

11 SCOB [2019] AD 7**APPELLATE DIVISION****PRESENT:**

Mr. Justice Syed Mahmud Hossain,
-Chief Justice
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider

CIVIL APPEAL NO.59 OF 2009.

(From the judgment and decree dated 22.08.2006 passed by the High Court Division in First Appeal No.17 of 2004.)

Haji Shamsul Alam : Appellant
Versus
Dr. Ashim Sarker and others : Respondents

For the Appellant : Mr. T.H. Khan, Senior Advocate & Mr. A.J. Mohammad Ali, Senior Advocate (with Mr. Qumrul Haque Siddique, Advocate) instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.

For Respondent No.1 : Mr. Abdul Wadud Bhuiyan, Senior Advocate (with Mr. Subrata Saha, Advocate) instructed by Ms. Sufia Khatun, Advocate-on-Record.

For Respondent No.6 : Mr. Giasuddin Ahmed, Advocate-on-Record.

Respondent Nos.2-5 & 7-8 : Not represented.

Date of hearing on : 05.04.16, 12.04.16, 11.05.16 & 17.05.16

Date of judgment on : 29.05.2018

It is observed that to get an order of pre-emption under section 4 of the Partition Act three condition are to be fulfilled, i.e. (1) the property must be dwelling house, (2) it must be the undivided family and then (3) the purchasers must file the partition suit. That is one of the basic conditions for applicability of section 4 of the Partition Act which has been expressly mentioned in the section is that the stranger transferee must sue for partition and separate possession of the undivided share transferred to him by the co-sharer. If the stranger moves execution application for separating his share by metes and bounds it would be treated to be application for suing for partition and it is not necessary that separate suit should be filed by such stranger transferee. "Such transferee sues for partition" includes idea of some action by transferee to secure partition even praying saham in suit for partition paying necessary court fees.

... (Para 20)

JUDGMENT

Hasan Foez Siddique, J:

1. This appeal is directed against the judgment and decree dated 22.08.2006 passed by the High Court Division in First Appeal No.17 of 2004 affirming those dated 25.10.2003 passed by the learned Joint District Judge, First Court, Chittagong in Partition Suit No.72 of 2003.

2. The relevant facts, for the disposal of this appeal, are that the respondent Dr. Ashim Sarker instituted the aforesaid suit for declaration of his title, confirmation of possession, for declaration that exchange deed No.786 dated 20.07.1996, sale deed No.787 dated 20.07.1996, sale deed No.804 dated 27.07.1996 of Fatebad S.R. Office and deed of exchange No.3628 dated 06.10.1999 of Hathazari S.R. office were not acted upon and those deeds are not binding upon the plaintiff and for partition together with the prayer for buying up of the land described in the schedule-3 to the plaint stating, inter alia, that the land appertaining to R.S. Khatian Nos.693, 131, 667, 945, 1817 and R.S. Plot Nos.6963, 6964, 6972, 6959, 6957 and 6958 of Mouza South Madrasha, P.S. Hathazari, District-Chittagong measuring an area of 1.53 acres described in schedule No.1 to the plaint originally belonged to Pran Krishna Dey and Ishan Chandra Dey. R.S. record of right was prepared and published in their names. They were the full brothers. Ishan Chandra Dey died leaving no issue and his interest was devolved to Pran Krishna Dey. Pran Krishna Dey had three sons namely, Umesh Chandra Sarker, Jugendra Lal Sarker and Surendra Lal Sarker. Jugendra Lal Sarker died before the death of Pran Krishna leaving wife Niroda Bala and two brothers Umesh Chandra Sarker and Surendra Lal Sarker. Pran Krishna Dey died leaving two sons Umesh Chandra Sarker and Surendra Lal Sarker. Thus, Umesh Chandra Sarker got 1/3rd share, Surendra Lal Sarker got 1/3rd share and Niroda Bala wife of Jugendra Lal Sarker acquired life interest in respect of 1/3rd share. She transferred some land to Sunil Kanti Sarker by kabala deed dated 16.04.1969. Umesh Chandra Sarker purchased .22 acre of land out of the suit land which was recorded in his name in R.S. Khatian No.131, 945 and R.S. Plot No. 6972 of $\frac{6956}{7527}/6957$ corresponding to B.S. Khatian Nos.767 and 1306 in B.S. Plot Nos.8095,7921 and 7922. Umesh Chandra Sarker died leaving four sons, Manik Lal Sarker, Sunil Kanti Sarker, Dilip Sarker and Amalendu Sarker by his two wives. Manik Lal Sarker is the son of first wife and rest of the sons are by his second wife. Surendra died leaving only son Babul Chandra Sarker, the defendant No.1. Sunil Kanti Sarker died leaving three sons Dr. Ashim Sarker, the plaintiff, Shambhu Sarker and Sanjib Sarker, the defendant No.2. Babul Sarker gifted .13 acre of land to plaintiff Dr. Ashim Sarker and Shanjib Sarker by two deeds of gift dated 09.03.1999 and 10.09.1999. The plaintiff Dr. Ashim and his brothers are in joint possession of the lands. He requested the defendants to effect partition of the suit land but the defendants did not pay any heed. Shamsul Alam, defendant No.5 (appellant) threatened the plaintiff to dispossess him and his family members on 02.06.2002 from the suit land stating that he has purchased some land from Sunil Kanti Sarker, the defendant No.3 and Dilip Sarker, the defendant No.4. He expressed his desire to construct structures in his purchased land. Getting such information, the plaintiff, obtaining certified copy of the deeds on 11.07.2002, confirmed about the transfers and, thus, filed the instant suit.

3. The defendant No.5-Shamsul Alam, the present appellant, contested the suit by filing a written statement contending that the suit land originally belonged to Pran Krishna Dey and Ishan Chandra Dey. Ishan Chandra Dey died leaving his full brother Pran Krishna as his heir. Pran Krishna Dey died leaving two sons Umesh Chandra Sarker and Surendra Lal Sarker and

another son Jugesh Chandra Sarker, predeceased Pran Krishna, leaving his widow Niroda Bala. Niroda sold her share to plaintiff's father, the defendant No.3 by kabala deed dated 16.04.1959. Surendra Lal Sarker died leaving only son Babul Chandra Sarker, the defendant No.1. Babul Chandra Sarker transferred his share to Anima Sarker by a kabala deed dated 04.05.1978. Sunil Kanti (defendant No.3), father of the plaintiff, instituted Miscellaneous Case No.16 of 1986 in the Court of Assistant Judge, Hathazari against Anima Sarker to get the said land by way of pre-emption which was allowed. Anima Sarker preferred Miscellaneous Appeal No.37 of 1988 which ended on compromise and Sunil Kanti got the said land. Sunil Kanti and Umesh Chandra Sarker gifted their share to Charu Bala by deed of gift dated 11.03.1970. Charu Bala gifted the said land to Sunil Kanti Sarker, the defendant No.3, father of the plaintiff and Dilip Chandra Sarker, the defendant No.4 uncle of the plaintiff. Umesh Chandra Sarker executed a will on 26.03.1970 in favour of Sunil Kanti Sarker, Dilip Chandra Sarker and Amalendu Sarker who filed Probate Case No.70 of 1988 which was subsequently registered as civil suit No.04 of 1990. The said suit ended on compromise and Sunil Kanti Sarker, Dilip Chandra Sarker obtained order of probate. Sunil Kanti Sarker and Dilip Chandra Sarker purchased the share of Amalendu Sarker by kabala deed dated 28.12.1969. All the co-sharers effected an amicable partition of those land on 28.10.1995. Thereafter, the defendant No.3 Sunil Kanti Sarker, father of the plaintiff and defendant No.4 Dilip Chandra Sarker, uncle of the plaintiff, sold .66 acre of land to this defendant No.5 by kabala deed No.787 dated 20.07.1996. They also sold .23 acre of land to this defendant by another kabala deed No.804 dated 27.07.1996 and delivered possession. They also transferred some other lands by a deed of exchange. One Mabilia Khanom filed Miscellaneous Case No.74 of 1996 in the 3rd Court of Joint District Judge, Chittagong for getting the said land by way of preemption which ended on compromise. In view of such circumstances, the suit should be dismissed.

4. The trial Court decreed the suit in preliminary form. It declared that the deeds No.786 dated 15.07.1996, 787 dated 15.07.1996, 804 dated 19.07.1996 and 3628 dated 06.10.1999, executed in favour of the defendant No.5, have not been acted upon in respect of the land described in schedule 2 to the plaint and those are not binding upon the plaintiff.

5. The trial Court allowed the prayer for buying up in respect of the land described in schedule-3 to the plaint, that is, measuring an area of 1.18½ acres and directed the plaintiff to deposit tk.7,67,299/- within 30 days from date, in default, the prayer for buying up shall stand dismissed. The trial Court allotted saham to the extent of 1.26½ acres (.08 as owner+1.18½ by way of buying up) as described in schedule-2 to the plaint in favour of the plaintiff. It also allotted saham to the extent of .07¼ acre of land to the defendant No.4. It also directed the defendant No.5 appellant to remove the structures constructed in the suit land.

6. The defendant No.5-appellant preferred First Appeal No.17 of 2004 in the High Court Division and the High Court Division, by the impugned judgment and decree, dismissed the said appeal. Thus, he has preferred this appeal getting leave.

7. Mr. T.H. Khan, A.J. Mohammad Ali, and Mr. Qumrul Haque Siddique, learned Counsel appeared for the appellant. On the other hand, Mr. Abdul Wadud Bhuiyan, learned Counsel appeared with Mr. Subrata Saha for respondent No.1.

8. The learned Counsel for the appellant submit that it is apparent from the plaint that the plaintiff was not a co-sharer in interest of the dwelling house of an undivided family when the appellant purchased his 1.18½ acre of land so the prayer for buying up was not maintainable.

They submit that to avoid limitation, the plaintiff filed partition suit intending to buying up the appellant's land inasmuch as the plaintiff knowing fully well that some other co-sharers filed pre-emption Miscellaneous Case No.31 of 2000 against the defendant-appellant, the High Court Division erred in law in not holding that the instant suit filed by the plaintiff was malafide and the prayer for buying up was not at all maintainable. They submit that the courts below committed an error of law in holding that the transfer deeds of the defendant No.5 appellant had not been acted upon inasmuch as he took over possession of the disputed land and the trial Court, finding his possession, directed him to remove the structures constructed by him and that he has been paying electric bills, rent etc. and also receiving house rent etc.

9. Mr. Abdul Wadud Bhuiyan, learned Senior Counsel appearing for the respondent No.1 in his submission, contended that the instant suit for partition along with the prayers for buying up, declaration of title and confirmation of possession was maintainable, the courts below rightly decreed the suit.

10. It appears that the trial Court declared that the title deeds of the defendant No.5 appellant had not been acted upon inasmuch as the trial Court directed the defendant No.5 to remove the structures as admittedly constructed by this defendant No.5 appellant after purchasing the said land. It also appears that the defendant No.5, after purchase, mutated his name in the khatian (ext.Uma is the mutated khatian) and has been paying rent (ext.Ja series are rent receipts) and electricity bills regularly. The appellant, purchasing his 1.18½ acres of land by the impugned deeds, took over possession of those lands, mutated his name and paid rent to the Government, that is, he did something pursuant to those deeds. In such view of the matter, the findings of the courts below that the transfer deeds executed in favour of the defendant No.5 appellant were not acted upon has got no basis.

11. Another important question for adjudication in this case is whether the prayer for buying up in a suit filed not by the transferee of the deed executed by the other co-sharers of the disputed holding is maintainable or not.

12. It is relevant here to quote the provision of section 4 of the Partition Act which runs as follows:

“4.(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 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 describes 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.”

13. Section 4 enables a co-sharer of an undivided family dwelling house to seek for buying up of the share of the transferee from a co-sharer selling his shares in undivided family dwelling house when the transferee sues for partition of his share. However, the expression “the transferee sues for partition” needs interpretation.

14. Section 4 shows that for its applicability at any stage of the proceeding between the parties, the following conditions are to be satisfied:

“(1)A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;

- (2)The transferee of such undivided interest of the co-owner should be an outsider of stranger to the family;
- (3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the concerned co-owner;
- (4)As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and
- (5)While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the Court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house.” (Ghanstesh Ghosh V. Madan Mohan Ghosh-DLR 1997 SC.471)

15. Supreme Court of India in the aforesaid case has observed that amongst other conditions, section 4 requires for its applicability that such stranger purchaser sues for partition and only in that eventuality the right of buying up envisaged under section 4 of the Partition Act can be made available to other co-sharers. If the stranger purchaser is impleaded as a defendant, if as defendant seek execution for decree of partition filed by a co-sharer, then the stranger purchaser can be held to have initiated a legal action for redressal of his decretal right and at that stage any co-sharer can seek the remedy for buying up under section 4 of the Partition Act.

16. Supreme Court of India taking into consideration of Ghantesh Ghosh V. Madan Mohan Ghosh’s case further observed in the case of Babu Lal V. Habibur Rahman Khan and others reported in (2000)5 SCC 662 that one of the basic conditions for applicability of section 4 as laid down by the aforesaid decision and also as expressly mentioned in the section is that the stranger-transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. It is, of course, true that in the said decision it was observed that even though the stranger-transferee of such undivided interest moves an execution application for separating his share by metes and bounds it would be treated to be application for suing for partition and it is not necessary that a separate suit should be filed by such stranger-transferee. In the case of Gautom Pal V Debi Rani (AIR 2001 SC 61) Indian Supreme Court further observed that at any stage before filing the petition under section 4 of the Act, the stranger purchaser impleaded as a defendant did not seek for separate allotment of his share, then the right of the co-sharer to apply under section 4 of the Act did not arise.

17. In our jurisdiction in the case of Maleka Khatun and others Vs. Amena Khatun and others reported in 59 DLR(AD) 69 it has been observed that the defendant in a suit for partition to avail the provision of section 4 of the Partition Act is required to establish that the person seeking partition is stranger purchaser from the co-sharer(s) of dwelling house of an undivided family.

18. When a co-sharer of an undivided family dwelling house has filed the suit for partition of that dwelling house against another co-sharer, no right against another co-sharer accrues to the plaintiff co-sharer to seek the relief for pre-emption under section 4 of the Partition Act. Dwelling house belonging to an undivided family means family not decided

qua dwelling house. The essence is that the house itself should be undivided although the co-sharers having defined shares. As long as there is a dwelling house which has not been divided qua the family it might be said to be a dwelling house belonging to an undivided family for the purpose of section 4(1) of the Act. The basic pre-requisites for an application under section 4 for exercising the right of buy up is that the property which is the subject matter of the application must be a dwelling house of an undivided family and the transferee must sue for partition.

19. Section 44 of the Transfer of Property Act and Section 4 of the Partition Act are complimentary to each other and the terms “Undivided family” and “dwelling house” have the same meaning in both the sections. Section 44 is to maintain the integrity of the family dwelling-house which provides that the transferee of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. The said provision adequately protects the family members against intrusion by an outsider into the dwelling house. The purchaser, though stranger, has certainly his title to the undivided share of the joint property by reason of his purchase but in enforcing his rights he is fettered to this extent that he cannot claim any joint possession in the undivided family dwelling house. That does not mean that the purchaser is without remedy. The purchaser has his remedy and he can sue for partition by metes and bounds and after such partition possess his own share, unless he is pre-empted under section 4 of the Partition Act. 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. In the case of *Dorab Cowasji Warder V. Loomi Sorab Warder* reported in (1990) 2 SCC 117 it was observed that even if the family is divided in status in the sense that they were holding the property as tenants in common but undivided qua the property, that is, the property had not been divided by metes and bounds, it would be within the provisions of section 44 of the Transfer of Property Act.

20. In such view of the discussion made above, it is observed that to get an order of pre-emption under section 4 of the Partition Act three conditions are to be fulfilled, i.e. (1) the property must be dwelling house, (2) it must be the undivided family and then (3) the purchasers must file the partition suit. That is one of the basic conditions for applicability of section 4 of the Partition Act which has been expressly mentioned in the section is that the stranger transferee must sue for partition and separate possession of the undivided share transferred to him by the co-sharer. If the stranger moves execution application for separating his share by metes and bounds it would be treated to be application for suing for partition and it is not necessary that separate suit should be filed by such stranger transferee. “Such transferee sues for partition” includes idea of some action by transferee to secure partition even praying saham in suit for partition paying necessary court fees which is totally absent in this case. In this case the defendant No.5 appellant Shamsul Alam is the transferee of the land under partition and the suit has been filed by Dr. Ashim Sarker who is not the transferee and appellant did not pray for any saham as yet in the said suit for partition, so the prayer for buying up by the plaintiff was not at all maintainable at the stage of the suit when the same was prayed for. The courts below have committed error of law in allowing the prayer for buying up.

21. Accordingly, we find substance in the appeal. Thus, the appeal is allowed. The judgment and decree passed by the courts below are hereby set aside. However, since the instant suit is a suit for partition, the plaintiff is entitled to get his share to the extent of .08 acre and the defendant No.4 is entitled to get saham to the extent of .07¼ acre as allotted by the trial Court.