IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Sugato Majumdar

SMA/83/2012
IA NO: CAN/5/2026

SURYYA KUMAR PAUL and ANR.
VS
SRI RABIN MONDAL and ORS.

For the Appellants	:	Mr. Debanik Banerjee, Adv, Ms. Ruchira Manna, Adv. Mr. Dipnil Banerjee, Adv.
Hearing concluded on	:	29.09.2026
Judgment on	**:**	**01.10.2026**

Sugato Majumdar, J. :

The instant Second Miscellaneous Appeal is filed against the Judgment and Order passed by the Learned Additional District Judge, Fast Track 6th Court at Alipore, South 24 Parganas in Miscellaneous Appeal No.373 of 2003 dated 22/08/2005 reversing the judgment and order No.65 passed by the Learned Civil Judge, Senior division at Sealdah in Title suit No.75 of 1995 dated 06/09/2003.

Brief history of the case is that one Phul Kumar Pal instituted the original Title Suit No.75 of 1995 against the other co-owners of the suit property praying for partition by metes and bound. The suit property is a residential unit resided by the family members. During pendency of the suit, the said Phul Kumar Pal transferred his undivided share in the suit property to the Plaintiffs/Respondents. The present Appellant was the Defendant No.1 in the suit. On transfer of the undivided share of the suit property, the Respondents became the substituted Plaintiffs.

The suit was contested by filing written statements.

The Appellant herein contended among others, in the written statement, that the suit may be proceeded with. The written statement filed by the Defendant Nos.3 & 4 contained admission that the Respondents were co-owners. The suit was subsequently contested by the Appellant only.

In terms of the judgment dated 31/01/2003 the Trial Court passed preliminary decree declaring the Respondents' title in respect of one fifth share of the suit property and also passed decree of separate possession of the Respondents.

After passing of the preliminary decree dated 31/01/2003, the Appellant filed an application under Section 4 of the Partition Act, 1893 on or about 24/03/2003. Pleas taken in the application was that the suit property was undivided family dwelling unit. The Respondents are stranger purchaser. Therefore, the Appellant exercised his right of pre-emption under Section 4 of the Partition Act, 1893.

The application was contested by the Respondents by filing written objection, denying the allegations. It was averred that in the written statement the Appellant did not make any whisper about any alleged intention of exercising the right of pre-emption. The suit property had been amicably separated long before the institution of the suit for partition. It was however not denied that during pendency of the suit, the Respondents purchased a share of the suit property from one of the co-owners. It was also not denied that the property in question was a family dwelling unit.

The Trial Court allowed the application in terms of the order dated 06/09/2003 directing the Appellant to deposit a sum of Rs.2,58,920/- to pre-empt 1/5th share of the suit property from the Respondents with liberty to the Respondents

to execute and register a deed within a period of one month with consequential orders.

On being aggrieved and dissatisfied, the Respondents preferred an appeal which was registered as Miscellaneous Appeal No. 373 of 2003. The Fist Appellate Court being the Additional District Judge, Fast Track 6th Court at Alipore set aside the said judgment and order dated 06/09/2003 in terms of the impugned judgment dated 22/08/2005.

On being aggrieved and dissatisfied, the instant appeal has been filed.

At the time of admission of the appeal, the following substantial question of law was framed:

> "Whether the learned Civil Judge (Senior Division) Sealdah rightly held that the present appellant was declared 1/5th co-sharer of the dwelling house belonging to an undivided family, is entitled to pre-empt under section 4 of the Partition Act, which has been transferred to a person who is not a member of the family, in the event he is agreeable to pay consideration money with other registration charges?"

None appeared for the Respondents at the time of hearing of the Appeal.

The Learned Counsel for the Appellant argued that the Trial Court rightly passed the order allowing the right of pre-emption in favour of the Appellant. The Learned Trial Court duly considered the applicable law with reference to the decisions of the Supreme Court of India on the point. It was further argued that the First Appellate Court committed serious error of law in passing the impugned judgment. The First Appellate Court observed that it is for the claimant seeking

relief to establish that a stranger purchaser, in order to get possession in respect of an undivided dwelling house, has already sued for possession and claimed separation of his share; the Respondents are already in the possession of the suit property; therefore, prayer under Section 4 of the Partition Act, 1893 is of no use. According to the Learned Counsel for the Appellant these observations and conclusions are not only erroneous but also not based on materials on record. It was submitted that the impugned order passed by the Fist Appellate Court should be set aside upholding the order passed by the Trial Court.

The principle of law is well-settled. In **Ghantesher Ghosh v. Madan Mohan Ghosh,[(1996) 11 SCC 446]** the Supreme Court of India held :

> **"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."

In **Srilekha Ghosh (Roy) v. Partha Sarathi Ghosh,[(2002) 6 SCC 359]** the principle was succinctly laid down by the Supreme Court of India:

> **"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 First Appellate Court committed serious error of fact as well as law. The First Appellate Court was oblivious of the fact that stranger purchaser had stepped into sues of the original Plaintiff and continued the proceeding for partition. This is a case where they are existed an undivided residential unit and one of the co-owners transferred it to a stranger purchaser and the stranger purchaser sued for partition. Therefore, this is a case which clearly comes to the ambit of Section 4 of the Partition Act, 1893 as discussed above. Therefore, this Court is of opinion that the order passed by the First Appellate Court demands interference.

It is ordered that the Judgment and Order passed by the Learned Additional District Judge, Fast Track 6th Court at Alipore, South 24 Parganas in Miscellaneous Appeal No.373 of 2003 dated 22/08/2005 passed by the First Appellate Court is hereby set aside and the order passed by the Trial Court is hereby upheld subject to the condition that the Appellant herein shall make payment of the value of the share at current market value. Since, the final decree has not been passed, the matter is remanded to the Trial Court to ascertain current market value and pass necessary order in this regard.

The instant appeal accordingly stands disposed of, along with all pending applications.

Let T.C.R be returned.

(Sugato Majumdar, J.)