(2012) 03 CAL CK 0052

Calcutta High Court

Case No: C.O. No. 888 of 2011

Smt. Shyamali Halder		APPELLANT
	Vs	
Sri Shibnath Banerjee and Another		RESPONDENT

Date of Decision: March 29, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151, 94(e)
- Constitution of India, 1950 - Article 227
- Partition Act, 1893 - Section 4
- Specific Relief Act, 1963 - Section 31
- Transfer of Property Act, 1882 - Section 4, 44

Citation: (2012) 3 CALLT 583 : (2012) 5 CHN 415

Hon'ble Judges: Dipankar Dutta, J

Bench: Single Bench

Advocate: A.C. Bagchi, Mr. M. Roy and Mr. M.K. Adhikari, for the Appellant;D. Roy, G. Pahari and Mr. D. Mishra for the Opposite Party No. 1, for the Respondent

Final Decision: Dismissed

Judgement

Dipankar Dutta, J.

The grandfather of the opposite party No. 1 and the father of the opposite party No. 2. Debendra Nath Bandopadhyay (since deceased), was the owner of a dwelling house standing on a land measuring more or less 2 cottahs 6 chittacks and 19 sq. ft. (hereafter the said property). Debendra Nath passed away intestate on September 8, 1943 leaving behind him five sons, who jointly inherited the said property equally, each having undivided 1/5th share therein. The eldest son of Debendra Nath was Kshetra Mohan Bandopadhyay, the father of the opposite party No. 1. Kshetra Mohan passed away intestate on August 22, 1970, leaving behind him three sons,

who jointly inherited the undivided 1/5th share of the said property that had devolved on Kshetra Mohan on the death of Debendra Nath. The opposite party No. 1 instituted Title Suit No. 512 of 2008 before the learned Civil Judge (Senior Division), 7th Court, 24 Parganas (South) at Alipore for declaration and permanent injunction, impleading the opposite party No. 2 as the sole defendant. It was alleged in the plaint that the opposite party No. 1 had received a letter dated December 26, 2007 from the learned advocate of the opposite party No. 2, wherein he had expressed his intention to sell his undivided 1/5th share of the said property and since the opposite party No. 1 was one of several co-sharers, an offer was made that he could purchase the same at a price of Rs. 1,80,000/-. In his reply, the opposite party No. 1 expressed willingness to purchase the share of the opposite party No. 2 but at a price of Rs. 1,20,000/-. It was further alleged that the opposite party No. 2 did not respond thereto but has been allowing inspection of portion of the said property under his occupation to outsiders/strangers with a view to encumber it. On or about February 20, 2008, the opposite party No. 1 noticed to his utter surprise that the opposite party No. 2 in collusion with his men and agents were illegally and unlawfully trying to block the common passage leading to the privy by constructing a partition wall but such attempt was resisted by him and the incident was diarized before the local Police Station. It was further alleged that since the said property is yet to be partitioned amongst the co-sharers, the opposite party No. 1 had right and authority to use and enjoy every inch thereof. He, accordingly, prayed for a decree declaring that the said property is joint and that the opposite party No. 2 had no right and authority to sell, transfer and encumber any demarcated portion of the said property to any third party until partition by metes and bounds and for a decree for permanent injunction restraining the opposite party No. 2, his men, agents and associates or any one claiming through or under him from causing any interference and obstruction in the peaceful enjoyment of the common portion of the said property and also from inducting any third party and/or stranger and/or alienating any portion of the said property in any manner and or changing the nature and character thereof.

2. Immediately after instituting the suit, the opposite party No. 1 applied for temporary injunction to restrain the opposite party No. 2 or any one claiming under him from causing any disturbance and interference in the enjoyment of the said property and also from inducting any tenant and/or alienating any portion of the said property and/or otherwise dealing with any part thereof and/or changing its nature and character. He obtained an ex-parte order of injunction dated February 22, 2008. whereby the parties to the suit were directed to maintain status quo in respect of the said property.

3. After the ex-parte injunction was ordered by the learned Judge of the Trial Court, a spate of applications followed at the instance of the parties herein.

4. The petitioner, alleging that she had purchased the 1/5th share of the opposite party No. 2 by a registered instrument, claimed that she ought to be added as a party to the suit. Such application was allowed by the learned Trial Judge and she was arrayed as defendant No. 2.

5. The opposite party No. 1 thereafter applied for amendment of the plaint. He sought to introduce paragraph 10A in the plaint and prayer ''a (i)'' for having a declaration that the sale deed dated February 8, 2008 executed by the opposite party No. 2 in favour of the petitioner is "void, fraudulent, tainted with fraud and not binding" upon the opposite party No. 1 and thus liable to be cancelled and delivered up within the meaning of section 31 of the Specific Relief Act. 1963. The application was allowed and the amended plaint has been tiled before the Trial Court.

6. The opposite party No. 1 also filed an application for local inspection under Older 39 Rule 7. CPC for holding local inspection of the said properly. The application was allowed and an Advocate Commissioner appointed. Commission work was conducted on March 3, 2008 and the report of the commissioner was filed in Court.

7. The opposite party No. 2 did not file any written objection countering the statement made in the application for temporary injunction but applied for vacating the order of injunction dated February 22, 2008 by filing an application under Order 39 Rule 4 of the Code. The opposite party No. 1 filed an application u/s 151 of the Code read with Section 94(e) thereof. The petitioner also filed an application under Order 39 Rules 1 and 2 of the Code.

8. The learned Judge of the trial Court considered all the applications together and by a common order dated December 9, 2010 (i) rejected the application for temporary injunction filed by the opposite party No. 1 and allowed the application under Order 39 Rule 4 filed by the opposite party No. 2: (ii) rejected the application under Order 39 Rules 1 and 2 read with section 151 of the Code filed by the petitioner: and (iii) allowed the application u/s 151 read with Section 94(e) of the Code filed by the opposite party No. 1 and directed the petitioner "to restore possession which has been taken by her". The order dated December 9, 2010, insofar as it allows the application of the opposite party No. 1 u/s 151 read with Section 94(e) of the Code filed by the opposite party No. 1 is under challenge in this revisional application under Article 227 of the Constitution.

9. Several contentions were urged by Mr. Bagchi, learned advocate for the petitioner for persuading this Court to hold that the learned Judge committed gross in directing the petitioner to restore possession as a consequence of allowing the application u/s 151 of the Code read with section 94(e) thereof filed by the opposite party No. 1. He also placed before the Court several decisions.

10. Referring to para 5 of the plaint, wherein it has been averred by the opposite party No. 1 that the joint owners of the said property along with other cosharers for mutual convenience have been living separately keeping some portion for common

use like privy, common passage, etc., Mr. Bagchi first contended that since the parties are living separately, possession qua the said properly is not joint and since possession is separate, the opposite party No. 2 was justified in giving separate possession to the petitioner. Secondly, he contended relying on the decision reported in AIR 2001 SC 61 : Gautam Paul v. Debi Rani Paul & Ors. that sale of the share of the opposite party No. 2 by him to the petitioner is not prohibited by law, yet, it was only on refusal of the opposite party No. 1 to purchase the share of the opposite party No. 2 that an offer was made by the latter to the petitioner and, therefore, the opposite party No. 1 being one of the cosharers cannot have any grievance, Additionally, the learned Judge had not indicated to whom possession was required to be restored in terms of the impugned order. Thirdly, he contended that since the opposite party No. 1 has disputed validity of the sale, he has no right to enforce his right u/s 4 of the Partition Act or u/s 44 of the Transfer of Property Act. According to him, the sale has to be accepted, if relief in terms of either of the aforesaid provisions is claimed. Fourthly, it was urged that the learned Judge grossly erred in not directing the opposite party No. 1 to put in Rs. 1.80.000/- being the purchase price, to show his bona fide since title had passed to the petitioner who purchased the suit property for value, and she could not have been dispossessed without securing the value. According to him the order amounts to granting preemption without money. Finally, it is urged that the decision of the learned Judge rejecting the application under Order 39 Rules 1 and 2 read with section 151 of the Code filed by the opposite party No. 1 would operate as res judicata on the application u/s of the Code read with section 94(e) of the Code and, thus the impugned order ought not to have been passed.

11. In his usual fairness, Mr. Bagchi invited the attention of the Court to certain decisions of the Hon''ble Supreme Court and this Court and submitted that they lay down principles of law adverse to the interest of the petitioner. Nonetheless, he sought to distinguish the same. I shall refer to one such decision of the Hon''ble Supreme Court at a later part of this judgment.

12. The application has been opposed by Mr. Roy, learned Advocate for the opposite party No. 1. According to him, none of the contentions urged by Mr. Bagchi deserve acceptance in view of the law settled by the Hon''ble Supreme Court. He referred to the decision reported in 2010(1) CHN 49 (SC) : Gajara Vishnu Gosavi v. Prakash Nana Saheb Kamble & Ors., wherein it has been held that although "an undivided share of a coparcener can be subject matter of sale/transfer, possession thereof cannot be handed over to the vendee unless the properly is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers". Reliance was also placed by him on the decision of a learned Judge of this Court reported in Ashish alias Piklu Das Vs. Debabrata Acharya and Others, , wherein it has been held that "remedy of the stranger purchaser is actually one of partition and until then he is obliged to keep out from asserting joint possession" and "when it prima-facie appears that plaintiff/petitioner is entitled to protection

under the second part of section 44 of the Transfer of Property Act and the stranger purchaser is liable to be restrained, it would follow that even if the defendant has been put in his possession or he came jointly to possess, he can be kept out of by injunction". It was also submitted that there was no question of the application that was allowed by the impugned order being barred by res judicata having regard to its different scope. It was, accordingly, prayed that the revisional application ought to be dismissed.

13. I have heard learned advocates for the parties and considered I he materials on record.

14. I propose to deal with the final contention of Mr. Bagchi first. According to him. In view of rejection of the application under Order 39 Rules 1 and 2 of the Code filed by the petitioner, the subsequent application u/s 151 read with section 94(e) ought to have been held by the learned Judge to have been hit by res judicata. The prayers in the application under Order 39 Rules 1 and 2 of the Code did not survive once it was revealed that a registered instrument had come into existence prior to the suit being instituted, whereby title had passed on to the petitioner. Subsequently, it was revealed that possession had been delivered to the petitioner, Rightly, the opposite party applied u/s 151 read with section 94(e) of the Code based on such subsequent event praying for mandatory injunction to restore possession. The rival claims in the two applications were not such so as to attract provisions of section 11 of the Code at different stages of the same proceeding. Relief claimed in the second application on a set of facts was substantially different from those in the first application and, therefore. I do not find any merit in the contention of Mr. Bagchi. It stands overruled.

15. Two of several decisions referred to by Mr. Bagchi, would exercise my consideration next.

16. In Gautam Paul (supra), the Hon''ble Supreme Court was considering (a) whether the appellant could be said to be a member of the family within the meaning of section 4 of the Partition Act? and (b) whether in the absence of the transferee suing for partition a shareholder can invoke section 4 and buy over such share? Answering the first question against the appellant, it was held that merely because he was related by blood through a common ancestor shall not make him a member of the family within the meaning of the term as used in section 4 of the Partition Act. It was held that the High Court was wrong in allowing the defendant Nos. 1 and 2 to exercise the right of preemption u/s 4 of the Partition Act since the condition of the transferee suing for partition had not been fulfilled. In paragraph 23 of the decision, it was held as follows:-

23. We are in agreement with this opinion.

There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers/outsiders can purchase shares even in a dwelling house.

Section 44 of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gels no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case section 4 of the Partition Act comes into play. Except for section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of preemption, u/s 4, is exercised the conditions laid down therein have to be complied with. As seen above one of the conditions is that the outsider must sue for partition. Section 4 does not provide the co-sharer a right to pre-empt where the stranger/outsider does nothing after purchasing the share. In other words, section 4 is not giving a right to a co-sharer to preempt and purchase the share sold to an outsider anytime he/she wants. Thus even though a liberal interpretation may be given, the interpretation cannot be one which gives a right which the Legislature clearly did not intend to confer. The Legislature was aware that in a Suit for Partition the stranger/outsider, who has purchased a share, would have to be made a party. The Legislature was aware that in a Suit for Partition the parties are interchangeable. The Legislature was aware that a Partition Suit would result in a decree for Partition and in most cases a division by metes and bounds. The Legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share. Yet the Legislature did not provide that the right for pre-emption could be exercised ''in any Suit for Partition''. The Legislature only provided for such right when the ''transferee sues for partition''. The intention of the Legislature is clear. There had to be initiation of proceedings or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger/purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition. The interpretation given by the Calcutta. Patna. Nagpur and Orissa High Courts would result in nullifying the express provisions of section 4, which only gives a right when the transferee sues for partition. If that interpretation were to be accepted then in all cases, where there has been a sale of a share to an outsider, a co-sharer could simply file a suit for partition and then claim a right to purchase over that share. Thus even though the outsider may have, at no stage, asked for partition and for the delivery of the share to him, he would be forced to sell his share. It would give to a cosharer a right to pre-empt and purchase whenever he/she so desired by the simple expedient of filing a suit for partition. This was not the intent or purpose of section 4. Thus the view taken by Calcutta, Patna, Nagpur and Orissa High Courts, in

the aforementioned cases, cannot be said to be good law.

17. While there could be no dispute in respect of the proposition that there is no compulsion on a co-sharer to sell his share to another co-sharer and that he may sell his share to a third party/outsider, the decision also lays down that the only manner in which an outsider can gel possession is to sue for possession and claim separation of his share. Undisputedly, the opposite party No. 2 has been put in possession of portion of the said properly, which prior to execution of the deed dated February 8, 2008 referred to above was in possession of the opposite party No. 2, without she having sued for partition of her share.

18. In the decision reported in Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, , the plaintiff had applied for interim injunction pending the suit instituted by him restraining the defendant Nos. 1 to 3 from parting possession and defendant Nos. 4 and 5 from entering into or taking possession and/or remaining in possession or enjoying the suit property or any part thereof on the ground that the suit property is a dwelling house belonging to an undivided family, that there had not been any division of the suit properly at any time, that the plaintiff and his deceased brother during his life lime were for convenience occupying different portions.-he occupying the first floor while the deceased occupied the ground floor, that after the death of the brother, the defendant Nos. 1 to 3 (the widow and two children of the deceased) continued to be in occupation of that portion which was in the occupation of the deceased brother and, therefore, the defendant No. 4, being a stranger to the family, has no right to have joint possession or enjoyment of the property along with the plaintiff on the basis of purchase of the undivided share. The Trial Court found that the suit property is a dwelling house belonging to an undivided family, that there was no partition of the same by metes and bounds at any time, that the family of the deceased were not divided qua the suit property and that so far as the suit properly is concerned, the plaintiff and his family and the family of the defendant Nos. 1 to 3 were joint and undivided and that the case came fully within the second paragraph of section 44 of the Transfer of Property Act and, consequently, the defendant No. 4 and his wife as strangers were not entitled to joint possession of the said family dwelling house. However, the defendant No. 4 having claimed that he had already entered into possession, interim mandatory injunction was granted to the effect that he and his servants and agents are restrained "from remaining in possession or enjoyment in suit property" or any part or portion thereof. The trial Court also ordered that the injunction would not prevent the defendant No. 4 to occasionally enter the suit property to enquire that no one else other than the plaintiff and his family members are entering into possession of the portion of the ground floor and a garage which he had purchased. On appeal, the High Court prima-facie found that the facts indicated that throughout the parties have lived separately, that there was severance in status and that it was not possible to give a finding that there has been no partition between the parties. Since the mailer required evidence on either side and to what extent the

ground floor could have ever been considered as a family dwelling house and that granting of interim mandatory injunction would have the effect of virtually deciding the suit without a trial and that the plaintiff was unable to make out a prima facie case of suffering irreparable damage or that the balance of convenience in his favour, the High Court allowed the appeal and set aside the order granting an injunction but directed that during the pendency of the suit the defendant No. 4 and his wife shall neither make any permanent alteration in the suit property nor shall they induct any third party, or create any third party interest over the suit property.

19. The Hon''ble Supreme Court was considering whether one could have a reasonably certain view at that stage before the actual trial that the suit property is a dwelling house belonging to an undivided family within the meaning of section 44 of the Transfer of Property Act. The other question that arose for consideration was whether irreparable injury would be caused to the plaintiff, which could not be compensated in terms of money and whether the balance of convenience was in his favour. Answering the first point in favour of the plaintiff, it was held as follows:-

23. **** In the absence of a document evidencing partition of the suit house by metes and bounds and on the documentary evidence showing that the property is held by the appellant and his brother in equal undivided shares, we are of the view that the plaintiff-appellant has shown a prima facie case that the dwelling house belonged to an undivided family consisting of himself and his brother.

24. The two brothers, therefore, shall be deemed to be holding the property as members of an undivided family and in the absence of the partition by metes and bounds qua this property they shall be deemed to have been holding the dwelling house as an undivided family. Prima facie, therefore, the transfer by defendants 1 to 3 would come within the mischief of second paragraph of section 44 of the Act.

20. Insofar as the second question is concerned, it was held that the defendants hurriedly executed the sale deed in a hush-hush manner keeping the transaction secret from the plaintiff and that the purchasers were inducted in a manner which clearly suggests that the defendants were attempting to forestall the situation and to gain an undue advantage in a hurry and clandestine manner defeating the appellant''s attempt to go to Court for appropriate relief. Ultimately it was held as follows:-

27. *** The respondents in such circumstances cannot be permitted to lake advantage of their own acts and defeat the claim of the appellant in the suit by saying that old cause of action u/s 44 of the Transfer of Properly Act no longer survived in view of their taking possession. In such circumstances it is but just and necessary that a direction should go to the respondents to undo what they have done with knowledge of the appellant''s rights to compel the purchaser or to deny joint possession.

28. These facts in our view clearly establish that not only a refusal to grant an interim mandatory injunction will do irreparable injury to the appellant but also balance of convenience is in favour of the appellant for the grant of such injunction. In the result we allow the appeal, set aside the judgment of The High Court and restore that of the Trial Court with costs in this appeal.

21. Mr. Bagchi sought to distinguish this decision by submitting that there is no averment in the plaint to the effect that the suit properly is a dwelling house belonging to an undivided family and that there had been no division of the suit property at any time and further that the opposite party No. 1 was extended the opportunity to purchase the share of the opposite party No. 2, which he refused.

22. I do not consider that this is sufficient ground to hold that the opposite party No. 1 was not entitled to relief of injunction merely because of absence of reference to the said property as a family dwelling house, or that it is held by an undivided family. In the plaint the opposite party No. 1 averred that he and the opposite part No. 2 are joint owners of the said property and that though for mutual convenience they have been living separately, certain portions are common. The opposite party No. 2 in his written objection to the application u/s 151 read with section 94(e) of the Code filed by the opposite party No. 1 asserted his right to sell his undivided share to a third party on the ground that the opposite party No. 1 refused to purchase it because of lack of financial capacity but, at least at this stage, there is no pleading that the said property has been partitioned by metes and bounds. Also from the materials on record, one can reasonably infer that the opposite parties had been holding the said property as members of an undivided family. The second paragraph of section 44 of the Transfer of Property Act imposes a restriction on the right of a transferee to joint possession under that section. Grant of interim mandatory injunction thus has to be examined in the light of the above position. On the authority of the decisions of the Hon''ble Supreme Court noticed above. I hold that the petitioner could not have been put in possession by the opposite party No. 2.

23. Contention raised by Mr. Bagchi that the opposite party No. 1 disentitled himself to the relief of interim mandatory injunction by disputing the sale has not impressed me. The claim of the petitioner is that she has purchased the share of the opposite party No. 2. She is undoubtedly a stranger and, therefore, could not have been put in possession by the opposite party No. 2.

24. The other contention regarding absence of any direction to put in the value of the properly that changed hands in pursuance of the deed dated February 8, 2008 also lacks force. The opposite party No. 1 would not derive the right to claim preemption unless the petitioner initiates action for partition.

25. The remaining contention that requires an answer is whether the learned Judge was justified in directing restoration of possession without indicating to whom

possession is to be restored. Admittedly, there has been a transfer of the undivided share of the opposite party No. 2 in the said property in favour of the petitioner for due consideration. The opposite party No. 2 may not have any further interest in receiving back possession of the property in dispute, having received the consideration amount from the petitioner. Having regard to the object that section 44 of the Transfer of Property Act seeks to achieve. I am of the considered opinion in the circumstances that it would be proper in the interests of justice to direct that the commissioner appointed by the learned Judge shall put the property in dispute under lock and key, if not already locked, and retain possession thereof until further order of the learned Judge in seisin of the suit.

26. With the aforesaid clarification, the revisional application stands dismissed. The learned Judge is requested to expedite the trial. It would be desirable if the suit, subject to convenience of the learned Judge and without grant of unnecessary adjournments, is finally decided by the end of next year without being influenced by any observation contained herein.

Urgent photostat certified copy of this judgment and order, if applied for may be furnished at an early date.