

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt, Chief Justice, and Mr. Justice Candy.

VAMAN VISHNU GOKHALE (ORIGINAL DEFENDANT No. 3), APPELLANT,
v. VASUDEV MORBHAT KALE AND ANOTHER (ORIGINAL PLAINTIFF
AND DEFENDANT No. 2), RESPONDENTS.*

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January 11.

Partition Act (IV of 1893), Sec. 4(1)—Application of section—Dwelling-house belonging to undivided family—Re-acquisition by members of such family after it has been sold to a stranger does not give any right under the section as against such stranger.

A dwelling-house belonged to four brothers, Krishnaji, Ramchandra, Vaman and Parashram, joint members of a Hindu family. In 1874 the shares of Krishnaji and Parashram were sold in execution of decrees against them, and in 1877 the remaining shares were sold, and finally the house became the property of the plaintiff and one Karandikar in equal moieties. The plaintiff sued Karandikar for partition and obtained a decree, but pending execution Karandikar conveyed his moiety back again to Ramchandra and Vaman. The brothers had continued to occupy the house notwithstanding the changes in ownership. Vaman now applied under section 4 of the Partition Act (IV of 1893) to be allowed to buy the plaintiff's moiety.

Held, that he was not entitled to the advantage given by the section. It is ownership, not occupation, that gives the right. After the sales in 1877 the house no longer belonged to an undivided family. Vaman and his brothers were then either tenants in the house or trespassers. The question was whether the dwelling-house at the time the shares therein, which had not been sold to Karandikar, were transferred to the plaintiff belonged to an undivided family. When the plaintiff purchased his moiety, he and Karandikar became the owners in common of the house, and as between them section 4 of the Partition Act had no operation. The subsequent purchase of Karandikar's interest by Ramchandra and Vaman did not confer upon them any rights which Karandikar did not possess. It was in their hands re-acquired

* Second Appeal, No. 795 of 1897.

(1) Partition Act (IV of 1893), section 4:—

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.

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ancestral property, but not property belonging to an undivided family within the meaning of section 4.

SECOND appeal from the decision of Ráo Báhádur M. R. Nadekarni, additional First Class Subordinate Judge of Ratnágiri with appellate powers.

The house in question originally belonged to Vishnu Bhikaji Gokhale, who died leaving four sons, *viz.*, Krishnaji, Ramchandra, Vaman and Parashram. In January, 1874, the shares of two of them, *viz.*, Krishnaji and Parashram, were sold in execution of a decree against them and were bought by one Karandikar. In 1877 a money decree was obtained against the heirs of Vishnu, and his (Vishnu's) interest in the house was sold in execution, and after passing through several hands was finally conveyed to the present respondent (and plaintiff) Vasudev Morbhat Kale. It was decided in a former suit (see I. L. R., 10 Bom., 451) that by his purchase he became entitled to one moiety of the said house and that Karandikar was entitled to the other.

He accordingly brought this suit for partition and obtained a decree, but pending execution, Karandikar in 1892 conveyed his moiety of the house to Ramchandra and Vaman, the sons of the original owner (Vishnu), and Vaman now applied under section 4 of the Partition Act (IV of 1893) to be allowed to purchase the plaintiff's share by paying him the value of it. His application was rejected. On appeal the Judge passed the following order:—

"I direct that the house be put to an auction sale in the presence either of the Subordinate Judge of Rájápur or the Názir of this Court as between plaintiff and defendants Nos. 2 and 3 (Ramchandra and Vaman), the appeal only, and given to the highest bidder on his paying half the amount of highest bid to the other party, the defendants Nos. 2 and 3 being at liberty to bid jointly or severally, and that if the sale be conducted by the Názir should not be completed without the sanction of the Subordinate Judge."

Vaman (original defendant No. 3) preferred a second appeal *M. B. Chaulal*, for the appellant Vaman (original defendant No. 3):—We have been all along in possession of the house although the interest of our two brothers Krishnaji and Parashram was sold in 1874. Notwithstanding the sale of their share the family continued to be a joint family, and our subsequent

purchase from Karandikar was effected by us as members of a joint family. The object of section 4 of the Partition Act is to give ancestral property to any of the members of a joint family under certain conditions. Vaman, the appellant, has continued to be a co-sharer in the joint family and he can claim the benefit of the section, which confers a right of pre-emption upon a member of a joint family.

Narayan F. Gokhale, for the respondent (plaintiff):—Section 4 of the Partition Act does not apply here; that section applies where the joint family have remained owners of the house, but a share of it has been sold to a stranger.

FARRAN, C. J.:—The dwelling-house with regard to which the present appeal has been brought, originally belonged to Krishnaji, Ramchandra, Vaman and Parashram (since deceased), the sons of Vishnu, deceased, but liable to be sold for Vishnu's debts.

In January, 1874, the shares of Krishnaji and Parashram therein were sold in execution of a decree against them, and were purchased by one Karandikar. The house after that sale belonged to the remaining sons of Vishnu on the one side and Karandikar on the other as tenants-in-common.

In 1877 in execution of a money decree obtained against the heirs of Vishnu, his interest in the house was sold to Joglekar, who sold to Hardikar, who in turn conveyed to the present plaintiff Kale. It has now been decided that Karandikar and the plaintiff under the above sales and purchases each became entitled to a moiety of the dwelling-house. In 1892 Karandikar conveyed his moiety of the house to the above-mentioned Ramchandra and Vaman.

In execution of a partition decree made in the present suit the question arises whether under the above circumstances the defendant Vaman, the appellant before us, is entitled to take advantage of the provisions of section 4 of Act IV of 1893. It could be added that the sons of Vishnu have never actually had the possession of the house. The latter circumstance, which Chaubal relied on, does not appear to us really to affect the question. It is the ownership of the dwelling-house and not equal occupation which brings the provisions of section 4

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of the Partition Act into play. The family of Vishnu after the sale in 1877 were either tenants in the house or trespassers. In neither capacity would they possess any privilege of pre-emption. The question is, whether the dwelling-house at the time, when the shares therein which had not been sold to Karandikar were transferred to the plaintiff, belonged to an undivided family. The answer must, we think, be in the negative. The house then belonged to Karandikar and the heirs of Vishnu whose shares had not been conveyed to Karandikar. When the latter shares were transferred to the plaintiff, he and Karandikar became the owners in common of the house, and it is plain that, as between them, section 4 of the Partition Act had no operation. The subsequent purchase of the interest of Karandikar by Ramchandra and Vaman did not, in our opinion, confer upon them any rights which Karandikar did not possess. It was in their hands re-acquired ancestral property, but not property belonging to an undivided family within the meaning of section 4.

We are, therefore, of opinion that the lower appellate Court took a correct view of the case. The order which it passed was really an order under section 3, clause (2), and no exception can be taken to it except that the Court ought to have valued the house before putting it up for auction between the parties as directed by section 3. This can still be done. The provisions of section 6, clause (3), have, we think, no application to the present case. Decree confirmed with costs.

Decree confirmed

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