

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

Present:

The Hon'ble Justice Sugato Majumdar

SA 244 of 2012

Biswanath Ghosh & Ors.

Vs

Mirarani Ghosh

For the Appellants : Mr. Rabindranath Mahato, Adv.

For the Respondent : Mr. Suprabhat Bhattacharya, Adv.

Hearing concluded on : 11.06.2026

Judgment on : 18.06.2026

Sugato Majumdar, J. :

The instant Second Appeal was filed against the impugned judgment and decree dated 20/05/2005 passed by the Learned Additional District Judge, 1st Court at Midnapore in Title Appeal No. 103 of 2002, affirming the judgment and decree dated 26/08/2002 passed by the Learned Civil Judge, Senior Division, 3rd Court at Midnapore in Title Suit No. 70 of 1984.

The suit was filed by the original Plaintiff praying for partition by metes and bounds and order of pre-emption alleging that one of the co-sharer transferred the dwelling house in favour of a stranger. The Trial Court allowed the decree for partition but refused to pass any order of pre-emption under Section 4 of the Partition Act, 1893. The Trial Court observed that the property consisted in Dag No. 447 contained garden, tanks etc. PW-6 did not state that the property was undivided dwelling house. The Trial Court also observed that the original Plaintiff was one on

the co-sharers. Section 4 comes into play when the stranger-purchaser sues for partition. It was concluded by the Trial court that the original Plaintiff failed to prove that the suit property was a dwelling house. On these grounds, the Trial Court refused to pass order of pre-emption.

The Learned First Appellate Court concurred with the finding of the learned Trial Court and upheld the judgment and decree.

At the time of admission of the appeal, the following substantial questions of law were framed:

- I. Since one of the outsiders, namely, the Respondent No. 29 having claimed separate possession in his written statement, whether the learned court of appeal below committed serious error of law in refusing the decree of pre-emption in favour of the Plaintiff;
- II. Whether learned court of appeal below committed substantial error of law in reversing the finding of the Learned Trial Judge that the suit property was the family dwelling house of the Plaintiff within the meaning of Section 4 of the Partition Act by not giving appropriate interpretation of the word “dwelling house” in accordance with law.

The sum and substance of the argument of the Learned Counsel for the Appellants was that the suit properties are a compact block and these are necessary for convenient use of the dwelling house. The learned Counsel argued that the word dwelling house should be given a liberal meaning. Referring to a Division Bench judgment of this Court, in **Kalipada Ghosh vs Tulsidas Dutt [AIR 1960 Cal 467]** and **Manick Lal Singh vs Gouri Shankar Shah [AIR 1968 Cal 245]**, the Learned Counsel argued that dwelling house does not mean only structure or building but also adjacent buildings, gardens, courtyard orchard and all the

necessary for the convenient occupation of the house. The Learned Counsel also referred to **Gautam Paul Vs. Debi Rani Paul & Ors. [(2000) 8 SCC 330]**.

The Learned Counsel for the Respondents argued that the Learned Trial Judge held that both the parties had no objection and the learned Counsels agreed to a decree of partition. Yet the Appellants preferred appeals. The Learned Counsel also referred to **Gautam Paul Vs. Debi Rani Paul & Ors. [(2000) 8 SCC 330]** to argue that Section 4 of the Partition Act, 1893 comes into play only when a stranger-purchaser sues for partition. In that case, the suit was filed by a co-owner. Therefore, the Section 4 has no application.

Section 4 of the Partition Act, 1893 reads as follow:-

“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.”

Pre-condition for application of Section 4 is that there must be a dwelling house, the same should belong to the undivided family, it must be transferred to a stranger and the stranger-purchaser sues for partition. In **Ghanteswar Ghosh Vs.**

Madan Mohan Ghosh [(1996) 11 SCC 446], the Supreme Court of India observed:-

“6. In order to answer this moot question, it has to be kept in view what the legislature intended while enacting the Act and specially Section 4 thereof. The legislative intent as reflected by the Statement of Objects and Reasons, as noted earlier, makes it clear that the restriction imposed on a stranger transferee of a share of one or more of the co-owners in a dwelling house by Section 44 of the T.P. Act is tried to be further extended by Section 4 of the Partition Act with a view to seeing that such transferee washes his hands off such a family dwelling house and gets satisfied with the proper valuation of his share which will be paid to him by the pre-empting co-sharer or co-sharers, as the case may be. This right of pre-emption available to other co-owners under Section 4 is obviously in further fructification of the restriction on such a transferee as imposed by Section 44 of the T.P. Act. It is true that amongst other conditions, Section 4 requires for its applicability that such stranger transferee must sue for partition and only in that eventuality the rights of pre-emption envisaged by Section 4 can be made available to the other contesting co-owners.”

In **Gautam Paul Vs. Debi Rani Paul & Ors. [(2000) 8 SCC 330]**, referring to **Ghanteswar Ghosh case (supra)**, the Supreme Court of India reiterated the same principle and adopted the same interpretation:

“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-sharer. Thus strangers/outsideers can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of a 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 pre-empt where the stranger/outsider 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, the interpretation cannot be one which gives a right which the legislatures clearly did not intend to confer. The legislature was aware that in a 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 interchangeable. 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 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 then in all cases, where there has been a sale of a 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.”

In *Srilekha Ghosh (Roy) Vs. Partha Sarathi Ghosh*, [(2002) 6 SCC 35], referring to the aforesaid decisions of the Supreme Court of India, it was observed:

“6. On a plain reading of the section it is clear that there are certain conditions for its application, such as —

(1) the dwelling house must belong to an undivided family;

(2) the transfer must be made to a stranger;

(3) the transferee has filed the suit for partition; and

(4) the shareholder claims and undertakes to buy the share of the stranger.

7. The condition for application of the statutory provision is that a dwelling house belonging to an undivided family must have been transferred to a person who is not a member of such family and such transferee sues for partition. If this precondition is satisfied then if any member of the family being a shareholder undertakes to buy the share of such transferee the court is to make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder.”

The principle of law is crystallized well. Question whether there existed dwelling house is more a question of fact and law. Both the courts had concurrent finding of fact on this issue. In second appeal, this court should not interfere concurrent finding of fact by both the courts below. The Learned Trial Court observed and concluded that existence of dwelling house was not proved and the same was affirmed by the Learned First Appellate Court. Concurrent finding of facts should not be interfered at the stage of Second Appeal.

The provision of Section 4 of the Partition Act, 1893 is specific and clear. The words “the transferee sues for partition” must be given its value. The principle of law are crystallized and noted in the above mentioned decisions and should not be reiterated. It is enough to say the original suit was filed by one of the co-owners; it is not a case where “the transferee sues for partition”. Therefore, Section 4 of the Partition Act, 1893 has no application.

In view of discussions made above, this Court is of opinion that neither of the Courts below committed any error in application of law in coming to their respective conclusions. Concurrent findings demand no interference, accordingly.

The instant appeal stands dismissed and disposed of accordingly.

T.C.R be returned.

(Sugato Majumdar, J.)