

(1950) 05 CAL CK 0036**Calcutta High Court****Case No:** Appeal from Appellate Decree No. 2012 of 1946

Rajani Kanta Pal

APPELLANT

Vs

Krishna Prasad Ash

RESPONDENT

Date of Decision: May 5, 1950**Acts Referred:**

- Partition Act, 1893 - Section 4, 4(1), 4(2)
- Transfer of Property Act, 1882 - Section 44

Citation: (1951) 1 ILR (Cal) 658**Hon'ble Judges:** Mookerjee, J**Bench:** Single Bench**Advocate:** Jitendra Kumar Sen Gupta and Nitya Ranjan Biswas, for the Appellant; Heramba Chandra Guha, for the Respondent**Final Decision:** Allowed**Judgement**

Mookerjee, J.

The property in suit originally belonged to the members of a Hindu joint family. At one stage, that joint family consisted of the Defendants 1 to 4 (who are the Appellants in this Court) and one Madhusudan. Defendants 1 to 4 were the owners of a two-third share and Madhusudan of the remaining one-third of the joint properties. Madhusudan's one-third share devolved on his two grandsons, Badal and Sadhan. Badal sold his one-sixth share in the joint homestead to the Plaintiff. Sadhan also sold his one-sixth share but to Defendants 6 to 9. The Plaintiff brought the suit, out of which the present appeal arises, for partition of the property purchased by him impleading Defendants 1 to 4, as also Defendants 6 to 9, who now represent the interest of Sadhan. Certain questions of title were raised in the suit and those were decided in a preliminary judgment, which declared the shares held by the different parties and directed the appointment of a commissioner of partition to make the allotments.

2. At this stage, an application was filed by the Defendants 1 to 4 u/s 4 of the Partition Act. It was claimed by them that, as the Plaintiff and Defendants 6 to 9 were outsiders, the Defendants 1 to 4 were entitled to invoke the provisions contained in Section 4 of the Act and to buy out the shares declared in favour of both the sets of outsiders. It is beyond doubt that in respect of the share held by the Plaintiff, the Defendants 1 to 4 are so entitled. The only question on which the parties have differed is whether Defendants 1 to 4 may buy out the shares allotted to the Defendants 6 to 9. The trial court held in favour of Defendants 1 to 4 and gave a direction accordingly. The learned District Judge on appeal has held otherwise. Hence this Second Appeal on behalf of the Defendants 1 to 4. The rights of the parties are to be determined u/s 4 of the Partition Act, which is in the following terms:

4. (1) Where a share of dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder and may give all necessary and proper directions in that behalf.

(2) if in any case described in Sub-section (1) two or more members of the family being such share-holders severally undertake to buy such share, the Court shall follow the procedure prescribed by Sub-section (2) of the last foregoing section.

3. That an application under this section may be preferred even after a preliminary decree is passed is now settled in a long line of decisions beginning from *Hiramoni Dassi v. Radha Churn Kar* (1899) 5 C.W.N. 128 and subsequently re-affirmed in *Kshirode Chunder Ghosal v. Saroda Prosad Mitra* (1910) 12 C.L.G. 525 and other cases.

4. u/s 4 of the Partition Act an application may be made only when an outsider transferee "sues for partition". In the present case the Plaintiff who sues for partition is an outsider.

5. On the fact of the present case, it is, therefore, not necessary to consider whether Section 4 of the Partition Act is attracted even when the suit of partition is not brought by the outsider transferee. We need not, accordingly, consider whether the extended meaning of the word "sue" in that section as signifying either "to prosecute" or "to defend" as held by G. N. Das J. in *Abu Isa Thakur v. Dinabandhu Banik* (1947) 51 C.W.N. 639 is, correct or not.

6. Of the Defendants impleaded, some are members of the original family and some others are outsiders transferees from some or other of the co-sharers. In a suit of this nature, Defendants 1 to 4, as already indicated, may, u/s 4 of the Act, exercise their right to buy out the share belonging to the Plaintiffs.

7. On behalf of the Defendants 6 to 9, it is contended that it is only the interest of the Plaintiff which can be bought out by the Defendants 1 to 4, but not the interest of the said Defendants 6 to 9. The opening words of Section 4 unmistakably refer to a transfer or transfers in favour of one or more outsiders and the right as under the section is given if "such transferee sues for partition".

8. As has been pointed out more than once, Section 4 of the Partition Act was promulgated for keeping out the possible intrusion of outsiders into the homestead of a joint family. This was in extension of the principle which had already been enunciated in Section 44 of the Transfer of Property Act. Under the provisions of the latter section an outsider is not entitled to claim joint possession with a co-sharer in the homestead in which the outsider might have purchased an interest. Section 4 of the Partition Act makes it impossible for such outsiders to get a separate share in the same homestead when the property is under partition provided certain conditions laid down in the section are fulfilled. In my view, the provisions contained in Section 4 will be made nugatory if the restricted interpretation which is proposed to be put by the Defendants 6 to 9 were to be accepted. When two persons outside the family purchase separately the shares of two members of a joint family and one amongst these outsiders brings a suit for partition impleading his co-sharers as Defendants including within that category the other outsider purchaser is it to be suggested that the outsider purchaser, who figures as the Defendant, will be entitled to have separate possession of the joint homestead in his share, only because he is not the Plaintiff in the suit.

9. In *Satyabhama De v. Jatindra Mohan Deb* (1928) 49 C.L.J. 136 a Division Bench of this Court held that any member of the original joint family can buy out the shares in the homestead purchased by outsider appearing whether as Plaintiff or as Defendant in the partition suit. Reference may in this connection be made to [Sheodhar Prasad Singh and Others Vs. Kishun Prasad Singh and Others](#) .

10. Mr. Guha, appearing on behalf of the Defendants 6 to 9, attempted to distinguish the Bench decision of this Court referred to above, inasmuch as in that case the persons whose shares were directed to be sold to the members of the original family had asked for partition, but, in the present case, there is as yet no such specific prayer made by these Defendants for the allotment of a separate saham.

11. It is well-settled that, even if parties to a partition suit do not specifically pray in the pleadings for the allocation of separate allotments, prayers made by them at a later stage and even after-the passing of the preliminary decree for such allocation of separate allotments are not only entertained, but given effect to. In the preliminary decree passed in the present case, provision is made for all the Defendants to get their separate allotments, if they so liked. The Commissioner of partition has been given direction accordingly. The mere omission in the written statement, therefore, to claim a separate allotment does not distinguish the present

case so as to make inapplicable the principle enunciated in *Satyabhama De v. Jatindra Mohan Deb* (supra).

12. The result, therefore, is that the appeal is allowed, the judgment and decree of the learned District Judge are set aside and those of the trial court restored.

13. The Appellants are entitled to their costs in this Court and in the lower appellate Court.

14. Leave to appeal under Clause 15 of the Letters Patent is refused.