

**(1983) 09 CAL CK 0005****Calcutta High Court****Case No:** None

Dhirendra Nath Sadhukhan

APPELLANT

Vs

Tinkari Sadhukhan and Others

RESPONDENT

**Date of Decision:** Sept. 30, 1983**Acts Referred:**

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

**Citation:** AIR 1984 Cal 397 : (1983) 2 CHN 343 : (1983) 2 CompLJ 297 : 88 CWN 147**Hon'ble Judges:** Nani Gopal Chaudhuri, J; Chittatosh Mookerjee, J**Bench:** Division Bench**Judgement**

Chaudhuri, J.

One Kiron Bala Dassi was the owner of the property in question namely, a dwelling house in 107, Panchanantala Road, P. S. Bally. She sold the undivided eastern half of the house by a Kobala to Uttam and Amulya Sadhukhan. By a second Kobala she sold the western half of the said house to aforesaid Amulya and his wife's brother Sudhanya Sadhukhan. Subsequently Uttam sold his share in the property to Amulya who has since died. Sudhanya has sold his share in the property to the appellant.

2. Respondents, as heirs of Amulya, brought a suit for partition and a decree in preliminary form has been passed declaring their 12 annas share and appellants 4 annas share in the suit property, overruling the appellants plea of previous partition. Subsequent thereto respondents filed a petition u/s 4 of the partition Act (hereinafter to be referred to as the Act) for purchasing the share of the appellant on the footing that he was a stranger-purchaser in relation to the dwelling house which belonged to undivided family. The learned court below has allowed the said petition dismissing appellants contention that Amulya and Subhanya did not constitute an "undivided family" in relation to the house and the prayer of the respondents did not comply with the requirements of the said section. So the

defendant opposite party in the proceedings u/s 4 of the Act has come up in appeal.

3. There is no dispute that the property is a dwelling house. The learned court below has held that the term "family" used in section 4 of the Act, according to judicial decisions cited by him, should be liberally construed and on such liberal construction he has held Amulya and Sudhanya to be constituting an undivided family.

4. Mr. S. C. Mitra, the learned Advocate for the Appellant vehemently challenges the decision of the trial court. He argues that the court below has not given the factual basis for his decision. He makes a grievance that the evidence adduced has been totally ignored.

5. Kalinath, the son of deceased Amulya, as P. W. I deposed "Sudhanya and Amulya were never joint. They did not live jointly in the said property." Dhirendra Sadhukhan the appellant as opposite party and transferee from Sudhanya deposed "Sudhanya was wife's brother of Amulya. They were never joint." In the petition u/s 4 of the Act the respondents had pleaded that subsequent to Amulya's death Sudhanya became the head of the family consisting of himself and Amulya's heirs, but they adduced no evidence in support of their plea.

6. In the well-known case Kshirodh Ghosal v. Sarada Mitra, reported in 12 CLJ 527 it has been held that the first element to attract section 4 of the Act is that the dwelling house belong to an undivided family. So the point of greatest importance in this case is if Amulya and Sudhanya constituted and undivided family in relation to the dwelling house in question. As to what is a "family" for the purpose of the Act we again refer to the judgment of Sir Ashutosh Mukherjee in the case cited above. The exposition is so good that till now no one has been able to improve upon the same and extracts from the judgment have been quoted in subsequent decisions to which we do not refer.

7. Mr. Mitter argues that in the case cited married daughters owning a house 5th indescent from the last full owner of the house were held to constitute a family. Mr. Mitter argues that Amulya and Subhanya neither had a common ancestor nor they related by blood. According to evidence on record, he emphasizes, they never lived jointly in the house nor as members of a family they messed together. He contends that the evidence on record does not disclose any material to justify a conclusion that they were members of an undivided family.

8. Mr. Ranajit Banerjee, the learned Advocate for the respondents relies on the observation in the judgment referred to, "The word "family" as used in the partition Act ought to be given a liberal and comprehensive meaning and it does include a group of persons related in blood who lived in the house under one head or one management". Referring to other observations in the judgment he contends neither descent from a common ancestor nor constant residents in the house by the co-sharers nor even joint messing by them is a single deciding characteristic of an

undivided family. He contends that the term "family" is to be interpreted in a liberal fashion.

9. The rights of co-sharers owning a dwelling house as members of an undivided family as distinguished from other co sharers are somewhat special as is evident from section 44 of the Transfer of Property Act. These special rights have been further enlarged by section 4 of the Act. Here lies the importance of the term undivided family. The generalisation as suggested by Mr. Banerjee leads as nowhere. To enforce their right u/s 4 of the Act, the respondents were required to satisfy the Court that Amulya and Sudhanya were members of an undivided family. In the evidence on record we do not find any common bond or cementing factor bringing both of them within the fold of an undivided family. Sudhanya and Amulya's wife had a common father, but not Amulya. They were thus not agnates, they had no relationship by blood on their maternal side so they were not cognates. The two families of Amulya and Sudhanya were brought close to each other by Sudhanya's sister's marriage with Amulya, this by no stretch of imagination effected integration of the two families, their separate identities did not merge rather continued. They never lived together nor messed together. We therefore find no bond of unity tying up Sudhanya and Amulya as members of an undivided family. However, liberally we try to interpret the term "family" we cannot overlook the above stubborn fact. We accordingly conclude that respondents the heirs of Amulya and Sudhanya were not members of an undivided family at any point of time and accordingly they were not entitled to purchase appellants share in the dwelling house which he has acquired from Sudhanya. In the above premises we are unable to sustain the order appealed against.

The view we have taken on the principal point of fact as noted above is sufficient for disposal of the present appeal, as such we do not enter into other points of law on which the order appealed against is assailed. In the result the appeal is allowed on contest, order appealed against is set aside and the respondents' petition u/s 4 of the Partition Act is dismissed on contest. We make no order as to costs. The parties are directed to bear the cost of the hearing themselves both in the trial court and in this court.

Mookerjee, J.

10. I agree.