

IN THE HIGH COURT AT CALCUTTA

(Civil Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Bibhas Ranjan De

C.O. 318 of 2023

Mrs. Purnima Das @ Purnima Das Chowdhury & Anr.

Vs.

Mrs. Bipasha Raha & Anr.

For the Petitioners : Mr. Sandip Kumar Bhattacharyya, Adv.
Mr. Aneek Pandit, Adv.
Ms. Atasi Sarkar, Adv.
Ms. Sonakshi Mitra

For the Opposite parties : Mr. Gopal Chandra Ghosh, Adv.
Ms. Jayeta Kaunda, Adv.
Mr. Rajkrishna Mondal

Heard on : March 20, 2023

Judgment on : April 21, 2023

Bibhas Ranjan De, J.

1. I am dealing with the revision application under Article 227 of the Constitution of India whereby petitioners challenged

proceeding of Misc. Case No. 09 of 1999 arose out of a petition under Section 4 of the Partition Act, 1893 (hereinafter referred to as Act, 1893), pending before the Learned Civil Judge (Senior Division), 9th Court, Alipore, South 24 Parganas (South).

Background in brief:-

2. The property in question being undivided dwelling house originally belonged to Dilip Kumar Dutta and Pradip Kumar Dutta. Dilip Kumar Dutta died leaving behind his wife, petitioner of the Misc. Case, and two married daughters. Pradip Kumar Dutta also died leaving behind his wife and sons (OP Nos 1 & 2 in the Misc. Case) and OP No. 3 Mihir Kumar Das is a tenant in a portion of the suit property. The heirs of Dilip took out a Partition Suit (T.S. 33/1997) against legal heirs of Pradip Kumar Das incorporating said Mihir Kumar Das as proforma defendant. In the partition suit said Mihir Kumar Das claimed himself the owner of share of Pradip Kumar Dutta by purchase. Thereby, said Mihir Kumar Das was transposed as defendant no. 3.
3. During pendency of the partition suit heirs of Dilip Kumar Das (Co-owners) took out an application under Section 4 of the

Act, 1893 against legal heirs of Pradip & Mihir Kumar Das i.e. all defendants of the partition suit.

4. Only Mihir Kumar Das contested the Misc. Case arose out of the application under Section 4 of the Act 1893, on some issues but, issue, high on the list, is that the application under Section 4 of the Act, 1893 cannot be taken out by the co-owners who filed the partition suit.
5. I have had the opportunity to peek into judgment passed by Hon'ble Division Bench in the Appeal from the original decree No. 107/1999 in respect of the property involved in the partition suit. Clear mandate of the Hon'ble Division Bench was that the property in question was unpartitioned although some specific portion were in possession of the parties by mutual arrangement. That mandate remained unchallenged.
6. Therefore, only question to be adjudicate by this Court is whether co-owner being a party to a partition suit can pursue the right of preemption by filing an application under Section 4 of the Act 1893.
7. Learned advocate, Mr. Sandip kumar Bhattacharyya appearing on behalf of the petitioners assailed the proceeding of the Misc. Case no. 9 of 1999 on the proposition that right of

pre-emption under Section 4 of the Act, 1893 can only be invoked by the co-sharer of the property if transferee sues for partition not otherwise. Mr. Bhattacharyya has contended that admittedly partition suit was not filed by Mihir Kumar Das who is a stranger purchaser/transferee.

8. Mr. Bhattacharyya raised another issue of limitation and has submitted that Article 97 of the Limitation Act, 1963 bars the right of pre-emption claimed beyond one year from the date when dispute regarding purchase of property surfaced.
9. In support of his argument Mr. Bhattacharyya relied on a case of ***A.R. Antulay Vs. R.S. Nayak and another*** reported in ***(1988) 2 Supreme Court Cases 602*** and ***Shalini Shyam Shetty & Anr Vs. Rajendra Shankar Patil*** reported in ***(2010) 8 Supreme Court Cases 329***.
10. Per Contra, Learned Advocate, Mr. Gopal Chandra Ghosh, appearing on behalf of the opposite party has drawn my attention to the paragraph 13 of the written statement filed by the stranger purchaser, Mihir Kumar Das (defendant no. 3 in the partition suit, quoted in the judgement passed in Appeal from original decree no. 107 of 1999.

11. Mr. Ghosh, pointing out the relevant paragraph of written statement filed by the defendant no. 3, stranger purchaser, has submitted that defendant no. 3 not only participated in the proceeding for partition but also expressed his inclination for partition of the suit property. Thereby, Mr. Ghosh has equated the inclination for partition with one words “ Sues for partition” inscribed in Section 4 of the Act, 1893.
12. In support of his contention, Mr. Ghosh relied on the ratio of the case of ***Kertick Chandra Basu & Anr. Vs. Subal Chandra Mandal*** reported in ***1989 (1)CLJ 439***, ***Gautam Paul Vs Debi Rani Paul and another*** reported in ***AIR 2001 SUPREME COURT 61***, ***Babulal Vs. Habibnoor Khan (Dead) by L.Rs. and another*** reported in ***AIR 2000 SUPREME COURT 2684***, ***Gyan Chand and another Vs. Sumat Rani and others*** reported in ***(2002) 9 Supreme Court Cases 477*** and ***Ghantesher Ghosh Vs. Madan Mohan Ghosh and another*** reported in ***(1996) 11 Supreme Court Cases 446***.
13. In ***Antulay*** (supra), Hon’ble Apex Court observed that the power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law

and no Court, whether superior or both combined can enlarge the jurisdiction of a Court or divest a person of his rights of revision and appeal.

14. *Antulay* (supra) also ruled that jurisdiction of Courts comes solely from the law of the land and cannot be exercised otherwise. Hon'ble Apex Court also cautioned that the Court should take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in Court.

15. In *Salini Shyam Shetty* (supra) Hon'ble Apex Court mandated that jurisdiction of superintendence under Article 227 is both administrative and judicial superintendence. In exercise of jurisdiction under Article 227, the High Court, apart from annulling the proceeding, can also substitute the impugned order by the order which the inferior Tribunal should have made. Power under Article 227 can be exercised by the High Court sue moto as a custodian of justice. The jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State.

16. Therefore, either in **Antulay** (supra) or in **Salini Shyam Shetty** (supra) Hon'ble Apex Court never restricted the power of Court to interpret the statute.

17. In the case, interpretation of words "Sues for partition" is in issue. Here in our case admittedly partition suit was not filed by the stranger purchaser/transferee. Before entering into the issue, I would like to remind the provision of Section 4 of the Act, 1893 which 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."

18. Hon'ble Division Bench of this Court in **Kertick Chandra Basu** (supra) interpreted the words "to sue" as under:-

"6. The words "to sue" may be applied indifferent either to the defendant or the plaintiff and it signifies not only "to protect" but also "to defend" or to do something which the law requires for the better prosecution or defence of the cause (Stroud's Judicial Dictionary). This interpretation has been adopted in Haradhane Haider v. Umacharan Karmakar and [Abu Isha Thakur v. Dinabandhu Banik](#) (51 CWN 639). In Haradhane Haider (supra) there were only two co-sharers, one original and another by purchase as we find in the instant case. It was held that the original co-sharer can sue for partition and still ask for pre-emption. As pointed out in Abu Isha Thakur (supra), "the object of the section is to prevent intrusion of strangers into the dwelling house of an undivided family" and that "this object would be frustrated if a stranger purchaser forces himself into the dwelling house of an undivided family, drives other co-owner to file a suit as plaintiff and then figuring as a defendant is allowed to defeat the claim for pre-emption Under [Section 4](#)". Similar view was subscribed in [Satyendu Kundu v. Amar Nath Ghosh and Ors.](#), reported in AIR 1964 Cal. 54. It was held that even where a suit for partition was not brought by the transferee but by a member of the joint family [Section 4](#) would apply. In the Division Bench decision in [Santosh v. Kalipada](#) (AIR 1951 Cal. 278 at 280) Anil Kumar Sen, J. held that a co-sharer can ask for pre-emption whether he is arrayed as a plaintiff or a defendant in a partition suit. In a later Division Bench decision in [Gopal v. Kalipada](#) (1987-1 CHN 214) A. M. Bhattacharya, J. reiterated the same view. The weight of authority is very much against the submission made on

behalf of the appellant and,-therefore, the argument on this score is bound to fail.”

19. In **Gautam Pal** (supra) Hon’ble Apex Court opined as follows:-

“ 23. We are in agreement with this opinion.

There is no law which provides that co-sharer must only sell his/her share to another co-share. Thus stranger/outsideers can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of pre-emption, under Section 4, is exercised the conditions laid down therein have to be complied with. As seen above one of the conditions is that the outsider must sue for partition, Section 4 does not provide the co-sharer a right to preempt where the stranger/outsideer does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider anytime he/she wants. Thus even though a liberal Interpretation may be given, interpretation cannot be one which gives a right which the Legislatures clearly did not intend to confer. The Legislature was aware that in Suit for

Partition the stranger/outsider, who has purchased a share would have to be made a party. The Legislature was aware that in a Suit for Partition the parties are inter-changeable. The Legislature was aware that a Partition Suit would result in a decree for Partition and in most cases a division by metes and bounds. The Legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share. 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 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 sued for partition. The Interpretation given by the Calcutta, Patna, Nagpur and Orissa High Courts would result in nullifying the express provisions of [Section 4](#), which only gives a right when the transferee sues for partition. If that interpretation were to be accepted than in all cases, where there has been a sale of 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.”

20. Hon’ble Apex Court observed in **Babulal** (supra) as follows:-

“ 10. Therefore, one of the basic conditions for applicability of [Section 4](#) as laid down by the aforesaid decision and also as expressly mentioned in the Section is that the stranger/transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. It is, of course, true that in the said decision it was observed that even though the stranger transferee of such undivided interest moves execution application for separating his share by metes and bounds it would be treated to be an application for suing for partition and it is not necessary that a separate suit should be filed by such stranger transferee. All the same, however, before [Section 4](#) of the Act can be pressed in service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move under [Section 4](#) of the Act because of the stranger transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased. This condition is totally lacking in the present case. To recapitulate, respondent No. 1-decree holder himself, after getting final decree, had moved an application under [Section 4](#) of the Act. Appellant, who was a stranger purchaser, had

not filed any application for separating his share from the dwelling house, either at the stage of preliminary decree or final decree or even thereafter in execution proceedings.”

21. Gyan Chand (supra) announced as follows:-

“4. Mr. S.V. Deshpande, learned Counsel representing the respondents, does not question the application of the law laid down in Gautam Paul's case (supra) to the facts of the case in hand. However, he contends that this Court in Gautam Paul's case has not taken into consideration the full bench judgment of the Gujarat High Court in the case of Sarfuddin Malek. Hence, it requires reconsideration. It is true that the full bench judgment of the Gujarat High Court (supra) is not cited before this Court in Gautam Paul's case (supra) but that cannot be a ground for us not to follow the said judgment which is of a coordinate bench of this Court. That apart, we are in respectful agreement with the law laid down by this Court in Gautam Paul's case. In the said view of the matter, this appeal is allowed and following the judgment in Gautam Paul's case (supra), we set aside the judgment of the High Court and restore that of the trial court. No costs.”

22. Ghantesher Ghosh (supra) discussed as follows:-

“17. As a result of the aforesaid discussion, it must be held that [Section 4](#) of the Act can validly be pressed in service by any of the co-owners of the dwelling house belonging to undivided family pending the suit for partition till final decree is passed and thereafter even at the stage of execution of the

final decree for partition so long as the execution proceedings have not effectively ended and the decree for partition has not been fully executed and satisfied by putting the shareholders in actual possession of their respective shares. Beyond that stage, however, [Section 4](#) will go out of commission.”

23. The position is well settled that Section 4 of the Act, 1893 deserves a liberal construction because its very object and purpose is to preserve the integrity of the dwelling house.

24. Applying the ratio in the aforementioned decided case to the case in hand the position that emerges is that stranger/purchaser has to seek actual division and possession either in the suit or in execution proceeding for exercising right of preemption by the co-sharer in terms of Section 4 of the Act, 1893. Therefore, “Sue for partition” depicted in Section 4 of the Act, 1893 does not necessarily mean that the strangers/purchaser has to file the suit for partition. It is sufficient if the stranger/purchaser also sought for partition in the proceeding brought in at the instance of co-sharer.

25. In the case in hand, relevant portion of the written statement filed by petitioner/transferee quoted in the judgement in appeal from the original decree no. 107 of 1999 (by the Division Bench of this Court) and to add to that order

impugned 16.05.2007 allows to be perceived that transferee himself claimed partition in his written statement and in his evidence by saying: “ we pray for partition of our share in the suit house.”

26. In this case, in my humble opinion, petitioner/transferee is said to have claimed partition of share in dwelling house satisfying condition envisaged in Section 4 of the Act, 1893.

27. Mr. Bhattacharyya further raised an issue of limitation under Article 97 of the Limitation Act, 1963 in exercising right of preemption.

28. But, I find hardly any merit in the submission advanced on the issue of limitation under Section 97 of the Act, 1963 as right of preemption under Section 4 of the Act, 1893 can be invoked at any point of time in the proceeding of partition.

29. With the aforesaid observation the instant application under Article 227 of the Constitution of India stands rejected. Order impugned stands affirmed.

30. All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.

- 31.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]