 1 has filed an application under Section 4 of the Partition Act, 1893 read with Section 44 of the Transfer of the Property Act, 1882 praying therein for a direction to the plaintiff for sale of the entire shares of the plaintiff company in suit schedule premises. It is to be pointed out here that since the date of purchase, the plaintiff is coming into possession and running the company office without any hindrance or objection by the defendants. Thus, after purchase of the suit premises and its use and occupation by the plaintiff, the nature of the premises in question has not remained as residential premises but the commercial premises too. It is further submitted that the learned court below has rightly relied upon the judgment of Hon'ble Delhi High Court passed in Indu Singh vs. Prem Choudhary 2018 (3) PCR (civil) 241. Learned counsel for the O.P. placing reliance upon the judgment rendered in Hussan Abbas Syad vs. Usamn Abbas Syad (2007) 2 SCC 355 and submitted that it has been held by the Hon'ble Apex Court that the order of sale is to be passed after drawing up of a final decree or before passing the final decree. As such, the application filed by the petitioner-defendant was rightly decided by the learned court below declaring it to be pre- mature, which does not suffer from any illegality/infirmary calling for any interference by invoking the jurisdiction of High Court under Article 227 of the Constitution of India.

5. The only point for consideration in this case is that whether the application under Section 4 of the Partition Act, 1893 read with Section 44 Transfer of the Property Act, 1882 filed by the petitioner before the learned trial court has been rightly rejected on the ground that it was pre-matured?

6. In order to come to the conclusion of the moot question, it would be proper to discuss the relevant provisions of the statute which are quoted below.

The Partition Act, 1893

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 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 shareholder, and may give all necessary and proper directions in that behalf.

(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."

The Transfer of Property Act, 1882 "44. Transfer by one co-owner.--Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's 1. The Illustrations omitted by Act 20 of 1929, s.

11. 2. Subs. by s. 12, *ibid.*, for "of the latter property or to compel its enjoyment in a particular manner". 3. Ins. by s. 13, *ibid.* 18 right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

7. The Hon'ble Apex Court in *Ghantewar Ghosh vs. Madan Mohan Ghosh & Others* (*supra*) considering the Objects and Reasons for enacting Partition Act 1893 and parent provision engrafted in Section 44 of Transfer of Property Act, 1882 has observed that, it is obvious that by the time the partition came to be enacted, the legislature has in view the parent provision engrafted under Section 44 of the Transfer of Property Act, 1882 to the effect that the stranger to the family, who becomes to transferee of an undivided share of one of the co-owner in a dwelling house belonging to undivided family could not claim a right of joint possession or common or part enjoyment of the house with other co-owner of the dwelling house. Implicit in the provisions and the legislative intent that such stranger should be kept away from the commons dwelling house occupied by other co-shares. It was enacted with the avowed object of ensuring peaceful enjoyment of the common dwelling house by the reaming co-owners being members of the same family sharing a common heart and a home. It is in the light of the aforesaid pre-existing statutory background encompassing the subject that we have to see that part Section 4 of the Partition Act, 1893 proposed to do.

8. It was further observed that "an analysis of Section 4 of the Partition Act, 1893 makes it clear that there is no express provision indicating the stage at which such application can be moved against the stranger transferee of the share of an erstwhile co-owner of dwelling house of undivided family. Consequently, on the language of Section 4 it cannot be urged that it cannot be pressed into service after the final decree for partition is passed and before such final decree is fully executed whereby the court becomes *functus officio*. It is trite to observe that in the present case out of the aforesaid

condition for applicability of Section 4, save and except the condition regarding the stranger transferee suing for partition which is subject matter of fierce controversy between the parties, all the remaining conditions are satisfied. In other words, it is well established on the record of the case that the suit house was a dwelling house belonging to the undivided family of three erstwhile brothers and which later on came to belong to two undivided brothers along with the widow of their deceased brother and thus the suit house was a dwelling house belonging the undivided family."

9. I have also considered the citation relied upon by the learned counsel for the respondents in Indu Singh Vs Prem Choudhary (supra) wherein following issues were involved and answered:-

(i) When an order for sale of the property/properties is passed in partition suit, whether such an order of sale is a final decree of partition or is just another preliminary decree passing of the earlier preliminary decree declaring the shares of the parties in the property/properties of the partition suit.

(ii) On the answer to the aforesaid issue being given, a further consequential issue will have be examined that if the order of sale is a final decree, then in such a case whether this final decree will be an "Instrument of Partition" as define in section 2(15) of the Indian Stamp Act, 1899 and which "Instrument of Partition" is required to be stamped as per Article 45 of Schedule 1 of the Stamp Act.

10. In the instant case no such issues are involved rather the case is based upon exercise of right of pre-emption by the petitioner as provided under Section 4 of the Partition Act, 1893. Hence, the judgement relied upon by the respondent no. 1 is not applicable in the present subject matter of this case.

11. Considering the overall aspects of the case as discussed above, and also the guiding principles of law propounded by Hon'ble Apex Court in the case of Ghantewar Ghosh vs. Madan Mohan Ghosh & Others (supra), I am of the firm view that all the ingredients of Section 4 of the partition Act, 1893 and parent provision earlier enunciated in Section 44 of the Transfer of Property Act, 1882 are squarely fulfilled in this case and may be considered at any stage of the proceedings. The restriction imposed on the stranger transferee in a share of one or more of the co- owners in a dwelling house by Section 44 Transfer of Property Act, 1882 is tried to be further extended by Section 4 of the Partition Act, 1893 with a view that such transferee washing his hands off from such a family dwelling house and gets satisfied with the proper valuation of his share, which will be paid to him by pre-empting co- share or co-shares, as the case may be.

12. Thus, I do not find any substantive reasons in the contentions of learned counsel for the respondents that the suit premises are no longer dwelling house of the petitioner/defendant rather it has come to be a commercial premises of the plaintiffs. Admittedly, the suit premises is old dwelling house, which belonged to seven co-sharers, who were members of undivided family and at present sole co-share is petitioner/defendant. The plaintiff has purchased 6/7th share in the said dwelling house and instituted a suit for partition. Therefore, petitioner has got valid right under section 4 of the partition Act, 1893 read with Section 44 of the Transfer of the Property Act, 1882 to exercise his right of pre- emption at any stage of the suit.

13. In the background of aforesaid discussions and reasons, I find that the impugned order is not sustainable and fit to be set aside.

14. Accordingly, impugned order dated 05.10.2020 passed by Civil Judge (Senior Division) Jamshedpur in Original Title (P) Suit No. 7 of 2015 is set aside and this petition is allowed. The learned court below is directed to rehear the application of the petitioner under Section 4 of the Partition Act, 1893 read with Section 44 of the Transfer of the Property Act, 1882 and pass afresh order in accordance with law and in the light of above observations.

I.A. No. 4607/2023 stands disposed of accordingly.

(Pradeep Kumar Srivastava, J.) Umesh/AFR