(1999) 07 CAL CK 0002

Calcutta High Court

Case No: F.M.A. No. 1604 of 1997

Subhas Mukherjee		APPELLANT
	Vs	
Ashok Kr. Roy		RESPONDENT

Date of Decision: July 12, 1999

Acts Referred:

- Partition Act, 1893 - Section 4
- Transfer of Property Act, 1882 - Section 44

Citation: 2 CWN 389

Hon'ble Judges: Tarun Chatterjee, J; S.K. Tiwari, J

Bench: Division Bench

Advocate: S.P. Roychowdhury and Prasanta Banerjee, for the Appellant; Mukul Prakash Banerjee and D.N. Sen, for the Respondent

Final Decision: Dismissed

Judgement

Tarun Chatterjee, J.

This appeal has been preferred by the plaintiff in a suit for declaration and injunction against a judgment and order being Order No. 26 dated 5th May, 1997 passed by Mrs. Kalpana Dey. Assistant District Judge. 4th Court at Alipore in Title Suit No. 140 of 1995. By the impugned order, the application for temporary injunction filed by the plaintiff/appellant and another application filed by the plaintiff/appellant on 31st July, 1996 to extend the interim order till the disposal of the suit were rejected. The plaintiffs specific case as made out in the plaint as well as in the application for injunction is that the suit property being premises No. 3, Nafar Kundu Road, Police Station Bhowanipur, Calcutta which belonged to five brothers namely Kishori Mohan, Lalit Mohon, Mohini Mohon, Peary Mohon and Ramoni Mohon Mukherjee is an undivided family dwelling house. The plaintiff and the defendant No. 4 are the sons of Koshori Mohon. In 1945 excepting Kishori Mohon, rest of the four brothers transferred their undivided 4/5th share in the suit property to Anil Kr. Banerjee who was a stranger to the family. Anil subsequently filed a suit

for partition which was decreed on 22nd August, 1956 and against that decree, an appeal was preferred before this court During the pendency of the appeal, Anil Banerjee transferred his 4/5th share in the suit property in favour of his brother Nirmal Banerjee. This court disposed of the appeal on 14th January, 1963 by affirming the final decree for partition with certain modifications. Nirmal died on 23rd May, 1988 leaving his only son Utpal as the sole heir who inherited the 4/5th share of Nirmal in the suit property. According to the plaintiff/appellant, the suit property was not actually partitioned by metes and bounds and the family property still remains joint and undivided. According to the plaintiff/appellant, the defendant No. 3, Utpal had sold his 4/5th share to defendant Nos. 1 and 2 by a deed dated 2nd December, 1994 without service of notice upon him. Accordingly, the plaintiff/appellant has tiled the instant suit for declaration and preemption u/s 4 of the Partition Act and for injunction and other incidental reliefs. After filing the instant suit, the plaintiff/appellant by filing a petition for temporary injunction sought for an order of injunction restraining the defendant Nos. 1 and 2 from enjoying the suit property and also for a mandatory order of injunction directing the defendant Nos. 1 and 2 to demolish the partition wall already constructed. By moving the application for temporary injunction, the plaintiff/appellant had obtained an interim order on 17th November, 1996 by which the parties were directed to maintain status quo in respect of the suit property till the disposal of the petition for temporary injunction. The application for temporary injunction was contested by the defendant Nos. 1 and 2 by filing a written objection wherein the material allegations made in the application for injunction were denied. They, however, claimed absolute ownership and exclusive possession over 3 cottahs 10 chattacks covering 4/5th share in the suit property was partitioned by metes and bounds long back and their vendor delivered possession of the specific demarcated portion to them on the date of purchase. This court also affirmed the final decree for partition with some modifications as regards drainage and sewerage system and the electric connection in the suit property. Accordingly, they prayed for rejection of the application for temporary injunction and consequent thereupon the order of status quo must be vacated.

2. The Trial Court by the impugned order rejected the application for injunction against which the present appeal has been preferred.

3. On behalf of the plaintiff/appellant, Mr. Roychoudhury submitted before us that although a final decree was passed in the previous partition suit in the year 1956 and confirmed in appeal with some modifications but in view of the admitted fact that no execution case was levied by the parties in respect of the said final decree for partition, the Trial Court ought to have held that in the eye of law, there was in fact, no partition and, therefore, parties had still remained joined and undivided so far as the suit property was concerned and therefore, the interim order directing the parties to maintain status quo over the suit property ought to have been made absolute till the disposal of the suit.

4. Mr. Banerjee, appearing on behalf of the defendant Nos. 1 and 2 respondents contested the submissions of Mr. Roychoudhury. According to Mr. Banerjee, since there was a final decree for partition in the year 1956 which was confirmed in appeal with modifications only in relation to sewerage system and electric line and as parties are in possession of the suit property on the basis of the final decree for partition, it was not necessary for the defendants to ask for execution of the final decree for partition relating to the suit property and accordingly, the prayer for temporary injunction of the plaintiff/appellant was rightly rejected by the Trial Court.

5. After considering the respective submissions of the learned Advocates for the parties and after considering the judgment under appeal and the materials on record, we are of the view that this appeal has no merit and therefore it must be dismissed.

6. Let us first consider the submission of Mr. Roychoudhury whether in the absence of filing of an execution case for delivery of possession in terms of the final decree for partition it can be held prima facie that the parties remain joint and undivided and, therefore, the plaintiff/ appellant was entitled to pre-empt the portion sold to the defendant Nos. 1 and 2 u/s 4 of the Partition Act and thereby entitled to an order of injunction as prayed for. Mr. Roychoudhury in support of this contention placed reliance to a decision of the Supreme Court in the case of Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others, In our view, this submission of Mr. Roychoudhury although at the first blush looked attractive but on consideration of the decision of the Supreme Court as noted hereinabove in detail and also the admitted facts of this case, cannot at all be accepted.

7. In the case of Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others, in paragraph 17, the Supreme Court observed as follows :

"As a result of the aforesaid discussions, it must be held that section 4 of the Act validly be pressed in service of any kind of co-owners of the dwelling house belonging to undivided family pending suit for partition till final decree is passed and thereafter even at the stage. of execution of the final decree for partition so long as the execution proceeding have not effectively ended and the decree for partition has not been fully executed and satisfied putting the shareholders in actual position of their respective shares."

(Emphasis added)

8. From the aforesaid observations of the Supreme Court, we are of the clear opinion that section 4 of the Partition Act can be validly pr(sic)d into service by any of the co-owners of a dwelling house belonging to undivided family pending the suit for partition till the final decree is passed. In this decision, the Supreme Court has also held that even at the stage of execution of the final decree for partition which had not effectively ended and the decree for partition had not been fully executed and satisfied by putting the shareholders in actual possession of their respective

shares section 4 of the Partition Act can be attracted. Therefore, it is evident from the aforesaid decision of the Supreme Court that section 4 of the Partition Act can be pressed into service in a case where final decree has not been passed or even when the final decree has been passed tout possession on the basis of such final decree has not been delivered in execution of the final decree for partition. Applying the aforesaid principles in the present case, we find that the admitted position is that the final decree for partition was passed long back in the suit for partition filed in the year 1945 and the said final decree passed by the Trial Court was confirmed by this court in appeal in the year 1963. It is true that no execution case was started for executing the final decree for partition by the parties but in view of the fact that the parties were already in possession on the basis of the final decree for partition, there was no need for the parties to apply for execution of the final decree for partition over again. It is clear from the materials on record that parties are in possession of the suit property on the basis of final decree for partition. Therefore, there was no necessity for the parties to levy execution in the facts of this case to take delivery of possession of the suit property in terms of the final decree for partition which was passed about 36 years back. There is another aspect of this matter. The present suit has been filed by the plaintiff/appellant for a declaration that the suit premises is an undivided family dwelling house and also for a declaration that the defendant Nos. 1 and 2 have no right to be in joint possession and the plaintiff/appellant is entitled to permit the 4/5th share of Utpal Banerjee defendant No. 3 in the suit who had admittedly transferred his right, title interest of the suit property in the year 1994 in favour of the defendant Nos. 1 and 2 respondents.

9. It is well settled that Section 4 of the Partition Act would be applicable to a dwelling house belonging to an undivided joint family. Therefore, the question that is now to be decided is whether in the facts and circumstances of this case it can be held for the purpose of deciding the application, for injunction, the suit property at this stage can be (sic) to be a dwelling house of an undivided Joint family of the parties. From the facts stated hereinabove, we are prima facie of the view that the suit property can not at all be considered to be a dwelling house of an undivided joint family as we find that the character of dwelling house belonging to an undivided joint family is no longer in existence. It was not disputed before us that in the year 1945 excepting the predecessor in interest of Kishori Mohan, rest of the four brothers transferred their undivided 4/5th shares in the suit property to a stranger Shri Anil Kumar Banerjee. Anil Kumar Banerjee thereafter filed a suit for partition which was decreed on 22nd August, 1956 and against that decree an appeal was preferred, as noted hereinearlier, before this Court. During the tendency of the appeal in this Court, the said Anil Banerjee transferred his 4/5th share in the suit property in favour of his brother Nirmal Banerjee. Nirmal Banerjee died on 23.5.1988 leaving his only son Utpal as the sole heir who inherited the'' 4/5th share of Nirmal Banerjee in the suit property, subsequently, Utpal, defendant No. 3 had

sold his 4/5th share to defendant Nos. 1 and 2 respondents by a deed on 2.12.1994. As noted hereinabove, from the series of events that had occurred since 1945 when 4 brothers transferred their undivided 4/5th shares in the suit property to Anil Banerjee a stranger, the character of the dwelling house of an undivided joint family within the meaning of Section 4 of the Partition Act was lost since the strangers to the joint family were allowed to occupy their respective shares in the suit property since 1945 till today.

10. We have also considered the judgment passed by this Court in appeal which was preferred against the final decree for partition of the Trial Court passed in the year 1956. From a perusal of the said judgment passed in the aforesaid appeal, it is also evident that this Court directed the father of the plaintiff/appellant to make a separate underground drain in his portion through the common passage by 4th February, 1963 and on the expiry of the said period Anil Banerjee was given liberty to disconnect the existing drainage connection and to prevent any entry in the sewerage system from the portion of the defendants/respondents. It also appears from the judgment of this Court passed in the aforesaid appeal, that this Court extended the period of making separate arrangements for water and electric (sic) in the (sic) decree. From the above facts and also after co(sic)g the final decree which was passed about 40 years back, it appears to us that the parties have accepted the final decree and are in possession of the (sic) on the basis of the said final decree for partition. It is an (sic) that the respondents have already raised boundary walls in the suit premises. From the pleadings of the parties in the application (sic) injunction as well as in the written objection to the application for injunction it is evident that respondents have raised such boundary walls in order to separate their portion in occupation of the plaintiffs long back. It is also an admitted position that the defendant Nos. 1 and 2 have already Militated their names in respect of the demarcated portion of the suit property with the Calcutta Municipal Corporation. Therefore, as the defendant Nos. I and 2 are in separate and exclusive possession in terms of the final decree for partition and by raising boundary wall in their portion and have mutated their names in respect of the demarcated portion with the Calcutta Municipal Corporation, it can no longer be field that the suit property still belongs to joint and undivided family. In view of the aforesaid discussions made hereinabove. it would not be necessary to deal with the decisions cited by Mr. Roychoudhury appearing on behalf of the plaintiff/appellant in support of his contention that the suit property must be treated to be a joint and undivided family dwelling house.

11. However, in this connection the Supreme Court decision in the case of Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, may be dealt with. In that decision, our Apex Court has held that the "family dwelling house" has the same meaning as in Section 4 of the Partition Act and in Section 44 of the Transfer of Property Act. In view of our discussions made hereinabove to the extent indicated that the character of family dwelling house belonging to an undivided joint family

has already been lost, the decision cited above would be clearly distinguishable on facts.

12. In this connection, the decision of the Supreme Court in the case of Anil Kumar Mitra and others Vs. Ganendar Nath Mitra and others, relied on by Mr. Banerjee appearing for the defendant/respondents is very much relevant. In the said decision, it has been clearly held that even after passing of preliminary decree for partition joint family status (sic) prior thereto would cease to exist and, therefore, there could be no presumption thereafter, about continuance of joint family status. The Supreme Court further observed in the said decision that this should be subject to the fact that even after the partition the parties continued to be members of the joint family and such continuity could be inferred only from the conduct and treatment meted out by the members of the family and in the absence of such a pleading or proof, it cannot be said that the joint family continued to exist even after the preliminary decree. After considering each and every statement made in the plaint appellant has made any statement either in the plaint or in the application for injunction in the manner indicated above. Therefore, following the aforesaid decision of the Supreme Court we are also -of the view that the existence of joint family dwelling house within the meaning of Section 4 of the Partition Act cannot even be inferred in the absence of any pleading to the effect as stated hereinbelow.

13. That being the position, we are prima facie of the view that the question of applicability of Section 4 of the Partition Act at this stage cannot arise at all. However, we keep in on record that this finding in this judgment would be treated to be a finding only for the purpose of decision of the application for injunction. For the reasons shown above, we are therefore of the view that the learned Trial Judge was fully justified in holding that the plaintiff/appellant had failed to make out a prima facie case to go for trial and, therefore, was not entitled to an order of injunction against the defendants/respondents.

14. Mr. Roychowdhury, appearing on behalf of the plaintiff/appellant has contended that as the plaintiff/appellant has raised a substantial question which needs to be decided on evidence, at this stage the plaintiff/appellant was entitled to an order of injunction till the disposal of the suit In support of this contention Mr. Roychowdhury relied on the decision of the Supreme Court in the case of Dalpat Kumar and another Vs. Prahlad Singh and others, . We are unable to agree with this submission of Mr. Roychowdhury. As noted hereinearlier, we have already held that the plaintiff/appellant could not make out any prima facie case to go for trial.

15. Applying the principles laid down in the aforesaid decision of the Supreme Court regarding the principles for grant of injunction we find that the "balance of convenience" and "irreparable loss and injury" would be faced by the defendants/respondents if an order of injunction is granted against them. The admitted fact is. as noted hereinearlier, that the plaintiff/appellant after about 40 years from the date of passing the final decree has now come forward to press his

claim u/s 4 of the Partition Act by filing the instant suit although there was no prayer for pre-emption form the said of the appellant or his predecessor in interest u/s 4 of the Partition Act in respect of the 4/5th share of the four brothers as the said share of the four brothers was sold in the year 1945 and subsequently, the defendant Nos. 1 and 2 purchased that share from defendant No. 3 Utpal Banerjee. That being the position, we are unable to agree with Mr. Roychowdhury that the plaintiff/appellant shall suffer irreparable loss and injury or the balance of convenience and inconvenience would be in favour of plaintiff/appellant if the nature and character of the suit property is allowed to change during the pendency of the suit. In the facts and circumstances of this case, we are of the prima facie view that the balance of convenience and inconvenience stands in favour of defendants/respondents and they will suffer irreparable loss if after about 40 years from the date of passing of the final decree the defendants/respondents are restrained by an order of injunction from changing the nature and character of the suit property.

16. For the reasons aforesaid, we do not find any reason to interfere with the order passed by the Trial Court by which the application for temporary injunction filed at the instance of the plaintiff/appellant was rejected. Before parting with this judgment we may also note that the other decisions relied on by Mr. Roychowdhury which concerned the principles for grant of injunction need not be dealt with in this judgment. In view of our discussions made hereinabove.

17. For the reasons aforesaid, the appeal is dismissed.

18. We, however, make it clear that whatever observations that have been made in this judgment on the question whether the plaintiff/ appellant is entitled to an order of pre-emption u/s 4 of the Partition Act, would be deemed to have been made for the purpose of deciding the application for injunction.

19. Parties would be at liberty to agitate their grievances on the aforesaid question before the Trial Court and the Trial Court should not be influenced by any of the observations made in this judgment, when deciding the suit. There will be no order as to costs.

S.K. Tiwari, J.

I agree.