

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

RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 897 OF 2001

H.VASUDEVA PAI (DEAD) BY LRS

Appellant (s)

VERSUS

KAMARUNNISA

Respondent(s)

(With office report)

Date: 14/02/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE B.N. SRIKRISHNA

HON'BLE MR. JUSTICE LOKESHWAR SINGH PANTA

For Appellant(s)

Mr. S.N. Bhat, Adv.

Mr. D.P. Chaturvedi, Adv.

For Respondent(s) Mr. N.P.S. Panwar, Adv.

Mr. K.K. Mani, Adv.

UPON hearing counsel the Court made the following

O R D E R

The Appeal is allowed in terms of the signed order. However, there s
hall be

no order as to costs.

(K.K. Chawla)

Court Master

(Radha R. Bhatia)

Court Master

[Signed order is placed on the file]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 897 OF 2001

H.VASUDEVA PAI (DEAD) BY LRS

Appellant (s)

VERSUS

KAMARUNNISA

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O R D E R

The Appellant impugns the judgment of the High Court
of Karnataka rendered in a Second Appeal.

The brief facts necessary to dispose of this Appeal
are as under:

On 11.11.1975 certain property comprising land
admeasuring 15 cents was purchased by one Abbas along with
the Appellant and two of his brothers ('Pai brothers').
There was a partition effected between Abbas and the Pai

brothers as a result of which Abbas got 7 cents of the said property and the Pai brothers retained with them 8 cents of property comprising a partly built dwelling house

with land appurtenant thereto. On 20.12.1980 two of the

Pai brothers sold and transferred their 2/3rd share in the

said property to the respondent Smt. Kamarunnisa. The

respondent thereafter filed a suit for partition and

possession of the property purchased by her. A preliminary

decree was rendered by the Civil Court. At the time of

the final decree proceedings, the Appellant filed an

application under Section 4 of the Partition Act and

claimed that he had a preemptive right to buy the share of

the respondent since the property in question comprised a

dwelling house with the land appurtenant thereto and the

respondent was not a member of the family which owned the

dwelling house. The learned Civil Judge allowed the

application of the Appellant and declared that the

Appellant was entitled to purchase the 2/3rd share in the property from the respondent before us. An appeal was carried thereagainst to the District Judge. The learned District Judge allowed the Appeal and set aside the order of the learned Civil Judge holding that there was no evidence on record to show that the property belonged to a joint Hindu family. A Second Appeal filed by the Appellant before the High Court failed. Hence, this appeal.

Shri S.N. Bhat, learned counsel for the Appellant, drew our attention to the findings made by the learned District Judge in his judgment. The learned District Judge took the view that as Pai brothers were residing separately (the Appellant residing in the suit property while two of Pai brothers were residing at Gowri Mutt Street Mangalore), it could not be held that the dwelling house in question became a family house or that the family continued as a joint Hindu family.

The learned District Judge referred to Mayne's "Hindu Law and Usage" and emphasized the concept of a joint Hindu family and was at pains to point out that the evidence on record did not warrant a finding that the Pai brothers constituted a joint Hindu family. It was only on account of this finding that the learned Judge persuaded himself to hold that Section 4 of the Partition Act did not apply and that the Appellant had no preemptive right to purchase the share of the property bought by the respondent.

Learned counsel for the Appellant has referred to the judgment of this Court in *Dorab Cawasji Warden v. Coomi Sorab Warden* reported in (1990) 2 SCC 117. This was a case arising under Section 44 of the Transfer of Property Act. Section 44 of the Transfer of Property Act also has a similar provision which reads as under:-

"44. Transfer by one co-owner.-- Where one of two or more co-

owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

This Court pointed out that in order to attract the second paragraph of Section 44,

the subject matter of the transfer has to be a dwelling house belonging to an

undivided family and the transfer should be of a share in the same to a person who

is not a member of the family. In order to satisfy the first ingredient, the plaintiff

would have to show that the suit property is a dwelling house and it belongs to an

undivided family.

With regard to the restriction on the rights of a transferee for joint

possession, this court pointed out that the dominant purpose of the second

paragraph of Section 44 of the Transfer of Property Act is that there is a danger of

an injury or violation of the corresponding rights of the other members of the

family and an irreparable harm to the plaintiff and the court's interference would

be necessary to protect the interest of the plaintiff. After referring Sultan Begam v.

Debi Prasad, 1908 ILR 30 Allahabad 324, Nil Kamal Bhattacharjya v. Kamakshya

Charan Bhattacharjya, AIR 1928 Cal. 539, Khirode Chandra Ghoshal v. Saroda

Prasad Mitra, (1910) 7 IC 436 (vide paragraph 23), this Court observed that the

proposition of law stated in Udayanath Sahu v. Ratnakar Bej, AIR 1967 Orissa 139

was a correct statement of law. We may mention that all these judgments noted by

this Court were cases where a stranger to the family attempted to get joint

possession of the dwelling house on the ground that the stranger had purchased an

undivided share in the property. This Court pointed out in Dorab Cawasji's case

(supra), that the provisions of Section 4 of the Partition Act were pari materia with

the provisions of Section 44 of the Transfer of Property Act, 1882. It was observed

that the notions of coparcener property of a Hindu Joint Family were wholly

irrelevant in considering Section 44 of the Transfer of Property Act and what is

relevant for the purpose of such proceeding is whether the dwelling house belonged

to an undivided family. Says, the Court, "we have already pointed 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

Act" (vide paragraph 24).

In our view, the judgment of this Court in Dorab Cawasji's case (supra),

clinches the issue. Although the evidence in the present Appeal shows that two of

the Pai brothers were residing elsewhere, there is no evidence to show that qua the

suit property, Pai brothers had separated or that there was any inter se partition

effected vis-a-vis the suit property.

In these circumstances, we are of the view that the application made by the Appellant under Section 4 of the Partition Act was fully justified and the trial Court was right in allowing the said application.

In the result, we set aside the judgment of the High Court as well as that of the District Judge and affirm the judgment of the Civil Court allowing the Appellant's application under Section 4 of the Partition Act.

The Appeal is, accordingly, allowed. However, there shall be no order as to costs.

.....J.
(B.N. Srikrishna)

.....J.
(Lokeshwar Singh Pant)

New Delhi;

February 14, 2006.