

(1984) 07 RAJ CK 0017

In the Rajasthan High Court

Case No : Civil Special Appeal No. 71 of 1974

Bhagwati Lal and Others

APPELLANT

Vs

Bheroo Lal and Others

RESPONDENT

Date of Decision : 31-07-1984

Acts Referred:

Partition Act, 1893 — Section 2, 4
Transfer of Property Act, 1882 — Section 44

Citation : (1985) 1 WLN 146

Hon'ble Judges : S.N. Bhargava, J;N.M. Kasliwal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.M. Kasliwal, J.—Learned Single Judge while dismissing the defendants' second appeal had granted leave to appeal to Division Bench u/s 18(2) of the Rajasthan High Court Ordinance, 1949, in view of the importance of the question of law involved in this case and also in view of the conflicting decisions of various High Courts. \n these circumstances, this appeal has been filed by the defendants against the judgment of learned Single Judge dated March 1, 1974, dismissing the second appeal filed by the defendants

2. We shall mention in brief the facts of the CESS, which are necessary for deciding an important question of law arising in this case.

3. Plaintiff Moola, who is now represented by his sons in the present appeal, and defendants No. 1 & 2 Potu and Lohrey were members of an undivided Hindu joint family. The joint family owned a house in Karauli. Moola had half share and Potu and Lohrey had jointly half share in the house. Defendants Potu and Lohrey mortgaged their undivided half share with Fakira Lal and Ghisiya Lal for a sum of Rs. 1,500/-by a registered mortgage deed dated May 15, 1957. Whole of the house was, however, in possession of Gannu Lal and Devi Lal as tenants about 20 years prior to the mortgage. Plaintiff Moola filed a suit for partition and separate possession of his half share in the house in the court of Munsif, Karauli

on January 22, 1968. Initially the suit was filed against Potu, Lohrey, Fakira Lal and Ghisiya Lal on January 22, 1968. During the pendency of the suit on March 16, 1968, Potu and Lohrey redeemed the mortgage and sold their half share to Bhagwati Lal and his brothers Hari Charan Lal and Gopal Prasad sons of the erstwhile tenant Devilal by a registered sale deed dated March 16, 1968. Consequently, the plaintiff amended the plaint on May 6, 1968, and impleaded the aforesaid purchasers Bhagwati Lal, Hari Charan Lal and Gopal Prasad as defendants No. 3, 4 and 5 respectively in place of the original defendants No. 3 & 4 Fakira Lal and Ghisiya Lal.

4. All the defendants resisted the plaintiffs' suit. Defendants No. 3 to 5 inter alia pleaded that Potu and Lohrey had offered to sell their half share in the house to the plaintiff and in the alternative also offered to purchase his share but the plaintiffs remained silent and thereafter Potu and Lohrey sold their share to them after redeeming the mortgage. On the basis of the aforesaid pleadings, the trial Court framed 5 issues on July 30, 1968. On August 30, 1968, the plaintiff moved an application u/s 4(4) of the Partition Act, 1893 (hereinafter referred to as "the Act") to the effect that the half share sold by Potu and Lohrey to defendants No. 3 to 5 may be directed to be sold to the plaintiffs for a price to be decided by the Court. This application was opposed by both sets of defendants, Defendants No. 3 to 5 stated that the valuation of the whole house was not less than Rs. 10,000/- and, therefore, the suit was not triable by the Munsif Court. It was further pleaded that they were prepared to purchase the plaintiffs' half share in the house for Rs. 5,000/-.

5. Learned Munsif after recording the evidence produced by the parties by judgment dated June 3, 1970, allowed the application filed by the plaintiff u/s 4 of the Act and directed defendants No. 3 to 5 to execute a sale-deed in favour of the plaintiffs in respect of half share and to get the same registered for a consideration of Rs. 5,000/- on or before July 22, 1970 and fixed July 7, 1970 for deposit of sale price of Rs. 5,000/-.

6. Aggrieved against the judgment of the trial Court the defendants No. 3 to 5 filed appeal but met with no success. The defendants No. 3 to 3 then filed a second appeal before this Court. Learned Single Judge considered the following two points urged by Mr. Rastogi, learned Counsel for the appellants:

(1) That Section 4 of the Act does not apply to the present case as the transferee has not sued for partition and, therefore, one of the essential conditions of the section has not been fulfilled; and

(2) That the house in question is not "dwelling house" and, therefore, too Section 4 does not apply?

Learned Single Judge examined decisions of several High Courts in detail. After considering the decisions the learned Single Judge held as under:

I am, therefore, of opinion that a member of undivided family, who has filed a

suit for a partition against a stranger defendant, is entitled to the benefit of Section 4 of the Act even in a case where the defendant stranger does not claim his share by partition of a dwelling house.

Learned Single Judge then examined this case from another point of view and held that the defendants in para 11 of their reply to the application u/s 4 of the Act had stated that they were prepared to purchase the plaintiffs' half share for Rs. 5,000/-. It was held that in the facts and circumstances of the present case, the defendant-appellants by making an offer to purchase the plaintiffs' half share in the dwelling house for Rs. 5000/- made a claim for partition and judging from this angle also the appellants should be deemed to have asked for partition, and therefore, too the condition "such transferee sued for partition" is fulfilled.

7. The learned Single Judge then examined the second point and held that the contention of the learned Counsel for the appellant in this regard was without force and his conclusion was that house in question had not ceased to be a dwelling house of the family. The net result of the above findings was that the appeal was dismissed.

8. It may be mentioned at the out-set that Mr. Rastogi, learned Counsel for the appellants, had challenged the finding of the learned Single Judge on the first question only and the finding as regards the house in question being considered as a dwelling house was not challenged

9. Mr. Rastogi, vehemently contended that Section 4(1) of the Partition Act cannot be applied in the present case as the transferees had not filed a suit for partition and were merely defendants in the present case. In the alternative it was submitted that neither any defence was taken by the defendant-appellants for making a claim for partition nor such stand was taken in reply to the application filed u/s 4 of the Act by the plaintiffs.

10. It was also submitted that there was no question of taking any liberal construction of Section 4(1) of the Act, when the language was quite clear and according to which the transferee must have sued for partition and then alone any member of the family being a shareholder had a right to move an application under the above provision. It was also argued by Mr. Rastogi, that the learned Single Judge committed an error in taking the view that the defendant-appellants by merely making an offer to purchase the plaintiffs' half share in the dwelling house for Rs. 5,000/- had made a claim for partition. It was also submitted that the right u/s 4(1) of the Partition Act, being a right of pre-emption was a very weak right and should not have been given a liberal construction.

11. Mr. Rastogi, also submitted that the learned Single Judge committed an error in deriving wrong assumptions and conclusion from, the, decided, cases referred before him.

12. On the other hand, Mr. M.D. Agarwal, appearing on behalf of the plaintiffs supported the judgment of the learned Single Judge. He further submitted that

the view propounded in *Alekha Mantri v. Jagabandhu Mantri and Ors.* AIR 1971 Orissa 127, and those of Calcutta and Patna High Courts was sound and even the other High Courts had not decided any question in favour of the appellants.

13. We have given our careful consideration to the arguments advanced by the learned Counsel for the parties and have thoroughly perused the cases cited before us. We shall first discuss the views taken by different High Courts with regard to the scope of Section 4(1) of the Partition Act. (here in after referred to as "the Act").

14. Before dealing with the various decisions given by different High Courts, it would be proper to reproduce Section 4 of the Act:

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 share-holder, 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 fore-going section.

There is a divergence of opinion in various High Courts on the interpretation of the words "such transferee sues for partition" used in the above section. The earliest case is that of the Bombay High Court in *Balshet Gopal Shet Sonar v. Miransaheb Valed Dadesaheb Daruwala*: (1899) ILR XXIII Bombay 77. In the above case the plaintiff brought a suit to recover his share of a house. The first two defendants were his brother and mother, and he complained that during his minority the house which had belonged to his deceased father had been sold in 1879 by them to the third defendant. He claimed to recover a half share of (he house which was in the possession of the fourth defendant, to whom the third defendant had sold it. The plaintiff obtained a decree declaring that the sale by defendants Nos. 1 & 2 was not binding upon him and that he was entitled to recover 7/16th share in the house. In execution the fourth defendant applied to be permitted to buy the plaintiff's share and it being admitted that the house could not be divided, the Subordinate Judge ordered a valuation to be made by a Commissioner, who valued the whole house at Rs. 500/- and directed that it should become the property of the fourth defendant on his paying the plaintiff the value of his share, viz., Rs. 218/12/-. The Subordinate Judge was of opinion that as the fourth defendant was already the owner of the larger portion of the house, he ought to be permitted to buy the plaintiff's share.

15. The plaintiff appealed and the Judge reversed the order of the Subordinate Judge. He applied Section 4 of the Act and directed the house to be sold by auction and that the plaintiff should be permitted to buy the share of the fourth

defendant if he chose to pay its value so ascertained. The Fourth Defendant appealed to the High Court. In the above facts it was held that the District Judge wrongly applied Section 4 of the Act without noticing that the said section in its terms related only to cases where the transferee sues for partition. It was further observed that if Section 4 applied to the case and plaintiff could have and had undertaken to buy the share of the transferee, the Judge should have made a valuation of that share only and directed its sale. It was thus, held that it was Section 2 and not Section 4 which must be applied in the case. The order of the District Judge was reversed and case was remanded. The above case as such is not a direct authority on the applicability of Section 4 of the Act in a case where the transferee does not sue for partition but is only a defendant in the suit. There is no discussion as to what is meant by the phrase "sues for partition".

16. Another case of the Bombay High Court is *Khanderao Dattatraya Wakde v. Balkrishna Mahadeo Phulambrikar and Ors.*: AIR 1922 Bombay 121. In the above case a decree was passed in a partition suit instituted by one Phulambrikar, asking for position of his one-third share of a certain house in Poona. The house was owned in equal shares by Phulambrikar, who had bought one-third share from Bhikaji a member of the original family of the owners, Belwant, the second defendant a member of that family, and Khanderao the third defendant, who derived his title through Gangadhar a member of the original family. After the partition decree was passed, applications were made by the second defendant u/s 4 of the Act asking the execution court to take action under that section with regard to the shares of the plaintiff and the third defendant. It was held that the lower Courts were wrong in granting the application of the second defendant with regard to the share of the third defendant. According to the learned Judge, that could only be done if the third defendant could be considered as a transferee from a member of the family suing for partition. He was a transferee from a member of the family but it certainly could not be considered that he was suing for partition. In the above facts it was observed as under:

The object of Section 4 of the Partition Act is to enable the members of a family in the case of one of their members having transferred his share to an outsider who seeks partition to buyout that outsider by having his share valued, and in ordinary cases such an application would be made before any preliminary decree was passed in the suit. That would then put an end to the suit unless one of the defendants wished to continue and apply to have his name inserted as plaintiff in the place of the plaintiff who had been bought out.

Thus, in the above case no considered opinion was given with regard to the point directly involved before us.

17. There are three cases of the Calcutta High Court. The earliest case is *Satyabhama Deb v. Jatindra Mohan Deb and Ors.*: AIR (sic) Cal 269. It was held in the case that a party in a partition suit, whether a plaintiff or a defendant is at the same time a plaintiff as well as a defendant. The dual capacity of a party in a partition suit does not preclude even a defendant, who claimed a share in

dwelling-house from being treated as plaintiff for the purposes of Section 4 of the Partition Act. The learned Judge of the Calcutta High Court also held that the decision in *Khanderao Dattatiraya Wakde's* case (supra) was clearly distinguishable.

18. In *Abu Roa Thakur and Anr. v. Dinabandhu Banik & Anr*: AIR 1947 Calcutta 426, the facts of the case were that certain plots of land belonged to Shib Chandra Banik and Balai Charan Banik. The plaintiff being the only son of Balai Charan Banik had 8 annas share in the plot. Shib Chandra left an only son Jagabandhu, Jagabandhu died in 1338 B.S. leaving his daughter Brahmamayee, proforma defendant No. 3 as his sole heiress. The principal defendants who were Mahomedans purchased the 8 annas share of Brahma Mayee. The plaintiff brought a suit for purchase of the share of the defendants or in the alternative for partition of the disputed plots and for temporary injunction. The trial court found that the disputed plots formed the dwelling house of the Baniks, the story of partition was not true that there was forcible possession by the defendants and that the plaintiff could buy up the 8 annas share of the defendant at a proper value of Rs. 1,000/-. The trial Court, therefore, decreed the same in a preliminary form and declared the plaintiff's right to buy up the 8 annas share of the defendant for Rs. 1,000/-. On appeal by the defendant, the learned Additional District Judge affirmed the decision of the trial Court. The defendants as such filed a second appeal in the High Court. Das, J., of the Calcutta High Court considered the scope of Section 4 of the Partition Act and held as under:

It has been pointed out in *Nil Kamal Bhattacharjya and Another Vs. Kamakshya Charan Bhattacharjya and Another*, that the section should be liberally construed. In Stroud's Judicial Dictionary the words "to sue" have been defined thus:

These words "to sue" may be applied indifferently either to the defendant or plaintiff...And the words "to sue" not only signify "to prosecute" but also to "to defend" to do something which the law requires for the better prosecution or defence of the "cause". "

The object of the section is to prevent intrusion of strangers into the dwelling house of an undivided family. This object would be frustrated if a stranger purchaser forces himself into the dwelling house of an undivided family & drives the other co-owner to file a suit as plaintiff and then figuring as a defendant is allowed to defeat the claim for pre-emption u/s 4 of the Act on a narrow and literal interpretation of the section. In a suit for partition, the parties to the suit are in the position of counter claimants and it can very well be predicated of a defendant in a suit for partition that he is suing for partition. In my opinion, the present case is within the ambit of the Section.

The above case, in our view, is identical to the facts and circumstances of the case with which we are dealing.

19. A Division Bench of the Calcutta High Court again in *Sunil Kumar Mukhopadhyaya and Another Vs. Provash Chandra Majumdar and Others*,

considered the same question and following the earlier decisions held that Section 4 of the Partition Act should be liberally construed and widely interpreted in favour of the members of the family and strictly against the stranger purchaser.

20. A Single Judge of the Madras High Court in *Sri Muthangi Butchi Ramayya Vs. Gurrula Venkata Subbarao and Others*, held that only sound view of Section 4(1) of the Partition Act was that there must be a suit at the instance of a transferee of a share of a dwelling house for partition & then, if any member of the family, being himself a share-holder in respect of the dwelling house undertakes to buy the share of the transferee-plaintiff the Court shall make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder. According to the Learned Single Judge this view of the section accords with the spirit as well as the letter of the section and does not extend the spirit of the section beyond its letter. The equity of the statute, as it is some times called, cannot override its plain language. AIR 1922 Bom 121 was relied on and *Satyabhama De Vs. Jatindra Mohan Deb and Others*, and AIR 1937 4 (Nagpur) were distinguished.

21. In *Ramaswami Pillai v. Subramania Pillai* AIR 1967 Mad 156 the matter again came up for consideration before Natesan, J., a learned Single Judge of the Madras High Court. Natesan, J., considered the decisions of Allahabad, Calcutta, Patna, Nagpur and Bombay High Courts and also the earlier decision of the Madras High Court in *Sri Muthangi Butchi Ramayya's* case (supra). After considering all the above cases it was held as under:

As I look at it, even though the stranger transferee might not have himself instituted the suit for partition, if in a suit for partition, wherein applies for his share and seeks relief from court in recognition of his rights it could properly be stated that he sues for partition. In so construing his act, there will be no undue extension of the meaning of the word or any strained construction of the language. As observed by Lord Goddard, C.J., in *Barnas v. Jarvia* 1953 1 WLR 649."

"A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.

Natesan, J., also distinguished the earlier decision of the Madras High Court in *Sri Muthangi Butchi Ramayya's* case (supra) in the following manner:

This judgment and particularly the observations therein, are strongly relied upon by the learned Counsel for the respondent. But for one thing, the question whether in circumstances like the present one, where the transferee himself moved for a final decree for partition and claims a share against the other co shares, the transferee could not be considered to be one who "sues for partition" did not arise for consideration before Raghva Rao, J., and secondly the present case is in the line of cases distinguished by the learned Judge. The other judgment of this Court *Subhamma v. Veerayya* 61 Mad LJ 552: AIR 1932 Mad 15 does not interpret the scope and factual requirements of the condition in Section

4 that the stranger transferee must have sued for partition.

Thus, the Madras High Court itself has turned out a middle course and the earlier view taken in Sri Muthangi Butchi Ramayya's case (supra) was watered down and distinguished in the manner indicated above.

22. The matter also came up for consideration before a full bench of the Allahabad High Court in Sakhawat Ali Vs. Ali Husain and Others, The Allahabad High Court followed the view in Sri Muthangi Butchi Ramayya's case (supra) and held as under:

A shareholder in a dwelling-house belonging to an undivided family cannot take advantage of Section 4 of the Partition Act in a suit for possession of the entire house and no for partition in which he is the plaintiff and the transferee in possession is a defendant.

Where a word or phrase has more than one meaning, that which is to be attributed to it in a particular case must depend on the context in which it is used. In the context in which the word "sues" is used in Section 4(1), Partition Act the legislature did not intend this word to mean also "or is a defendant in a suit". It was clearly the intention of the legislature that the right conferred by Section 4 should accrue to the member of the undivided family only in the event of the transferee seeking to obtain partition of his share in the dwelling house, and, therefore, the provisions of Section 4(1) will not apply to a suit for partition in which the stranger defendant does not himself claim the separation of his share. It may be that this construction which will in some instances, deprive a plaintiff of a relief to which under a wider interpretation he would be entitled, but the equity of the statute cannot override its plain meaning.

A suit for possession of the entire dwelling house is not a suit for partition. When such a suit is brought by a co-sharer against the transferee of another co-sharer it is in the nature of a suit for pre-emption, and although Section 4(1) does not confer a right of pre-emption on a co-sharer against stranger transferee that right is limited in its scope. It can be claimed, only if the transferee either sues for partition himself or makes the same claim when he is impleaded as a defendant in such a suit. That section does not entitle a co-sharer to buy out the stranger transferee whenever he likes unless the transferee is claiming a partition of his share either as a plaintiff or as a defendant.

The above decision of the Allahabad High Court also adopted the middle course and according to which Section 4(1) of the Partition Act could also apply where the stranger transferee either sued himself for partition or claimed a partition of his share as a defendant.

23. We need not refer the earlier decisions of the Patna High Court as the latest view is contained in a Division Bench case of that Court in Harendra Nath Mukharjee Vs. Shyam Sunder Kuer and Others, It was held in the above case that for the maintainability of an application to purchase back the share of

dwelling house from a stranger transferee it is not necessary that the transferee should have filed suit for partition. Section 4 applies also to a suit for partition filed by a member of the family. It was further observed as under:

In my opinion, the court below was in error in holding that Section 4 of the Act is in-applicable in this case as the suit for partition was not filed by the transferee. It may be observed that though on the language Section 4 of the Act applies to a suit for partition filed by a transferee, by judicial decisions this section has been extended to apply to a suit for partition filed by a member of the family as well. As an authority for this proposition, reference may be made to a Bench decision of this Court in the case of *Abinash Chandra v. Smt. Kamla Devi*, reported in AIR 1950 Pat 317. Section 4 of the Act cannot be read as precluding a member of the family from availing himself of the provision of this section if the stranger transferee has not filed the suit for partition. It is well established that this section has to be liberally construed. It is, therefore, immaterial that the suit for partition in the instant case has not been filed by the transferee; he would be deemed to have stepped into the shoes of the plaintiff of the partition suit whose share in the dwelling house he has purchased.

24. A division bench of the Orissa High Court in *Alekha Mantris* case (supra) held that it was not necessary that transferee should have filed a suit or being defendant he should have specifically claimed a share in residential house. *Khanderao Dattaraya Wakde's* case (supra) and *Sri Muthangi Butchi Ramayya's* case (supra) and *Sakhawat Ali's* case (F.B) have been dissented with. After taking note of Section 44 of the Transfer of Property Act it was observed as under:

Therefore, the expression "such transferee sues for partition" occurring in Section 4 of the Act can as well apply to a transferee defending a suit for partition and this is an interpretation which does not in any way do any violence to the language of the section. Where therefore, in a case the language of the section is capable of hearing two interpretations, the one that would further the object of the Act should in our opinion be preferred to the other. That apart, under certain circumstances the object underlying Section 4 of the Act is liable to be frustrated if we accept the narrow interpretation, namely, that to attract the applicability of Section 4, the stranger purchaser must have filed the suit for partition. Take, for instance, a case where the stranger purchaser forces himself into a dwelling house of an undivided family and drives the other co-owner to file a suit for partition as plaintiff. If the narrow interpretation is to be accepted, the plaintiff would not be able to avail himself of the benefit of Section 4 of the Act with the result that he would not be able to exclude the stranger from possession of a joint share of an undivided family house. This is an instance where the very object of Section 4 of the Act would be defeated by accepting the narrow interpretation.

25. Mr. M.D. Agarwal, learned Counsel for the plaintiff, respondents has placed strong reliance on the above Orissa case. Mr. Rastogi, learned Counsel for the

defendant-appellants, on the other hand, has placed reliance on the view taken by Madras High Court in Sri Muthangi Butchi Rammayya's case (supra) and full bench decision of the Allahabad High Court. Mr. Restogi in the alternative also argued that the view taken by Orissa High Court in Alekha Mantri v. case (supra) was not sound, and even if the view is taken that in a suit for partition, the parties are counter claimants, still the provisions of Section 4 of the Partition Act can only be attracted where any claim for partition of his share is made by stranger-transferee in the capacity as a defendant. It is submitted that Section 4 can either apply in case where such transferee himself sues for partition or in case where he is defendant it must be proved that he had made a specific claim for partition. It was also argued by Mr. Rastogi that there was no question of giving a liberal interpretation, when the language of the section was clear and the intention of the legislature was expressed in clear language. We have given our thoughtful consideration to the arguments advanced by learned Counsel for both the parties and have also gone deeply into the various reasons in the case law decided by various High Courts of this country. So far as Calcutta, Orissa, and Patna High Courts are concerned they are clearly in favour of the view that a liberal construction should be given to the words "sues for partition" used in Section 4 of the Act. Even Madras High Court in a latter decision in Ramaswami Pillai v. Subraminia Pillai's case (supra) has adopted the view taken in Calcutta, Orissa, and Patna High Courts and has distinguished the earlier view taken in Sri Muthangi Butchi Ramayya's case (supra). Even the Allahabad High Court in full bench decision in Sakhawat Ali's case (supra) has adapted the view that a right u/s 4 of the Act can be claimed only if the transferee either sues for partition himself or makes the same claim when he is impleaded as a defendant in such a suit. Thus so far as the position that the stringer transferee should himself sue for partition as a plaintiff and then alone Section 4 would be attracted, is not the view of any of the High Courts. All the High Courts have agreed to the extent that the stranger-transferee, even in the capacity of the defendant would come under the purview of Section 4(1) of the Act. The only controversy remains now is, that according to the one view the impleading of stranger transferee as a defendant was enough while according to other view for attracting Section 4 it must be further proved that the stranger-transferee though being defendant, but should have made a claim for partition of his share.

26. In our view a suit for partition has its own characteristics. In such a suit it is immaterial as to who came forward as plaintiff and the defendant in such a suit can be relegated the position of a plaintiff. Any one of the co-sharers will have to bring a suit as plaintiff, in case the other cosharers are not willing to join him as plaintiff. In such cases if the original plaintiff subsequently may not be willing to continue the suit, the same would not be dismissed and the defendant-co-sharer can be allowed to continue the suit as a plaintiff. Once having arrived at this conclusion that in a suit for partition both the plaintiff and the defendant have almost identical position, we have to consider the object of Section 4 of the Act in this back ground. The object of Section 4 of the Partition Act is that the joint

family member in respect of a dwelling house should be allowed to live together and not to dissolve the integrity of the property by intruding a stranger transferee. The intention of the legislature in enacting Section 4 was clear that in case such transferee sued for partition, the Court shall make a valuation of the share of such transferee in case any member of the family under-took to buy such share and the court may give all necessary and proper directions in that behalf. This object should not be allowed to be defeated in case the stranger transferee does not sue for partition himself but is impleaded as a defendant. Once it is held, as the view taken by Allahabad and Madras High Courts that the provision of Section 4 of the Act are attracted, even though stranger transferee does not sue as plaintiff but appears in the capacity as defendant, we find no logic in further holding that in such a case the stranger transferee, even in the capacity of a defendant, should also make a claim for partition. If this condition of claiming partition by the transferee is adhered to, the very object of Section 4 of keeping unity in the dwelling house by the members of the joint family can be defeated by taking a stand by the transferee defendant that he contested the suit and was not agreeing for partition. Such transferee is admittedly a person, who purchases a share of a dwelling house belonging to an undivided family and has been allowed compensation for the value of his share as determined by the Court. The right given u/s 4(1) of the Partition Act is no doubt a sort of right of pre-emption given to a member of the family being a share-holder in a dwelling house but such right has been held to be a reasonable restriction on the fundamental rights to hold and dispose of property under the pre-emption laws. Section 44 of the Transfer of Property Act also provides as under:

Section 44 Transfer by one co-owner:Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transfer's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer; the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part-enjoyment of the house.

The above section also restricts a strangers to intrude upon the privacy of an undivided family residence. We are thus, in agreement with the view taken in Alekha Mantri's case (supra) and the observations made therein.

27. Therefore, hold that Section 4 of the Partition Act would be applicable where the suit for partition is; brought by a member of the undivided family against the stranger-transferee and it is not necessary that the latter should have filed the suit or being a defendant he should have specifically claimed a share in the dwelling house. It may be important to mention that in the present case originally the suit was filed on January 22, 1968, against Potu and Lohrey, who

were co-sharers and Fakira Lal and Ghisa Lal the mortgagees. After filing of the suit Potu and Lohrey got the property redeemed and sold their share on March 16, 1968 in favour of Bhagwati Lal, Hari Charan Lal and Gopal Prasad, the present defendant-appellants. In these circumstances the plaintiff submitted an application on August 30, 1968, u/s 4 of the Partition Act that the sale was fictitiously made in an inflated price of Rs. 5,000/- but its actual value was not more than Rs. 2,000/-. It was, however, prayed that a reasonable price of the share of Potu and Lohrey sold in favour of defendant-appellants be determined by the court and the plaintiffs were willing to purchase the said share on the price to be determined by the court and necessary direction may be given in that regard. The defendants Potu and Lohrey in the written statement filed on March 18, 1968, had admitted that the property in question was ancestral and a joint one of the plaintiffs and the defendants No. 1 and 2 i.e. Potu and Lohrey. In spite of the above pleadings on certain other grounds it was pleaded that the suit was liable to be dismissed. It was nowhere in the pleadings that the property had already been partitioned. The defendant-appellants filed a reply on September 17, 1968 to the application filed by the plaintiff u/s 4 of the Act. In para 11 of the reply it was stated as under:

;g gS fd nkok vnkyr gktk ds v[r;kj lekvr es ugh gS D;ksfd tk;nkn dh ekfy;r 10000-00 nl gtkj :Ik;k ls de fdlh Hkh gkyr es ugh gS A ;fn oknh o mlds yM+ds vk/kk fgLlk dks o; djuk pkgs rks ge izfroknhx.k 5000 vads ikap gtkj :i;k vnk djus dks rS;kj gS A

28. The above reply shows that the defendant-appellants alleged that in case the plaintiff and his sons wanted to sell their half share, the answering defendants were willing to purchase the same in Rs. 5,000/-. On the basis of the above reply learned Single Judge arrived at the conclusion that in the facts and circumstances of the present case, it must be held that the appellants by making an offer to purchase the plaintiffs' half share in the dwelling-house for Rs. 5,000/- made a claim for partition. Learned Single Judge thus held that by judging from this angle also the appellants should be deemed to have asked for partition, and therefore, too the condition "such transferee sues for partition" is fulfilled. Mr. Rastogi, learned Counsel for the defendant-appellants vehemently contended that merely making an offer to purchase the plaintiffs' half share in the dwelling house cannot be considered as a claim for partition made on behalf of the defendants. We find no force in this contention and we are in agreement with the view taken by learned Single Judge in this regard. There is no material difference in claiming a share by partition or making an offer to purchase the plaintiffs' half share for Rs. 5,000/-. Thus, the appeal of the defendant-appellants fails on this ground also, even if the view is taken that a stranger-transferee in the capacity of defendant should have made a claim for partition.

29. In the result, we find no force in this appeal and the same is accordingly dismissed. Looking to the facts and circumstances of the case the parties are left to bear their own costs.