

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**FMA 3390 of 2014
Bijan Kumar Ghosh.
Vs
Swapan Mondal & Ors.**

For the Appellants : Mr. Debjit Mukherjee
Mr. Kaustav Bhattacharya
Ms. Susmita Chatterjee
Ms. Dipanwita Ganguly

For the Respondents : Mr. Buddhadeb Ghosal
Mr. Ramprokas Banerjee
Mr. Promode Ranjan Chatterjee

Heard on : 05.09.2023

Judgment on : 04.10.2023

Ajoy Kumar Mukherjee, J.

1. This appeal has been preferred against Judgement and order dated 24th April 2014 passed by Learned Additional District Judge, 5th court Howrah, in Title Appeal no 152 of 2012, which was preferred against judgement and decree dated 28.08.2012 passed by Civil Judge (Sr.Division) 2nd court, Howrah in Title Suit no 25 of 1998.

2. Brief background of the present case needs to be stated at the outset. The property in dispute comprising of dwelling house over land measuring about 2 katha 7 chattak 20 sq ft, known as 6/2, Asutosh Mukherjee Lane, originally belonged to one Bhola Nath Majilya who during his lifetime

executed a registered deed of "*Nirupan Patra*" on 10th July 1985, by which he settled the said dwelling house in favour of his three sons namely, Subuddhi Bhajan Majilya, Harekrishna Majilya and Debnarayan Majilya in equal share. Thereafter Subuddhi Bhajan mortgaged his 1/3rd share in the said premises in favour of respondent no. 1 herein, Swapan Mandal by executing an ostensible deed of sale and simultaneously an agreement of reconveyance was also executed on the same date. Subsequently on 16th Sep 1998, said respondent no. 1 Swapan Mandal reconveyed the property by executing a registered deed of Re-conveyance in favour of Subuddhi. Thereafter on 11th April 1997, aforesaid Harekrishna and Debnarayan sold their 2/3rd share of the said premises in favour of appellant herein, Bijon Ghosh. On 26th February 1998 appellant/Bijon filed Title Suit no. 25 of 1998 against said Subuddhi Bhajan and Swapan for partition and injunction relating to aforesaid suit building. During pendency of the said partition suit, Subuddhi Bhajan i.e. defendant no 2 of that suit filed one Misc. case being 5 of 2000 under section 4 of the Partition Act 1893, seeking pre-emption of the transferred portion to the stranger purchaser i.e. appellant herein.

3. Learned Trial Court heard the partition suit as well as aforesaid Misc. case seeking Pre-emption analogously and by the judgement and decree dated 28.08.2012 was pleased to dismiss aforesaid Misc. case no. 5 of 2000 on the ground of limitation relying upon section 97 of the Limitation Act and decreed the partition suit being Title Suit no. 25 of 1998 in preliminary form.

4. Being aggrieved by that judgment and decree, the substituted defendant/respondent no 2 series herein preferred appeal being Title Appeal no. 152 of 2012 before Learned District Judge, Howrah, which was

subsequently transferred before Additional District Judge, 5th court, Howrah for disposal. The appellate court vide its judgement dated 24th April 2014 was pleased to allow the said appeal after setting aside the judgment and decree passed by the learned Trial Court and sent back the suit on remand to the Trial Court for hearing afresh the Misc. case no. 5 of 2000.

5. Being aggrieved by the aforesaid judgment of remand, passed by the first appellate court the appellant/plaintiff have preferred this Misc. Appeal before this court. While admitting the Misc. Appeal this court was pleased to formulate following substantial questions of law :-

- (i) *Whether the Ld. Judges in the courts below, substantially erred in law in not considering the provisions of Articles 97 of the Limitation Act, which says that the period of Limitation to Pre-empt a property is one year?*
- (ii) *Whether the ld. Judge in the lower appellate Court substantially erred in law in not considering that the application for pre-emption under Section 4 of the Partition Act was barred by limitation in view of Article 97 of the Limitation Act?*

DECISION

6. At the outset it is to be mentioned that learned Trial Court rejected defendants prayer for pre-emption filed under section 4 of the Partition Act stating that in the instant case the sale was effected on 11.04.1997 and the Trial Court observed that Article 97 provides that the period of limitation to pre-empt the property is one year, which runs from the time when the purchaser takes physical possession of the property. In that view of the matter the right of pre-emption ought to have exercised within 11.04.1998. Since the prayer for pre-emption was filed long after one year and since there was no prayer for condonation of delay, the Trial Court rejected defendant's prayer for pre-emption with further observation that pre-

emption right being a weak right, should have filed ordinarily within the prescribed period of a limitation.

7. Learned Appellate Court did not agree with said observation and relying upon a judgment reported in **72 CWN 128 (Birendra Nath Banerjee Vs. Smt. Snehalata Devi & Ors.)** observed that an application of pre-emption under Section 4 of the Partition Act can be made at any stage of the suit and the law of limitation does not apply in such case and accordingly she set aside the Trial Court's judgment and remanded the case for disposal of the application of pre-emption filed by Subuddhi Bhajan afresh and if defendant's pre-emption case fails, the decree passed by Trial Court will be affirmed.

8. Before going to further details let me reproduce Section 4 of the Partition Act

Section 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.

9. In view of the aforesaid provision of law it is quite clear that for the applicability of Section 4 at any stage of the proceeding the following condition must be satisfied as held by Apex Court in **Ghantesher Ghosh vs. Madan Mohan Ghosh and others** reported in **AIR 1997 Supreme court 471 (Para 4)**.

- (i) A Co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;*
- (ii) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;*
- (iii) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the concerned co-owner;*
- (iv) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and*
- (v) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the Court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house.*

10. In the said judgment the Apex Court has also reiterated the object of the said Act which is to prevent the introduction of any foreign element into the group of the family members and its aim is to maintain homogeneity in respect of the entire family. The object of such a right being the avoidance of a disagreeable stranger and to prevent the intrusion of stranger into the family residence which is allowed to be possessed and enjoyed by the members of the family alone inspite of the transfer of a share to the stranger.

11. In the instant case there is no dispute about fulfilment of the aforesaid conditions for filing a pre-emption Misc case by the defendant /pre-emptor. The only dispute that has been raised by the appellant is that plaintiff purchased undivided 2/3 share of the property on 11.04.1997 and defendant no 2 filed written statement on 20.06.1998, opposing partition

suit and long thereafter on 27.01.2000, he filed Misc. case seeking pre-emption under section 4 of the Partition Act and as such the prayer for pre-emption is whether barred under article 97 of the Limitation Act. Article 97 of the limitation act runs as follows:-

To enforce a right of preemption whether the right is founded on law or general usage or on special contract.	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered.
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12. It is no longer *res integra* that an application for preemption under section 4 of the Partition Act can be made at any stage, of partition suit so long the entire partition decree is not satisfied. It is only when the decree engrossed on stamp paper, the joint title of the parties comes to an end and the parties ceases to be a co-sharer. In ***Bimalendu Chatterjee and others. vs. Sarita Chhyajlani and others*** reported in **(C.O 1374 of 2000)**, a co-ordinate bench of this court observed in paragraph 25, 26, 27 as follows:-

25. A final decree for partition takes effect not from the moment of passing of decree but from the time such decree is engrossed on stamp papers. Once it is so engrossed, the new separate title relates back to the date of passing of decree. No execution can be started unless the decree is so engrossed. Thus, after a decree is drawn up on stamp papers, the joint title of the parties comes to an end and the parties cease to be co-sharers. Now it is settled by the Apex Court in the case of Ghantesher vs. Madan Mohan (supra) that the application under section 4 of the Act can be filed for the first time in the execution proceedings if a stranger tries to take possession. The fact that an execution case has been filed necessarily follows that the decree has been engrossed on stamp papers and consequently it implies that by that time the erstwhile co-sharers have acquired separate title.

26. Thus, in the aforesaid decision, the Apex Court has approved the position that even after co-sharers have become separate in title they can maintain an application for pre-emption. All that is necessary is that the decree for partition must not be fully satisfied.

27. Therefore, even if the petitioners are in possession of their respective allotments, so long the entire decree is not satisfied they can maintain such application if a stranger purchaser tries to take possession in execution of the final decree for partition.

13. In an old judgment passed by a Divisions Bench of this court in ***Nirankar Sashi Roy and another vs. Swarganath Banerjee***, reported in ***AIR 1926 Cal 95***, while interpreting the terms “court” appearing in section 4 of the Partition Act observed that the word “court” is not confined to the Trial Court, but the power conferred by the section may be exercised by an appellate court and therefore, a Court of Appeal is as much entitled to pass an order under section 4 as the Trial Court and the right conferred by section 4 may be exercised at any time before the final allotments take place.

14. In the subsequent decisions the same consistent view was expressed by Apex Court and the High Courts. In ***Birendra Nath Banerjee vs. Sneha Lata Devi and another***, reported in ***AIR 1968 Cal 380***, it was observed in paragraph 14 as follows:-

14. Of the above again, the decision in 49 Cal LJ 136 : (AIR 1929 Cal 269) (supra) may also be taken as an authority for the proposition that in regard to such an application, the right arises from day-to-day, while the partition suit is pending, and no matter that the application has been made beyond three years of the date of the preliminary decree, it will still be in time. This is with regard to the second contention of the opposing respondents. The right of pre-emption under the aforesaid statutory provision is a right, given by the statute, and on its wording, it subsists so long as the suit remains pending, or, in other words, so long as the suit has not been concluded or terminated by an effective final decree for partition. In the instant case, applying the above test, the plea of limitation in respect of the application must be rejected. The contesting respondents' second objection, also, to the appellant's above application must, accordingly, be overruled. That view will also be supported, by the decision of this Court in (1882) ILR 8 Cal 420.

15. In ***Ghantesher Ghosh case (supra)*** the Supreme Court approved the same view in paragraph 17 which runs 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 the 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.

16. In ***Sharada Verma vs. Dilip Gupta and others***, reported in **(2000) 10 SCC 560** Supreme Court observed that an application under section 4 is maintainable even at the execution stage.

17. Since it is well settled in view of aforesaid judicial pronouncements that right of pre-emption under section 4 of the Partition Act is a right given by the statute, on its wording, it subsists so long as the suit remains pending or the suit has not been concluded or terminated by an effective final decree of partition. An application under section 4 of the partition act, can only be made in a pending partition suit for which the cause of action arose upon institution of a partition suit and such a cause of action being a recurring one, the provision of Article 97 of the Limitation Act cannot have any application therein. On a bare reading of Article 97 of the Limitation Act it is clear that it speaks of an independent preceding for pre-emption and as such it cannot have any application in a prayer for pre-emption made under Section 4 of the Partition Act, which can only be made in a pending partition suit.

18. In ***Madhukar Pranjivan and others vs. Jagmohan Narottam and others***, reported in **1986 (1) CLJ 241** the same question arose before a Coordinate Bench of this court and relying upon the case of **Birnedra Nath Banerjee (supra)** this Court is of clear view that in regard to an application for pre-emption the right arises from day to day, while the partition suit is pending and no matter that the application has been made beyond 3 years of the date of preliminary decree, it will still be in time. In other words right

of pre-emption under section 4 subsists so long as the suit remains pending and has not been concluded or terminated by an effective final decree for partition.

19. The applicability of Section 97 of the Limitation act in an application under Section 4 of the Partition Act in a pending partition suit, again came up for consideration before this court in **Soumen Paul vs. Babulal Rojha and others** reported in **2002(1)CHN 398**, where it was held in paragraph 6,7,8,9 as follows :-

“6. Upon close scrutiny of section 4 it appears that for the purpose of invoking the right of pre-emption by a co-sharer the following conditions must exist (a) there must be a dwelling house belonging to an undivided family, (b) a share thereof has been transferred to a person who is not a member of such family (c) the transferee has sued for partition. In the absence of any of these conditions the provision of the said section is not attracted. The said section therefore on its face has its applicability only in the partition suit and on its terms does not prescribe for any time frame for invoking the provisions thereof.

7. At the same time the law of limitation being the rules of procedure operates to bar the remedy but it cannot extinguish the right itself. The section 4 of the Partition Act confers a right on any member of a family being a shareholder of a dwelling house belonging to an undivided family to buy back a share of such a dwelling house which has been transferred to a person who is not a member of such family. In terms of the said section such right of pre-emption can be invoked only after a suit for partition is instituted and not before that. The Division Bench of this court in a decision reported in 72 CWN 128 (Birendra nath Banerjee vs. Smt. Snehalata Devi & Ors.) held in paragraph 12 of the said report that it is well settled now that an application for pre-emption under section 4 of the partition Act can be made at any stage of the suit or, in other words, at any stage, while the suit is pending. Furthermore, in that case the suit was treated as pending as because an appeal against the final decree passed in the suit was pending. In the said judgment it was further held that the decision reported in 49 CLJ 136, (smt. Sattyavama Dey Vs. Jatindra Mohan Dev & Ors.) is an authority for the proposition that in regard to an application for pre-emption under section 4 of the Partition Act, the right arises from day to day while the partition suit is pending and no matter that the application has been made beyond three years of the date of the preliminary decree, it will still be in time.

8. it was further held in the said judgment that the right of pre-emption under the aforesaid statutory provision is right, given by the statute, and on its wording, it subsists so long as the suit remains pending, or, in other words so long as the suit has not been concluded or terminated by an effective final decree for partition.

9. On the analogy of the principle that the right of pre-emption under section 4 of the Partition Act is exercisable in a pending partition suit at any stage,

the rules of procedure as per Article 97 of the Limitation Act will have no application in relation to an application for pre-emption in the pending partition suit. Because the right of pre-emption under section 4 is not lost by the fact that the stranger purchaser has obtained possession of the whole or part of the property sold to him as the said section 4 does not make any difference for the purpose of its application, whether the transferee is in possession of the dwelling house or not. The substantive right of pre-emption conferred by the statute being thus irrespective of delivery of possession in favour of the stranger purchaser and exercisable in a pending partition suit, the bar of such remedy under Article 97 of the Limitation Act cannot have application so long the partition suit is pending. Thus, an application under section 4 of the said Act if made in a pending partition suit, for which the cause of action arose upon institution of such a partition suit and such a cause of action being a recurring one pending such partition suit, the provision of Article 97 of the Limitation Act cannot have any application therein”.

20. In view of aforesaid consistent observation in connection with the applicability of Article 97 of the Limitation Act in a pre-emption proceeding, initiated in a partition suit, I am of the firm opinion that the court below is absolutely justified in passing the order impugned dated 24.04.2014. The order impugned dated 24.04.2014 is affirmed.

21. In such view of matter **F.M.A 3390 of 2014** stands dismissed.

There will be no order as to costs.

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

(AJAY KUMAR MUKHERJEE, J.)