

PETITIONER:
ANIL KUMAR MITRA & ORS.

Vs.

RESPONDENT:
GANENDRA NATH MITRA & ORS.

DATE OF JUDGMENT: 28/11/1996

BENCH:
K. RAMASWAMY, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

This appeal by special leave arises from the judgment of the Division Bench of the Calcutta High Court, made on April 29, 1988 in Original Decree No. 52/78.

This case has a chequered history. The property bearing No.10-D, Puddapukur Road, P.S. Bhowanipur, Calcutta-20 is the subject matter of an endless litigation at four stages. Initially, the property was shared by two brothers Haridas and Gunendra in equal shares. Haridas hypothecated his half share to Rabindra Nath Bose, who had filed Title Suit No. 461/1927 for foreclosure of mortgage and a preliminary decree therein was granted on April 7, 1927. A decree for a sum of Rs. 9,222/- was passed. Since the amount was not paid the property was brought to sale and a final decree was passed on August 16, 1927 in which Rabindra Nath Bose had purchased the half share of Haridas. A sale certificate in that behalf was given on February 22, 1928.

It would appear that Gunendra a minor represented by his mother Sailabala, filed Title Suit No.13 of 1929 which was ultimately compromised by Sailabala and Rabindra Nath Bose by Compromise decree dated July 17, 1929 in which she received certain amount, the details of which are not material. Thereafter, Rabindra Nath Bose filed Title Suit No. 69/1928, which was renumbered as 128/1929, for partition and separate possession of his half share purchased by him towards the share of Haridas. A preliminary decree in that behalf was passed on December 17, 1931 and a final decree was also passed on July 18, 1934 in which Plot No.A was allotted to Gunendra, represented by his mother Sailabala and a sum of Rs. 5,000/- in addition was given. Thus, it could be seen that the joint family status of Haridas and his brother Gunendra had come to be severed after passing of the preliminary decree on December 17, 1931. Another Title Suit No. 71/1965 filed by the appellants in the court of Fourth Subordinate Judge at Alipore for partition of the properties had by Sailabala with Rabindra Nath Bose claiming that it was a joint family property and the consideration for discharge of the mortgage with the Rabindra Nath Bose had passed on from the joint family property. Therefore, they claimed for partition of the half share had by Gunendra

at a partition action laid by Rabindra nath Bose in the partition Title Suit No. 129/1929. The question is whether the appellants can claim partition of the share had by Gunendra, represented by his mother Sailabala, as guardian. Both the trial Court and the High Court rejected the relief.

Shri Arun Prakash Chatterjee, learned counsel appearing for the appellants, contends that the High Court has found that the respondents have not proved their capacity to purchase the property after paying consideration for discharge of the mortgage debt and, therefore, in the absence of their proof of capacity to discharge the debt, it must necessarily be construed that the consideration had flown from the joint family. It is also contended that there is no proof of the severance of the status of the joint family and joint family continues to exist and, therefore, courts below have committed manifest error of law in not passing the decree for partition. We find no force in the contentions. We requested the learned counsel to read out from the plaint whether there is any averment made in the plaint, viz., any averment or issue raised after the final decree was passed in Title Suit No. 128/1929 and whether there is any reunion of the members of both the branches and whether the share had by Gunendra was blended so as to be treated as Joint family property. Learned counsel sought to read out to us the plaint as amended and sought to contend that it gives the indication that they remained to be members of the joint family and, therefore, that gives a clue that joint family continued to exist. We fail to appreciate the stand taken by Shri Arun Prakash Chatterjee. After preliminary decree was passed in Title Suit No. 128/1929, the joint family status existing prior to the date came to a terminus and, therefore, there is no presumption thereafter that both Haridas and Gunendra continued to be members of the joint family. It is true that by the acts of the parties that even after the previous partition, the continued to be members of the joint family. But it should be by conduct and treatment meted out to the properties by the members of the family in this regard. It must be pleaded as a fact and proved that after the preliminary decree was passed on December 17, 1931 and both branches were reunited and Gundndra through his mother had blended the share had in final decree in the joint family property, the parties treated and enjoyed it in that character as joint family property. Unfortunately, there is no such plea nor proof. Under these circumstances, it cannot be held that the joint family continues to exist in the absence of which the question of partition does not arise. Under these circumstances, we do not find any illegality in the decree passed by the trial Court as affirmed by the High Court.

The Civil Appeal is dismissed, No costs.