

(1982) 02 CAL CK 0023

Calcutta High Court

Case No: None

In Re: Kalipada Sadhukhan

APPELLANT

Vs

RESPONDENT

Date of Decision: Feb. 18, 1982

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151
- Partition Act, 1893 - Section 4
- Transfer of Property Act, 1882 - Section 44

Citation: 86 CWN 346

Hon'ble Judges: S.M. Guha, J

Bench: Single Bench

Advocate: Manindra Nath Ghosh and Dhruba Bhattacharjee, for the Appellant; Bhupendra Nath Panda and Mrinal Kanti Roy, for the Respondent

Final Decision: Allowed

Judgement

S.M. Guha, J.

This application is directed against the order dated 5th December, 1981 passed by Sri D. Pal, Sub-ordinate Judge, 1st Court, Howrah in T. S. No. 17 of 1946 rejecting the petitioner's application u/s 15rc. P. Code. Tulsi Charan Jati filed the above suit for partition of the dwelling house and other lands. The preliminary decree was passed on June 16, 1947. Thereafter on or about. 11th April, 1940 Tulsi sold his undivided four annas interest in the suit property to Gostha Behari Sadhukhan, father of the petitioner. On or about June 27, 1959 the opposite party filed an application u/s 4 of the Partition Act for pre-emption of the sale which was allowed. Later on the opposite party was directed to deposit Rs. 9,000/- towards valuation of the property to be preempted.

2. A kobala was thereafter executed by the Court In favour of the opposite party. The opposite part v prayed for delivery of possession with the help of police. The

petitioner came up with the application u/s 151 C. P. Code objecting to the prayer of such delivery of possession. That was however rejected.

3. It is contended by Mr. Manindra Nath Ghosh, the learned Advocate for the petitioner that a proceeding u/s 4 of the Partition Act being a suit a final decree has to be drawn up and engrossed in non judicial stamp before execution.

4. It is further contended that the learned Court below misread the order of the High Court. What Their Lordship observed was that no decree need be drawn up in Letters Patent Appeal No. 20 of 1974 which was dismissed and not to mean that no final decree need be passed in the Partition Suit. Mr. Ghosh is perfectly justified in his contention. It was never intended by Their Lordships that no final decree need be passed in the suit pending before the Subordinate Judge.

5. Mr. Bhupendra Kumar Panda, the learned Advocate for the opposite party argues that the petitioner without moving the superior Court against the order granting police help has come up with an application u/s 151 C. P. Code on some Vague allegations. It is also contended by Mr. Panda that no question of making final decree arises, because the opposite party was allowed pre emptory in respect of undivided 4 annas share in possession of the petitioner. According to him the opposite party has his ancestral share in the dwelling house and to this 4 annas undivided OF the petitioner has been added and it is only after delivery of possession of the undivided 4 annas share that the commissioner for partition can make partition and grant separate allotment to members the Jati family and after that only the question of drawing up final decree would come in.

6. u/s 44 of the Transfer of Property Act the purchaser of the share of a dwelling house was not entitled to joint possession or other common or part enjoyment of the house. But the purchaser in this case was successful in taking possession of the undivided 4 annas share in the dwelling house.. So on an application u/s 4 of the Partition Act in Court directed the sale of 14th share of the petitioner in favour of the opposite party and in fact, a sale deed was executed by the Court in favour of the opposite party.

7. In Surendra Nath Achar vs. Ram Chandra Hazra, reported in 75 CWN 195 it is held that the proper stage for making the application u/s 4 of the Partition Act would be when application for final decree for partition by appointment of a Commissioner to effect partition by metes and bounds has been made. If an application u/s 4 of Partition Act is made proper direction to the commissioner should be that after allotments have been fixed the lot to which plaintiff will be entitled need have to be valued for exercise of the rights by defendants u/s 4 of the Partition Act. In this case there has already been a transfer of the petitioner's share in favour of the opposite party by the Court. Now the question is whether he can take delivery of possession before the final decree.

8. Unless there is a final decree and an allotment in favour of the petitioner, the petitioner cannot become the sole and exclusive owner of the portion transferred to him-- so unless there is an allotment in favour of the petitioner, he continues to be the joint owner and in joint possession of the entire dwelling house. Accordingly, on such allotment the petitioner loses all interest in other plots. Thereafter the opposite party-- pre-emptor can step, into the shoes of the petitioner, and not before that. Exactly similar was the observation in the case of Gour Chandra Ghosh vs. Prasanna Das & Ors., reported in 55 CWN 743. Their Lordships at page 746 of the report observe as follows :-

The parties, therefore, when, they make an actual division by taking possession by metes and bounds according to the allotments, mentioned in the sole decree (Ext. 13), effect in law, a partition on those terms, amicably and. without writing, and this will be an effective partition in law as between them conferring title to the respective allotments.

9. Thus in this view of the matter the opposite party by virtue of pre-emption cannot take delivery of unascertained portion of the dwelling house as there was no regular partition. So, in agreement with Mr. Ghosh I would hold that the opposite party should not be allowed to take delivery Of possession of the unascertained portion of the dwelling house in 4 annas share by police help. The application is allowed without costs. The impugned order is set aside.