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IN THE HIGH COURT OF ORISSA AT CUTTACK
CMP No. 353 of 2016

(An application under Article 227 of the
Constitution of India)

A. Mohan *Petitioner*
-Versus-
Babita Ram and others *Opp. Parties*

Advocates appeared:

For Petitioner : Mr. Dwarika Prasad Mohanty,
Advocate

For Opp. Parties : Mr. Sanjeeb Chakravarty,
Advocate
(For Opposite Party No.1)

CORAM :
MR. JUSTICE K.R. MOHAPATRA

★ **Date of Judgment: 26.09.2023** ★

JUDGMENT

K.R. Mohapatra, J.

1. This matter is taken up through hybrid mode.
2. Order dated 2nd February, 2016 (Annexure-7) passed by learned 1st Additional Civil Judge (Senior Division), Cuttack in Title Suit No.458 of 1991 (Final Decree) is under challenge in this CMP, whereby an application filed by the Plaintiff-Petitioner under Section 4 of the Partition Act, 1893 to exercise the right of preemption, has been rejected.
3. As submitted by Mr. Mohanty, learned counsel for the Petitioner, TS No.458 of 1991 was filed by one Laxmi Dei for

partition of the suit property claiming eight annas share therein. She also prayed for a decree to direct the Defendant Nos.2 and 3 (Opposite Party Nos. 3 and 4) to re-transfer the eight annas share of Defendant No.1 purchased by them under Section 4 of the Partition Act. She also prayed for certain other reliefs, consequential as well as alternative. The suit was preliminarily decreed vide judgment dated 2nd December, 1995 declaring that the Plaintiff and Defendant No.1 have eight annas share each in the suit property. It was also directed that the Plaintiff may exercise her right under Section 4 of the Partition Act to repurchase the suit property from Defendant Nos.2 and 3. Further, Defendant Nos.2 and 3 were also directed to execute a sale deed in favour of the Plaintiff within three months therefrom on receipt of Rs.18,000/- from her and to give delivery of possession of the suit property. Assailing the same, the Defendant Nos.2 and 3 filed Title Appeal No.18 of 1996, which was disposed of vide judgment dated 28th February, 2003 (Annexure-2) confirming the decree with regard to entitlement of eight annas share of each of the Plaintiff and Defendant No.1 over the suit property. But the finding with regard to exercise of power under Section 4 of the Partition Act over the suit house by the Plaintiff was set aside, holding it to be pre-mature.

4. Defendant Nos.2 and 3 are the purchasers of a portion of the suit property from Defendant No.1, namely, A. Chandrabati vide RSD dated 18th June, 1991. The Plaintiff, namely, Laxmi Dei and husband of Defendant No.1, namely, A. Bhaskar Rao are the siblings. When the Plaintiff came to know that Defendant No.1 managed to record her name in the ROR and sold the suit property

to Defendant Nos.2 and 3, which was their dwelling house, she filed the suit as aforesaid. In the meantime, Defendant Nos. 2 and 3 sold the suit property to Opposite Party No.1. Thus, the Opposite Party No.1 initiated the Final Decree proceeding for carving out the share of Defendant No.1 and to allot the same in her name.

4.1 After the death of the Plaintiff, the Petitioner being her son was substituted in her place. During pendency of the Final Decree proceeding, the Petitioner filed an application under Section 4 of the Partition Act to exercise his right of preemption to repurchase the property from said Babita Ram-Opposite Party No.1, who purchased the suit property from Defendant Nos.2 and 3. Said application was rejected on the ground that the property in question has lost its character of being a dwelling house by the time the application under Section 4 of the Partition Act was filed. Hence, this CMP has been filed assailing the said order under Annexure-7.

5. Mr. Mohanty, learned counsel for the Petitioner submitted that learned trial Court while passing the preliminary decree and learned appellate Court while pronouncing judgment in TA No.18 of 1996 concurrently held that the suit property was a dwelling house. Further, the Petitioner in his evidence in affidavit at para-7 stated as under:-

“7. That originally there were residential houses in the property and my mother was staying thereon with her parents. After demolishing the same my mother shifted to another place for her stay and could not arrange sufficient money to construct a building on the suit property. The land was lying vacant and for her sustenance she had allowed one Shohan Lal Chug to run his business in the name and style Haryana Handloom thereon. There is no

permanent construction/structure on the suit property and tenant by affixing tin sheds temporarily is doing his business. I am now preparing to make construction of my residential house thereon by removing the temporary tin sheds from the suit property."

It is thus submitted that there was dwelling house over the suit property and the Petitioner has intention to make construction of his residential house over the suit property. In support of his submission, Mr. Mohanty, learned counsel for the Petitioner relied upon the case law in the case of ***Tejpal Khandelwal and Ors. vs Mst. Purnima Bai and Ors.***, reported in AIR 1976 Ori 62, wherein it is held as follows:-

"11. It is unnecessary to multiply illustrations. Whether a house is a dwelling-house or not is to be determined with reference to the facts and circumstances of each case. The test which is, however, essential is that the house must have been meant for residential purposes though temporarily it might be used for other purposes according to the exigency of circumstances."

He also relied upon the case of ***Mohiddin Molla Vs. Jitendranath Karmakar And Ors.***, reported in AIR 1976 Cal. 288, wherein it is held as follows:-

"6 In this connection Mr. Motilal has made an attempt to argue that when there is a shop room in the suit premises, the suit property cannot be held as the dwelling house. On this question there can be no doubt that only a minor part of the dwelling house is a shop room. The meaning of the dwelling house in Section 4 of the Partition Act is relevant. The relevant portion of Section 4 of the Partition Act runs as follows:--

"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."

In this connection we should consider the decision of a Division Bench of this Court in the case of Dulal Chandra Chatterjee v. Gostha Behari Mitra, (AIR 1953 Cal 259). There we find the following:

"But assuming that the house concerned must be a residential house of the members of the family owning it. I am altogether unable to agree that any suspension of occupation or, for the matter of fact, the absence of the owners of the house therefrom or an occupation or terminable occupation by tenants, can have the effect of making the house cease to be a dwelling house."

Further down we also get "the mere grant of a tenancy cannot possibly have the effect of making the house which is otherwise a residential house of the members of the undivided family owning it, cease to be a dwelling house."

It is clear, therefore, that to ascertain whether a house is a dwelling house or not, it has got to be considered how the house is being used or for what purpose the house is there. In the instant case a minor portion of the suit property constitutes a shop. But the admitted fact is that the defendant is the owner of the dwelling house inherited from his father and that his other co-sharers sold their shares to different persons." In my view, therefore, simply because there is a shop in the suit dwelling house it cannot be stated that the character of the dwelling house has been changed. I cannot, therefore, accept the contention of Mr. Motilal that due to the existence of a shop room the character of the suit property as dwelling house has been changed."

He, therefore, submitted that only because the property in question was being rented out and was being used for running a business, it will not lose its character of being a dwelling house. As the suit house was dilapidated one, mother of the Petitioner (the Plaintiff)

demolished the suit house with intention to construct a new one, but due to paucity of funds she could not proceed with the construction and let it out on rent to one Sahon Lal Chug for running Haryana Handloom business. It has only made temporary tin construction to run his business. He further submitted that the Petitioner has also shown his intention to construct his dwelling house thereon on repurchase. Thus, learned trial Court has misdirected itself in holding that the suit property having lost its character of being a dwelling house and protection under Section 4 of the Partition Act is not available to the Petitioner. Although the impugned order is well-discussed one, but learned trial Court failed to appreciate the aforesaid position of law. Hence, he prays for setting aside the impugned order under Annexure-7 and to grant leave to the Petitioner to exercise his right under Section 4 of the Partition Act.

6. Mr. Chakravarty, learned counsel for the contesting Opposite Party No.1 submitted that after disposal of Title Appeal No.18 of 1996, Opposite Party Nos.3 and 4 initiated a final decree proceeding. The Petitioner being the son of the original Plaintiff filed an application under Section 4 of the Partition Act. The said application was initially rejected. Assailing he said order, the Petitioner preferred W.P.(C) No.2320 of 2013 before this Court. The writ petition was disposed of on 13th December, 2015 setting aside the impugned order rejecting the application under Section 4 of the Partition Act remanding the matter to learned trial Court to adjudicate the application under Section 4 of the Partition Act afresh giving opportunity of hearing to the parties. Accordingly,

the matter was considered afresh and the impugned order under Annexure-7 has been passed.

6.1 It is his submission that the finding of learned trial Court does not warrant any interference in view of the discussion made therein and finding arrived at. Learned trial Court, also relied upon the case of *Gautam Paul Vs. Debi Rani Paul and others*, reported in AIR 2001 SC 61, discussed the provision of Section 4 of the Partition Act for arriving at the conclusion.

6.2 While considering the application under Section 4 of the Partition Act, the Court should keep in mind that the purchaser (in the instant case, Opposite Party No.1) must come forward claiming actual and physical possession. *Secondly*, there must be the existence of dwelling house at the time of filing of an application under Section 4 of the Partition Act. In the instant case, admittedly, there was no residential house over the suit land at the time of filing of the application under Section 4 of the Partition Act. The case laws relied upon by learned counsel for the Petitioner have no application to the case at hand, as in those cases dwelling house was existing at the time of consideration of petition under Section 4 of the Partition Act. But the house in question was rented out. Thus, this Court as well as Calcutta High Court categorically held that only because the house was used for other purposes for a temporary period, it would not lose its character of a dwelling house. He categorically stated that his mother, namely, the original Plaintiff had demolished the dwelling house and rented the property to one Sohan Lal Chug to run his business, who by making a tin structure was running his business

in the name and style 'Haryana Handloom'. Thus, by no stretch of imagination the protection under Section 4 of the Partition Act is available to the Petitioner as rightly held by learned trial Court. He, therefore, prays for dismissal of the CMP.

7. Mr. Chakravarty, learned counsel for the contesting Opposite Party No.1 also relied upon the case of ***Bimla Devi and Ors. Vs. Radhishaym Patwa and others*** reported in AIR 2006 Pat 112, wherein it is held as under:-

"15. 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 a 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 suit for partition. The interpretation given by Calcutta, Patna, Nagpur and Orissa High Courts would result in nullifying the express provision 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 co-sharer 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."

Thus, learned trial Court has committed no error in rejecting the petition under Section 4 of the Partition Act.

8. Heard learned counsel for the parties. Perused the materials on record and case laws placed before this Court.

9. Section 4 of the Partition Act reads as under:-

“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.”

Thus, the following conditions are to be satisfied for entertaining an application under Section 4 of the Partition Act.

- i) Dwelling house must belong to an undivided family;
- ii) There is a transfer of share in it to a stranger;
- iii) The transferee has sued for share in the undivided property and for possession; and
- iv) The share holder claims and undertakes to buy the share of the stranger;

10. In the instant case, admittedly, the Petitioner, who is the son of the Plaintiff, in his evidence stated that his mother was staying in the dwelling house. As the dwelling house was in a dilapidated condition, his mother demolished the same and shifted to another place for her stay and intended to reconstruct the house. But she could not arrange money to construct a new building thereon. It shows that the property in question was being used as dwelling house and the mother of the Petitioner had intention to make new construction of a building for her stay. At that juncture, the property was sold to Opposite Party Nos.3 and 4, who in turn sold the property to Opposite Party No.1. It is also deposed by the Petitioner that he would construct the residential building thereon after removing the temporary structure and tin shed from the property after getting possession. It is thus clear that the Petitioner and his mother were although out were treating the property as homestead. For a temporary period, for sustenance of the Plaintiff, the property was let out to one Sohan Lal Chug, who by constructing a temporary tin shed, was running his business. As the property was in the meantime alienated and for the subsequent events, as narrated above, neither the Plaintiff nor the Petitioner could get opportunity to make construction thereon. The evidence of the Petitioner as quoted supra was not challenged by Mr. Chakravarty, learned counsel for Opposite Party No.1. On the other hand, accepting the aforesaid evidence, Mr. Chakravarty, learned counsel for Opposite Party No.1 submitted that the evidence of the Petitioner clearly goes to show that at the time of filing of the petition under Section 4 of the Partition Act there was

no dwelling house existing over the suit property. As laid down by this Court as well as Calcutta High Court in the case of *Tejpal Khandelwal (supra)* and *Mohiddin Molla (supra)* respectively, it is clear that only because the property was being used for some other purpose for a temporary period, it would not lose its character of being a dwelling house. Fact remains that there was a dwelling house existing over the suit property and by demolishing the same, mother of the Petitioner had an intention to construct a new building thereon for her stay. But due to paucity of funds, she could not build the same. She for a temporary period let out the property to one Sohan Lal Chug to run his business. In view of the ratio in the case laws, as aforesaid, there remains no iota of doubt that the property in question had not lost its character of a dwelling house only because the dwelling house was demolished for construction of a new one and for a temporary period, it was being used for a purpose other than dwelling house.

11. The case law cited by Mr. Chakravarty, learned counsel for the Opposite Party No.1 explains the position of law to maintain an application under Section 4 of the Partition Act. It does not deal with a situation as in the case in hand.

12. As discussed above, the property having not lost its character of a dwelling house, in view of the intervening circumstances in the facts and circumstances of the case, the conclusion arrived at by learned trial Court in the impugned order is not sustainable.

13. In view of the discussions made above, I do not approve such finding. Accordingly, the impugned order under Annexure-7 is set aside and the matter is remitted to learned trial Court for fresh adjudication of the petition under Section 4 of the Partition Act on its own merit keeping in mind the discussion made hereinabove and giving opportunity of hearing to the parties concerned.

14. The CMP is, accordingly, allowed to the aforesaid extent. However, in the facts and circumstances, there shall be no order as to costs.

Issue urgent certified copy of the judgment on proper application.

