

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S) 1634 OF 2019
[ARISING OUT OF SPECIAL LEAVE PETITION
(CIVIL) NO.22977/2016]

RISHABH KUMAR JAIN ...APPELLANT(S)

VERSUS

GYANCHAND JAIN & ANR. ...RESPONDENT(S)

ORDER

1. Leave granted.
2. One Nonelal (died in the year 1951) was owner of house property No.25 and 26, Lordganj, Jabalpur. He left behind three legal heirs, namely, Naval Kishore, Sunderlal and Surkhi Chand. Surkhi Chand son of Nonelal died in the year 1972.
3. The appellant is the son of Surkhi Chand. He had filed a suit for partition. During the pendency of the suit, on 7th August, 1979 another legal heir of Nonelal, namely, Naval Kishore sold one-third

(1/3rd) share of the suit property to the present respondents Nos. 1 and 2 who were in occupation of the suit property as tenants from the year 1966-1967.

4. The partition suit was finally decreed and each heir of Nonelal i.e. Naval Kishore, Sunderlal and Surkhi Chand (since deceased) was held to be entitled to one-third (1/3rd) share and separate possession of the suit property.

5. The respondents Nos. 1 and 2 filed execution proceedings seeking possession of the one-third (1/3rd) share of Naval Kishore which they had purchased.

6. In the execution proceedings, the appellant filed an application under Section 4 of the Partition Act, 1893 for a right of pre-emption claiming the suit property to be a dwelling house. The Executing Court found that the major portion of the suit property i.e. 1082 sq.

ft. was being used as residential premises whereas an area of 481 sq. ft. was being used by the respondents as 'tailoring shop'.

7. Taking into account that the major portion of the suit property was used as 'dwelling house', the Executing Court granted right of pre-emption in favour of the appellant leading to revision proceedings before the High Court where the High Court reversed the conclusion of the Executing Court by holding that the suit property could not be termed as 'dwelling house' as a part of the suit property was being used for 'commercial purpose'. Aggrieved, this appeal has been filed.

8. We have heard the learned counsels for the parties.

9. The sole question arising for determination in this case is: if a suit property is substantially used for

'dwelling house' and a small part is used for 'commercial purpose' it would cease to be a 'dwelling house' within the meaning of said expression as appearing in Section 4 of the Partition Act, 1893.

10. Section 4 of the Partition Act is in the following terms:

"4. Partition suit by transferee of share in dwelling-house.- (1) Where a share of a 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 shareholder 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 shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

11. In the course of the arguments advanced, learned counsel for the appellant has drawn our attention to the views of the Calcutta High Court in an identical matter in Kartick Chandra Basu & Anr. vs. Subal Chandra Mondal¹ wherein the High Court had taken the view that if a major part of the suit property is used as a dwelling house the same would not cease to be a dwelling house merely because a portion thereof may be used for commercial purpose.

12. We have perused the grounds and reasons on the basis of which the High Court of Calcutta had thought it proper to take the above view. We are in respectful agreement with the views expressed by the High Court of Calcutta in Kartick Chandra Basu (supra). Any other view, in our considered opinion, would permit a co-sharer to defeat the object of Section 4 of

1. (1989) 1 Cal LJ 439

the Partition Act, 1893 by initially renting a premises for a commercial purpose and thereafter in transferring the same to such tenant which actions could be unilateral to the exclusion of the other co-sharer leaving him with no remedy.

13. Section 4 of the Partition Act was interpreted in Srilekha Ghosh vs. Partha Sarathi Ghosh², after referring to earlier judgments of different High Courts, to mean that the dwelling house must belong to an undivided family and the transfer must be to a person who is not a member of such family to whom the dwelling house belongs. Reference was made to Section 44 of the Transfer of Property Act and Section 23 of the Hindu Succession Act to observe that Section 4 of the Partition Act does not provide the co-sharer right to pre-empt where the stranger/outsider does nothing

2. (2002) 6 SCC 359

after purchasing the share. It is only in cases when the transferee sues for partition, which may be by way of initiating proceedings for partition or even claiming partition in execution, that the provision of Section 4 of the Partition Act come into play. The language of Section 4 of the Partition Act was contrasted with the then provision of Section 23 of the Hindu Succession Act. Referring to Narashimaha Murthy vs. Susheelabai³ it was emphasised that Section 4 of the Partition Act stands enacted to preserve the dwelling house when the stranger-transferee sues for partition and separate possession of the undivided share transferred to him by the co-owner. This decision defines the expression "dwelling house" to mean a house for habitation and domicile and would embrace the dwelling itself or such

3. (1996) 3 SCC 644

buildings as are used in connection with it. Dwelling house also would refer to a house which is capable of being used for human habitation i.e. the place used for residence, a board or home. A building would not cease to be a dwelling house if the dwellers are absent only temporarily and have *animus revertendi* and legal ability to return (see opinion authored by Punchhi, J. for himself and Kuldip Singh, J. in paragraph 27).

14. In Ghantesh Ghosh vs. Madan Mohan Ghosh and others⁴ this Court while interpreting Section 4 of the Partition Act on the question of right of the transferee, made the following observations to protect the interest and rights of the stranger-transferee:

"6. In order to answer this moot question, it has to be kept in view what the legislature intended while enacting the Act

4. (1996) 11 SCC 446

and specially Section 4 thereof. The legislative intent as reflected by the Statement of Objects and Reasons, as noted earlier, makes it clear that the restriction imposed on a stranger transferee of a share of one or more of the co-owners in a dwelling house by Section 44 of the T.P. Act is tried to be further extended by Section 4 of the Partition Act with a view to seeing that such transferee washes his hands off such a family dwelling house and gets satisfied with the proper valuation of his share which will be paid to him by the pre-empting co-sharer or co-sharers, as the case may be. This right of pre-emption available to other co-owners under Section 4 is obviously in further fructification of the restriction on such a transferee as imposed by Section 44 of the T.P. Act."

This dictum would equally apply to the present case.

15. We, therefore, take the view that in the present case as a major portion of the suit property, namely, 1082 sq. ft. was used as a 'dwelling house' and only 481 sq. ft. was used for 'commercial purpose' the

suit property would still remain a 'dwelling house'.

16. For enforcement of the rights of the co-sharer under Section 4 of the Partition Act the order of the High Court is set aside and the appeal is allowed in the above terms. Execution Court would proceed accordingly.

.....,CJI.
(RANJAN GOGOI)

.....,J.
(L. NAGESWARA RAO)

.....,J.
(SANJIV KHANNA)

NEW DELHI
FEBRUARY 12, 2019

ITEM NO.5

COURT NO.1

SECTION IV-A

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

PETITION(S) FOR SPECIAL LEAVE TO APPEAL (C) NO(S). 22977/2016
(ARISING OUT OF IMPUGNED FINAL JUDGMENT AND ORDER DATED 28-04-2016
IN CR NO. 6/2016 PASSED BY THE HIGH COURT OF M.P PRINCIPAL SEAT AT
JABALPUR)

RISHABH KUMAR JAIN

PETITIONER(S)

VERSUS

GYANCHAND JAIN & ANR.

RESPONDENT(S)

Date : 12-02-2019 This petition was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE L. NAGESWARA RAO
HON'BLE MR. JUSTICE SANJIV KHANNA

For Petitioner(s)

Mr. Amol Chitale, Adv.
Mrs. Pragya Baghel, AOR

For Respondent(s)

Mr. Dinesh K. Garg, Adv. (AOR)
Mr. Abhishek Garg, Adv.
Mr. Dhananjay Garg, Adv.
Mr. Deepak Mishra, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeal is allowed in terms of the signed order.

[VINOD LAKHINA]

[ANAND PRAKASH]

AR-cum-PS

BRANCH OFFICER

[SIGNED ORDER IS PLACED ON THE FILE]