

(1937) 09 PAT CK 0013

Patna High Court

Case No: None

Babulal Tiwari

APPELLANT

Vs

Hulla Mallah and
Others

RESPONDENT

Date of Decision: Sept. 23, 1937

Acts Referred:

- Partition Act, 1893 - Section 4

Citation: 172 Ind. Cas. 835

Hon'ble Judges: Manohar Lall, J

Bench: Single Bench

Judgement

Manohar Lall, J.

This is an appeal by the plaintiff who sued for partition of a half share in a house bearing No. 794 and a third share in plot bearing No. 802, having based his title on purchase from defendant No. 3 who had snares to this extent in these two plots. The suit was decreed by the trial Court. The lower Appellate Court, however, proceeded to act u/s 4, Partition Act, (Act IV of 1893), and has directed the appointment of a Commissioner who will:

fix a valuation of the house and if defendants Nos. 1 and 2 pay the proportionate value of it for half-share in the house the plaintiff shall convey his share to the defendants.

2. Hence this appeal before me. It is contended on behalf of the appellant that the order of the learned Judge was wrong because defendants Nos. 1 and 2 were not members of an undivided family with defendant No. 3, the vendor of the plaintiffs. Reliance is also sought to be placed upon the undoubted fact that in the Survey Record of Rights in the year 1920, the shares of the vendor of the plaintiffs have been defined. On a clear reading of the section, it seems to me that this provision in the Act was intended to apply to all subjects of His Majesty including Hindus,

Muhammadans and Christians and therefore the meaning of the term "undivided family" means a family which is undivided with respect to the house. Otherwise the law would be different for each community. I am supported in this view by the Full-Bench decision of the Allahabad High Court in *Sultan Begam v. Debi Prasad* 30 A 324 : 1908 AWN 126 : 5 ALJ 352 where it has been laid down authoritatively at p. 327:

It seems to me that the object of the section...is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of the transferor's family have a right to live, and that the words "undivided family" must be taken to mean "undivided qua the dwelling house in question and to be a family which owns the house but has not divided it.

3. The same view was taken by the Calcutta High Court in *Khironde Chandra v. Baroda Prasad Mitra* 7 Ind. Cas. 436 : 7 Ind. Cas. 436 : 12 CLJ 525 where the head-note appears to correctly represent the judgment, and it runs as follows:

The words "undivided family" in the section must be taken to mean undivided qua the dwelling house in question, and to be a family which owns the house but has not divided it....

The elements which must co-exist to attract the operation of Section 4 are first that the dwelling house should belong to an undivided family; secondly, that a share, therefore, should have been transferred to a person who is not a member of such family; and thirdly, the transferee should sue for partition.

4. All the three elements pointed out in the Calcutta case are present in the case before me. To the same effect is a recent decision of the Madras High Court in [\(Manna\) Vazhmuni Mudali Vs. Nathumuni Mudali and Others](#), where the learned Judges relied upon the decision in *Sultan Begam v. Debi Prasad* 30 A 324 : 1908 AWN 126 : 5 ALJ 352 and came to the same conclusion.. It was then argued that the Appellate Court had no power to act u/s 4 when no such application had been made by the plaintiffs in the trial Court. It is enough to say in answer to this contention that, as pointed out in the decision in [Pran Krishna Bhaduri Vs. Keshab Chandra Roy and Others](#),

The word "Court" in Section 4 is not confined to the trial Court but includes the Appellate Court, and the Appellate Court like the trial Court is bound upon any member of the family who is a shareholder undertaking to buy the share of the transferee, to make an appropriate order in pursuance of which the steps necessary to carry out the provisions" of the section may be taken either in the one Court or in the other.

5. The learned Judges in that case also decide that:

In connection with a conveyance of % partition of a "dwelling-house" the word generally means, not only the house itself but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment.

6. I, therefore, find that there is no merit in any of the contentions raised before me. But I find that the order of the learned District Judge is defective in that it has not directed the valuation of the land and the appurtenances, if any, nor has it fixed any period of time during which defendants Nos. 1 and 2 should pay the money which would be fixed by the Commissioner: nor has he directed that the expenses of the Commissioner must be borne by the plaintiff: nor has he fixed the time within which the kabala should be executed by the plaintiffs in favour of defendants Nos. 1 and 2. I, therefore, direct that the learned District Judge, when the case goes back to him after this order, do appoint a Commissioner at the cost of the plaintiff; and he will direct the Commissioner to fix the valuation of the house and the land on which the house stands together with appurtenances thereto, if any. As the question was never raised in the trial Court, the parties will be at liberty to give evidence before the Commissioner upon this point, and thereafter they will be entitled to raise objections before the learned Judge whose decision will be final on this matter. After the learned Judge has finally disposed of the question of valuation, he will fix a period of time in his discretion during which the plaintiff will be required to convey the share which he has purchased to defendants Nos. 1 and 2 on their depositing the amount fixed, in proportion to the share of the plaintiff, in Court to the credit of the plaintiff. After this deposit has been made by defendants Nos. 1 and 2, plaintiff will be required to execute a kabala in favour of defendants Nos. 1 and 2 within the time fixed by the Court; and if it is not done within the time so fixed, then the kabala will be executed under the orders of the Court. If, however, the amount fixed is not deposited, the plaintiff's suit will be decreed as a simple partition suit to be carried out in the usual way in respect of this house as in respect of the land which bears No. 802. There will be no order for costs of this appeal. The costs of the Commissioner will not be costs in the cause but will be borne by the plaintiff. Costs of the conveyance will be borne by the defendants.