APPELLATE CIVIL.

Before Richardson and Walmsley JJ.

PRAN KRISHNA BHANDARI

v.

SURATH CHANDRA ROY.*

1918

Jan. 25.

Partition—Suit for partition—Jurisdiction—Partition Act (IV of 1893) s. 4—"Court"—"Dwelling house."

A, B and C were the joint owners of a property. A sold his share to Z, Z instituted a suit for partition. B and C claimed to purchase Z's share under s. 4 of the Partition Act. The Court of first instance made a preliminary decree and appointed a Commissioner and subsequently made a final decree. B and C appealed. The lower Appellate Court remanded the case for the determination of the suit under s. 4 of the said Act :—

Held, that the word "Court" in s. 4 of the Partition Act included the Appellate Court. The latter like the trial Court was bound, upon any member of the family who was a shareholder undertaking to buy the share of the transferee, to make an appropriate order in pursuance of which the steps necessary to carry out the provisions of the section would be taken either in the one Court or in the other.

Held, also, that in connection with a conveyance or a partition of a "dwelling house" the word would generally mean not only the house itself but also the land and appurtenances which were ordinarily and reasonably necessary for its enjoyment.

Kshirode Chunder Ghosal v. *Saroda Prosad Mitra* (1) referred to.

SECOND APPEAL by Pran Krishna Bhandari, the plaintiff.

The facts are briefly these. The lands in dispute, comprising about 15 cottahs in area with a building,

* Appeal from Order, No. 230 of 1915, against the order of Upendra Chandra Mukerjee, Subordinate Judge of Hooghly, dated Feb. 18, 1915, reversing the order of Amrita Lal Mukerjee, Munsif of Howrah, dated Nov. 28, 1913.

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originally formed the joint property of three brothers. On the 19th October 1911, one of the brothers sold his one-third share to the plaintiff who was a stranger to the family. On the 27th February 1913, the plaintiff instituted a suit for partition of the property. On the 30th November 1913, the Court of first instance made a preliminary decree, and appointed a Commissioner who made a plan and carried out the division of the property. The latter was subsequently adopted by the final decree of the said Court made on the 28th November 1913. The defendants claimed the right to purchase the share sold under section 4 of the Partition Act, and they preferred an appeal. On the 28th February 1915, the lower Appellate Court remanded the case to the Court of first instance for the determination of the suit by making a valuation of the share and allowing the defendants to purchase the same in accordance with the said value.

From that decision the plaintiff preferred this appeal to the High Court.

Babu Mahendra Nath Roy and *Babu Manmatha Nath Roy*, for the appellant.

Babu Sib Chandra Palit, for the respondent

RICHARDSON J. This is an appeal from an order of the learned Subordinate Judge of Hooghly made under section 4 of the Partition Act (IV of 1893) in the course of a suit for partition. Under section 8 of the Act such an order must be deemed to be a decree within the meaning of section 2 of the Civil Procedure Code, so that an appeal lies therefrom to this Court. The property in question is a small property about 15 cottahs in area. There are some buildings upon it and a part of the area is occupied by a tank. The property was originally joint property belonging to three brothers. On the 9th October 1911, one of the three

brothers (defendant No. 1 in the suit) sold his one-third share to the plaintiff, a stranger to the family. The suit for partition was instituted by the plaintiff on the 27th February 1913, and the preliminary decree was made on the 20th November 1913. Then a Commissioner was appointed who made a plan and carried out a division of the property which was subsequently adopted by the Court in the final decree which was made on the 28th November 1913. In their written statement the defendants Nos. 2 and 3 (the owners of the remaining two-thirds share of the property) claimed the right to purchase the share sold, but thereafter they seem to have taken no active part in the proceedings up to the final decree. From the final decree, however, they preferred an appeal and in the memorandum of appeal and at the hearing, they again claimed and insisted on their right of purchase under section 4 of the Act. The learned Subordinate Judge, thereupon, made the order under that section to which the plaintiff takes exception. The points raised on behalf of the plaintiff are two in number.

It is contended in the first instance that the learned Subordinate Judge had no jurisdiction after the final decree in the suit had been made in the trial Court to make an order under section 4. As to that I agree with the learned Subordinate Judge. The terms of section 4 are quite general. It says that 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 and so forth. There seems to be no reason why the word "Court" should be confined to the trial Court and should not include the Appellate Court.

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The appeal is a continuation of the suit. If the section applies to the Appeal Court, as in my opinion it does, that Court like the trial Court, is bound upon any member of the family who is a shareholder undertaking to buy the share of the transferee, to make an appropriate order in pursuance of which the steps necessary to carry out the provisions of the section will be taken either in the one Court or in the other.

It has been held in a number of cases that an application under the section need not necessarily be made upon the institution of the suit but may be postponed till after the preliminary decree: *Kshirode Chunder Ghoshal* v. *Saroda Prosad Mitra* (1). If that is so, and an undertaking to buy given to the Court after the stage at which the preliminary decree is made, may or must be accepted, there seems no reason why the operation of the section should be restricted to the trial stage and should not also extend to the appellate stage of the suit.

Some reliance was placed on section 10 of the Act. That section provides that the Act should apply to suits instituted before its commencement in which no scheme for the partition of the property has been finally approved by the Court. The section merely defines how far the Act is to have retrospective operation. For the present purpose, the section appears to be entirely irrelevant.

The contention therefore that the Appellate Court had no jurisdiction, in my opinion, fails.

The second point turns upon the meaning of the words "dwelling-house" as used in section 4. It has been said that the word "house" is an ambiguous word and possibly some ambiguity attaches also to the compound word "dwelling-house". In connection,

(1) (1910) 12 C. L. J. 525.

however, with a conveyance or a partition of a dwelling-house, the word will generally mean not only the house itself, but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment: *Kshirode Chunder Ghosal* v. *Saroda Prosad Mitra* (1). As I have said the area of the whole property is only 15 cottahs. There are buildings upon it in which the defendants live and the learned Subordinate Judge has found that the land which was allotted to the plaintiff in accordance with the Commissioner's report is a curtilage appurtenant to the defendants' house. It is said that this finding rests on no evidence. The learned Subordinate Judge had before him the report of the Commissioner and the Commissioner's map. That being so, it is difficult to say that the learned Judge had before him no materials sufficient in law to support his conclusion.

No objection has been taken to the form of the Subordinate Judge's decree by which the final decree of the trial Court was set aside, and the case remitted to that Court to be dealt with according to the directions given. To put the matter beyond doubt, it may well be to add as to the costs which have been incurred in the trial Court; that those costs will be in the discretion of the Munsif. Subject to this addition to the Subordinate Judge's decree, the appeal should be dismissed with costs.

WALMSLEY J. I agree.

Appeal dismissed.

L. R.

(1) (1910) 12 C. L. J. 525, 535.