

(1978) 04 CAL CK 0057**Calcutta High Court****Case No:** S.A. 32 of 1968

Radhaballav Kundu and Others

APPELLANT

Vs

Purna Chandra Singh

RESPONDENT

Date of Decision: April 10, 1978**Acts Referred:**

- Partition Act, 1893 - Section 4

Citation: 82 CWN 957**Hon'ble Judges:** N.C. Mukherji, J**Bench:** Single Bench**Advocate:** H.K. Basu, for the Appellant; Aditya Narain Roy and B.B. Giri, for the Respondent**Final Decision:** Allowed

Judgement

N.C. Mukherji, J.

This is an appeal against the judgment and decree passed by Shri S.N. Banerji, Subordinate Judge, 2nd Court at Midnapore dated 29.4.67 in Title Appeal No. 481 of 1966 affirming those of Shri D.P. Sarkar, Munsif, 1st court at Midnapore in Title Suit No. 189 of 1965 dated 29.6.66. The plaintiffs brought a suit for partition and for preemption u/s 4 of the Partition Act in respect of 1/3rd share of defendant No. 1 who, admittedly, is a stranger purchaser. Only the defendant No. 1 contested the suit. It was contended that defendant Nos. 2 & 3 sold their ♀ share to defendant No. 1 and thus, the defendant No. 1 acquired half interest in the suit property. It was also contended that the suit property was never used as a dwelling house by the plaintiffs or defendant No. 2 within last 30 years. The structures have all fallen down, the roofs have caved in and the walls are also dilapidated. The plaintiffs live in a separate homestead on the other side of the Municipal Road. In such circumstances section 4 of the Partition Act has no application. The learned Munsif found that the defendant No. 1 acquired 1/3rd interest in the suit property. The plaintiffs' 2/3rd share was declared and the suit was decreed in preliminary form for partition of the

properties. The plaintiff's application for pre-emption u/s 4 of the Partition Act was dismissed. Being aggrieved, the plaintiffs preferred an appeal before the learned District Judge. The Subordinate Judge who heard the appeal affirmed the findings of the learned Munsif and dismissed the appeal. Being aggrieved, the plaintiffs have come up to this court.

2. The only point involved in this case is whether the suit property still retains the character of "dwelling house". Mr. Himanshu Kumar Basu, learned advocate appearing on behalf of the appellants, contends that both the courts below have wrongly found that the suit property is not "dwelling house" within the meaning of section 4 of the Partition Act. It has also been wrongly found by the courts below that the plaintiffs have abandoned the suit property with the idea of never using the same as dwelling house. In this connection, Mr. Basu submits that there is evidence on record to show that the plaintiffs are still using the suit property as their dwelling house and it is not their case that they abandoned the suit property and they have no idea of repairing the same and make the dilapidated and broken house fit for permanent habitation. The learned court of appeal below has found that there is no case in the plaint, nor there is any evidence to show that the plaintiffs intend to use the suit property as their dwelling house in the near future or within a reasonable time or that they are prevented by virtue of their poverty and other sufficient ground for repairing it and using as their dwelling house. This observation of the Court of appeal below does not seem to be quite correct in paragraph 6 of the plaint, it has been stated that the suit property is dwelling house and homestead and for want of money it cannot be repaired and it is in a dilapidated state. It has been admitted that the roof have caved in, but the wall are standing and the plaintiff's are using the latrine and the wells of the said dwelling house and also they are stocking hay and straw in the two rooms and are keeping their cattle in the said house. These statements in the plaint have been proved by the plaintiff No. 3 who has been examined as P.W. 1. On this point, there is no challenge by the other side. The only case made out on behalf of the defendant No. 1 was that the plaintiffs have constructed a new house on the other side of the road and are living there, they have not repaired the old house, nor have paid the Municipal tax and that being so, it must be concluded that they have abandoned the said house and they have no idea of using the same at any future date as dwelling house. Mr. Basu contends that on the case made out by the plaintiffs in the plaint and on evidence in record it must be said that the learned courts below have wrongly found that the suit property is not a dwelling house. In support of his contention, Mr. Basu first refers to a decision reported in [Kalipada Ghosh Vs. Tulsidas Dutt and Others](#). In this case it has been laid down "a dwelling house does not cease to be a dwelling house merely because of suspension of occupation or, for the matter of that, absence of the owner therefrom or because of occupation or terminable occupation thereof by tenants. What is important u/s 4 of the Partition Act is that the house concerned should either be actually in use, though not in constant occupation by the owners as a

residential house or that conditions should be such that it is still possible for them to return to the occupation of the house at some future date". Mr. Basu submits that it is in evidence that the plaintiffs are still using the said house as they are using the latrine and the well and are keeping straw and hay in two of the rooms and also keeping their cattle in the said house. There is no evidence Mr. Basu submits that the plaintiffs have abandoned the dwelling house and have no idea to return to the same at any future date. The next case relied on by Mr. Basu has been reported in AIR 1969 Cal 89 (Sunil Kumar Mukhopadhyaya v. Provash Chandra Majumdar. In this case it has been held that the mere fact that the structures on the disputed land which was once the site of the family dwelling house of the parties, had disappeared, would not, by itself, be conclusive on the point whether it had ceased to be the dwelling house of the family. Their Lordships in coming to the said finding relied on a decision reported in Nil Kamal Bhattacharya and Another Vs. Kamakshya Charan Bhattachariya and Another, . In the said case, it was observed "the fact that the huts have blown down does not make the dwelling house any the less a dwelling house so long as the members have not abandoned it or, at any rate given up the idea of using it as such."

3. Mr. Aditya Narain Roy, learned advocate appearing on behalf of the respondent, relies on a decision reported in 93 Cri.L.J. 362 (Basanta Kumar Sen v. Gour Hari Dey). In this case it has been held that a garden or open land and or a tank cannot by themselves, that is apart from or independently of any common hut or structure, reasonably constitute a house or a dwelling house. The facts are completely different in the present case and as such this case has no application to the present case as the principle laid down in this does not apply to the facts of the present case.

4. On the case as made out in the plaint and on the evidence on record I am of opinion that the disputed property must be considered as a dwelling house as the plaintiffs are still using a part of the same. Though it may be said that they are not actually living in that house then also there is nothing from which it can be concluded that they have abandoned the dwelling house and they have no idea of returning back to the same after making the same fit for habitation. In the circumstances the application u/s 4 of the Partition Act must be allowed. In the result, the appeal succeeds. The appeal is allowed on contest. The judgment and decree passed by the learned court below are set aside so far as the application u/s 4 of the Partition Act filed by the plaintiffs has been rejected. The plaintiff's application u/s 4 of the Partition Act is allowed. The learned trial court will fix the value of the 1/3rd share of the disputed property and direct the defendant No. 1 to sell the property to the plaintiffs on payment by the plaintiffs of the amount which would be fixed by the court as price of 1/3rd share of the disputed property. There will be, however no order for costs in this appeal.