**(2012) 03 RAJ CK 0009**

**In the Rajasthan High Court**

**Case No :** Civil Revision Petition No. 188 of 2011

Ganga Singh APPELLANT

Vs

L.Rs of Chhotu Singh and Others RESPONDENT

**Date of Decision :** 16-03-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 21 Rule 55, Order 21 Rule 66, Order 21 Rule 82, Order 21 Rule 88
Partition Act, 1893 — Section 2, 3, 3(1), 4, 6
Transfer of Property Act, 1882 — Section 3, 44

**Citation :** (2012) 3 RLW 2181

**Hon'ble Judges :** Vineet Kothari, J

**Bench :** Single Bench

**Advocate :** M.C. Bhoot, assited by Surendra Singh, for the Appellant; Om Mehta, S.D.N. Bhat and Rakesh Arora, for the Respondent

**Final Decision :** Dismissed

# Judgement

Hon''ble Dr. Vineet Kothari, J.—The present case has a chequered history of litigation and the judgment debtor and defendant - Ganga Singh has been multiple rounds of litigation to avoid the execution of the preliminary decree of partition against his residential house in a portion of which he is residing and the history of litigation dates back to 1968 when the plaintiff respondent - Chotu Singh, a stranger to the family, instituted a money recovery Suit No. 42/68 on 9.10.1968 in the Court of Addl. Civil Judge, Jodhpur and obtained the money decree against Ganga Singh - the present petitioner and in execution thereof vide Execution Case No. 7/72, the plaintiff - Chotu Singh himself purchased 3/10 share in the said residential house in an auction proceedings held by the trial Court and he was issued the sale certificate on 26.2.1976 and symbolic possession was given to him. Thereafter, Chotu Singh filed another suit for partition of the house viz., Suit No. 206/1985 claiming partition by metes and bounds of the said 3/10th share against the defendants - joint owners and after the trial on 2.12.1991 a preliminary decree of partition was made by the learned trial Court for partition of the house allowing 3/10th share to the plaintiff - Chhotu Singh while the defendant No. 1 - Ganga Singh and defendant No. 2- Guman Singh were allotted 1/5 each share and defendant No. 3 - Om Singh and defendant No. 4 - Manohar Singh were allotted 1/2 share in the house. It was further ordered that in case partition by metes and bounds is not possible, then the said house shall be put to auction and amount of sale proceeds to the extent of 3/10th share shall be payable to the decree holder plaintiff-Chotu Singh, while the balance money shall be apportioned amongst the other defendants-joint owners.

2. The plaintiff decree holder - Chhotu Singh filed an application under Order 20 Rule 18 read with Section 151 CPC on 16.4.1993 for grant of final decree in aforesaid terms and requested that the said house may be partitioned by metes and bounds and 3/10th share of the plaintiff decree holder - Chhotu Singh maybe physically delivered to him and in case same is not possible, the said house may be put to public auction and proportionate share money be paid to him. The relevant prayer in the said application was :-

3. On 2.8.1985, the learned trial Court appointed Shri Jai Dev Bohra, Advocate, as Commissioner and sought report of partition of said house by metes and bounds, however, on 7.10.1995, after 10 years, the Commissioner reported to the learned trial Court that the suit premises could not be partitioned by metes and bounds and the decree could only be executed by ordering the public auction of the same and not otherwise. On 8.12.1995, the learned trial Court directed the parties to appear before the Court on 12.1.1996 for valuation of house and to propose the minimum amount of reserved bid for auctioning the suit house by way of public auction and finally the said house was put to auction on 4.5.1996 and the plaintiff - non applicant (Ganga Singh) filed an application u/s 4 of the Partition Act on 14.2.2001, Ex. 1 on record, before the learned trial Court that since the valuation of the house is less, the present petitioner, being fully aware of Section 3 and 4 rights, as stated in para 3 and 4 of the said application, filed such application u/s 4 read with Order 26 Rule 10 and 16 CPC and asked for proper valuation of said property. The said request was accepted by the learned trial Court vide order dated 26.4.2006 and the valuation of suit house was determined at Rs. 8,96,360/- on the basis of report of Executive Engineer, PWD. However, the present petitioner did not exercise his right to buy 3/10th share of decree holder Chhotu Singh at this stage. Against the orders dated 19.3.1996 and 4.5.1996, one of the co-sharers, defendant - non-applicant, Mst. Bhanwari Devi - sister of present petitioner Ganga Singh filed a revision petition before this Court, namely; Civil Revision Petition No. 628/1996, which came to be decided by the coordinate bench of this Court on 1st July, 1998 and this Court clearly held in para No. 40 and 41 as under :-

40. The trial Court shall, after inquiry, pass final decree in the matter thereby giving appropriate directions for sale of property, if any, and for the apportionment of the sale proceeds between the parties in terms of preliminary/

 

final decree, otherwise, the present proceedings before the trial Court shall stand frustrated, necessitating no final decree after the sale proceedings are complete.

41. Hence an inquiry in relation to valuation of the suit property before fixing reserved bidding price of the suit property before putting the same to public auction is necessary to enable the parties to exercise their rights as laid down under Sections 2, 3 and 4 of the Partition Act, 1893 before proceedings under the provisions of Sections 6, 7, 8 and 9 of the Partition Act, as the case may be.

4. In pursuance of said direction of this Court, the learned trial Court referred the matter to PWD Department for valuation of the suit premises vide order dated 22.5.1999 in Civil Misc. Case No. 1/1994 (Chhotu Singh vs. Raghunath Singh) and ultimately vide order dated 26.4.2006, on the basis of said report, the valuation of Rs. 8,96,360/- was determined vide order dated 26.4.2006. However, the petitioner Ganga Singh did not exercise his right to purchase 3/10th share of decree holder Chhotu Singh and thus he seems to have given up his this right u/s 3/4 of the Partition Act.

5. Later on, the minimum bidding price was fixed by the learned trial Court at Rs. 10 lacs vide order dated 30.7.2009. At this stage also, the present petitioner Ganga Singh failed to exercise his pre-emptive right u/s 3 and 4 of the Partition Act, 1893.

6. On 20.4.2010, the application u/s 151 CPC filed by Parvati Devi, another co-sharer, u/s 151 CPC on 3.10.2009 for cancellation of sale certificate dated 26.2.1976 in favour of Chhotu Singh was rejected with cost of Rs. 2000/- and matter was fixed on 20.5.2010 for fixing the date of public auction of the entire suit house.

7. Vide order dated 17.2.2011, the application under Order 21 Rule 66 CPC read with Section 151 CPC filed by applicant Jamna Devi Wd/o Late Shri Chotu Singh - decree-holder, who died on 16.4.2010 sought permission to participate in the auction proceedings and the same was allowed, and on 13.4.2011, the public auction was accordingly held of the suit property as it had already been found that partition by metes and bounds was not possible and none of the co-sharers undertook to buy the 3/10th share of Chhotu Singh at the valuation arrived at by the Court in terms of Section 3 and 4 of the Partition Act. The respondent No. 2, Jagdish Arora gave the highest bid in the said auction proceedings at s. 43,21,000/- and deposited the entire money before the learned trial Court in terms of the auction notice, 1/4th amount of Rs. 10,18,250/- on the date of auction itself and remaining amount of Rs. 32,40,750/- on 27.4.2011 in State Bank of India.

8. It is at this stage and on the very next date when the matter was kept for confirmation of auction on 28.4.2011 in favour of Jagdish Arora, the present petitioner Ganga Singh filed the present application purportedly u/s 3 of the Partition Act, 1893 saying that he is ready and willing to deposit money equivalent to 3/10 share of Rs. 43,21,000/-, which share belonged to the original

 

decree holder - Chotu Singh and he may be given pre-emptive right to purchase his share in the suit property. It is this application of the petitioner, which came to be rejected by the learned Executing Court by the impugned order dated 2.7.2011 and the auction sale in favour of respondent No. 2, Jagdish Arora, was confirmed by the Court below and it is this order dated 2.7.2011, which has been challenged by the petitioner - judgment debtor - Ganga Singh in the present revision petition filed before this Court.

9. The matter was argued at length by both the sides and they have also filed their written submissions and relied upon various case laws in support of their contentions.

10. Mr. M.C. Bhoot, learned Senior Advocate assisted by Mr. Surendra Singh appearing for the petitioner - judgment debtor - Ganga Singh submitted that Sections 3 and 4 of the Partition Act, 1893 mandate that whenever share holder of a joint property undertakes to buy the share of a stranger, decree holder in the joint family suit property at any stage of the litigation, the Court is under an obligation to order valuation of the share or shares of such property and has to direct the sale of such share or shares of the share holders to the offering co-sharer member of the family and court may give all necessary and proper directions in that behalf. He said that valuation of Rs. 43,21,000/- arrived at by auction on 13.4.2011 is the valuation of the house and Ganga Singh is ready and willing to deposit 3/10th share of the same to purchase the share of decree holder Ganga Singh.

11. He also submitted that the purpose of these provisions of Section 3 and 4 of the Partition Act is to protect the continuous possession of the co-sharer of joint family property in such property and in preference over the strangers, the co-sharers are allowed the preferential right of such purchase of share of other person, a stranger, whenever u/s 2 of the Act a decree of partition is made and it appears to the court that by reasons of nature of property to which the suit relates or of the number of share holders therein, or of any other special circumstances, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds under Sec. 2 of the Partition Act of 1893 and if in any case, in which the Court directs such a sale u/s 2 of the Act, the other share holders may apply for leave to buy at a valuation to be arrived at by the Court, the share or shares of the party or parties asking for a sale, and in such circumstances, the court shall order a valuation of the share in such manner as it may think fit and offer to sell the share of stranger to such shareholder at the price so ascertained, and may given all necessary and proper directions in that behalf.

12. Mr. M.C. Bhoot further submitted that on the application filed by the petitioner Ganga Singh on 28.4.2011 u/s 3 of the Partition Act after the price of

 

the suit property was determined by the auction on 13.4.2011, which came to be Rs. 43,21,000/-, since the petitioner Ganga Singh was ready and willing to deposit the 3/10 share of the said price so determined upon auction, the petitioner Ganga Singh has to be given in his right to purchase the 3/10 share of Chotu Singh - decree holder on deposit of Rs. 12,96,300/-. He submitted that Section 4 of the Act of 1893 further stipulates that 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 undertakes to buy the share of such transferee, 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 shareholder.

13. The contentions raised in written submissions submitted by learned counsel for the petitioner, Mr. M.C. Bhoot, Sr. Advocate, are also quoted below:

This revision petition arises out of the order dated 2nd July, 2011 passed by the Court of the learned Additional Civil Judge (Senior Division) No. 2, Jodhpur Metropolitan passed in Civil Misc. Case No. 01/1994 pending for passing of final decree in a partition suit.

Brief facts of the case are that the plaintiff late Shri Chhotu Singh purchased 3/10th share of the house in dispute in execution of a money decree for Rs. 4,600/- and sale certificate was issued on 26th Feb., 1978 and thus, the plaintiff Late Shri Chhotu Singh became sharer in the residential house as stranger to the HUF of late Shri Gopal Singh Bhati.

Late Shri Chhotu Singh then filed a partition suit being Civil Suit No. 206/1985. The learned Trial Court passed a preliminary decree on 2nd Dec. 1991 whereby shares of the parties were declared.

The plaintiff then filed an application under Order 20 Rule 18 CPC for passing of final decree on 16th April, 1993 with the following prayer:-

Though the application for preparation of final decree is continuity of the original suit, yet the learned Trial Court registered it as Civil Misc. Case No. 01/1994. On 2nd Aug., 1985 the learned trial Court appointed Shri Jai Dutt Bohra, Advocate for inspection and survey so as to submit a report for partition of the suit house by metes and bounds in terms of the preliminary decree. The Commissioner on 7th Oct., 1995 submitted a report that it not possible to partition the suit house by metes and bounds and decree could only be executed by ordering public auction of the same.

The learned Trial Court fixed reserve bid price at Rs. 3.00 lacs on 4th May, 1996. Against that, S.B. Civil Revision Petition No. 628/1996 was filed before this Hon''ble court and this Hon''ble Court by order dated 1.7.1998 passed the following order in para 41 of the order:

41. Hence an inquiry in relation to valuation of the suit property before fixing reserved bidding price of the suit property before putting the same to public

 

auction is necessary to enable the parties to exercise their rights as laid down under Sees. 2, 3 and 4 of the Partition Act, 1893 before proceedings under the provisions of Sees. 6, 7, 8 and 9 of the Partition Act, as the case may be.

The learned Trial Court started enquiry and compliance with the order passed by this Hon''ble Court. During that inquiry, the humble petitioner moved an application under Sec. 4 of the Partition Act, 1893 read with Order 26 Rule 10 and 16 CPC and the learned trial Court by order dated 12th July, 2006 accepted the application and granted time to produce evidence for valuation of the property. Photo stat copy of the order dated 12.7.2006 is submitted herewith for ready reference.

Ultimately, the learned trial Court by order dated 30th July, 2009 fixed Rs. 10.00 lacs as reserve bid price and issued sale proclamation as per direction of this Hon''ble Court as reproduced above. The last bid offered by an outsider Shri Jagdish Arora (respondent No. 2 in the revision petition) for an amount of Rs. 43,21,000/- on 13th April, 2011. He deposited Rs. 10,80,250/- as petty cash through sale-amine and the next date in the learned trial Court was 28th April, 2011. On this date, the humble petitioner filed an application under Sec. 3 of the Partition Act to exercise his right of pre-emption. This application has been rejected by the learned trial Court on a fundamentally misconception of law that the application is an execution proceeding whereas the application filed under the Partition Act is in the matter pending for preparation of a final decree. The auction purchaser did not raise any objection to the application of the petitioner but decree holder contested the same as if the application has been filed in an execution proceedings of money decree and hence, this revision petition.

Admittedly, a partition suit has been filed by a stranger against the members of the HUF of late Shri Gopal Singh and when a stranger files a suit for partition, the provisions of Sections 3 and 4 of the Partition Act comes into play giving a right to share holder(s) to purchase the share of the plaintiff. Here in this case, the auction ale has been ordered during the proceeding for passing the final decree and not in execution proceedings. By virtue of Sec. 7B, sale is conducted as per procedure prescribed in the CPC in respect of sales in execution decree. Here it may be submitted hat by adopting that procedure, the proceeding for preparation of the final decree will not turn into an execution proceedings. The learned trial Court proceeded for auction in compliance with the order passed by this Hon''ble Court dated 1.7.1998 and hence for all practical purposes, the last bid of Rs. 43,21,000/- is nothing but a valuation of the suit property for the purpose of Sections 3 and 4 of the Partition Act, 1893 as unless a final amount is reached, the right under Sections 3 and 4 of the Partition Act could not be exercised. The humble petitioner being one of the share-holder exercised his right to purchase the share of the plaintiff by filing an application on 28th April, 2011 well before creation of any right in a third party person i.e. Higher bidder as by that time, the sale was not confirmed and unless the sale is confirmed, no right is created in favour of the respondent No. 2 - highest bidder and he has no locus standi to raise any objection u/s 3/4 of the Partition Act. As a matter of fact, in the learned trial Court he raised no objection against the petitioner''s application.

In the present revision petition, following substantial question of law arises:-

(i) When right to move an application under Sections 3 and 4 of the Partition Act, 1893 accrues and at what point of time, this right extinguishes.

The Hon''ble Apex Court in Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others, has observed that provision of Sec. 4 of the Partition Act, is a BENEVOLENT provision enacted by the legislature for the welfare and tranquility of the members of a joint family occupying the dwelling house, the provisions must be construed as to make it available at all the relevant stages of the litigation between the contesting co-owners till the litigation reaches its terminus by way of full and final discharge and satisfaction of the final decree for partition. The Hon''ble Apex Court after considering the entire scheme of the Partition Act and so also the restricted right of the stranger under Sec. 44 of the Transfer of Property Act held in para 17 as under:-

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 share. Beyond that stage, however, Section 4 will go out of commission.

Admittedly, in the present matter, when the humble petitioner filed an application under the Partition Act, the auction sale was not confirmed and till auction is confirmed, no right in the property is created in favour of higher bidder and unless a right is created in the higher bidder, he has no locus standi to oppose the application filed by he petitioner. Actually he has not opposed the application before the learned Trial Court. Only the plaintiff has opposed the application. Here it may be submitted that as per final decree which is yet to be passed, the plaintiff is only entitled for an amount of Rs. 12,96,300/- (3/10th share of Rs. 43,21,000/-) and he cannot say that he will not accept this amount from the co-sharers nor he can say that he will accept this amount only by the highest bidder. Here it may be submitted that when the petitioner has offered the amount through the learned Trial court then the plaintiff should have accepted the same without any ifs and buts but by not accepting the money, he is himself delaying the price of his share. Moment the share of the plaintiff is paid by the petitioner, the decree shall stand satisfied as it is the plaintiff alone who has filed an application for preparation of the final decree which is pending before the learned trial Court at No. 01, 1994.

The contention of the plaintiff/respondent and the auction purchaser that the provision of Sec. 3 of the Partition Act will apply before the sale is ordered and not thereafter. The matter came up before this Hon''ble Court in Baldeo Das and Others Vs. Kishanlal and Another, this Hon''ble Court has clearly held in para 6 of the judgment that the words "before a court makes an order under Sec. 2" are not to be found in Sec. 3. All the Section 3 requires is that the application should be filed after a request has been made by the co-sharers under Sec. 2 of the Act for the public sale of the property. In the absence of any restrictive provision in Sec. 3 it cannot be held that the limiting point of time when the application should be made under that Section is the date on which the order u/s 2 is made. This Hon''ble Court in para 7 of the aforesaid judgment has observed that of course, if a sale actually takes place no application under Sec. 3 can be made till that sale is set aside.

Here it may be submitted that the sale is complete when the sale is confirmed. Mere holding of the auction does not amount to "sale actually took place". Here it may be submitted that the Hon''ble Apex Court has clearly held that unless the Court becomes functus officio, the application can be made.

The Hon''ble Allahabad High Court in Smt. Chandrawati Vs. Kallu and Others, has held in para 5 that unless when none of the share holder is ready to purchase he property at the price ascertained, the sale may be made in favour of an outsider and further held that such a sale cannot be held to be a sale held in accordance with law. Hon''ble High Court has justified the setting aside of the sale itself and cancellation of the sale certificate by the learned trial Court. Hon''ble Division Bench of the Hon''ble Patna High Court in Harendra Nath Mukharjee Vs. Shyam Sunder Kuer and Others, has held that an application under Sec. 4 of the Act is maintainable before the possession is delivered to the stranger transferee.

Here it may be submitted that the decision given by the Hon''ble Patna High Court was dissented by the Hon''ble Madras High Court in Abdul Sathar Vs. A. Nawab, but the Hon''ble Apex Court in the above noted judgment 1997 SC 471 overruled the judgment of the Hon''ble Madras High Court reported in Abdul Sathar Vs. A. Nawab, .

The Hon''ble Apex in Hurmat Bibi & Ors. vs. Prodosh Kumar Bajpayee & Anr. (1998 (Supp) SC 507) has held that even if a family member co-sharer once fails to purchase share of a stranger transferee, a second application by the co-sharer or his successor-in-interest for purchase of such share in maintainable.

The ratio of he law laid down by the Hon''ble Supreme Court is that the provisions of the Partition Act and the Transfer of Property Act represents a well knit legislative scheme for insulating the domestic peace of members of undivided family occupying a common dwelling house. The Hon''ble Apex Court in R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao, has described the right under Sec. 3 of he Partition Act as a vested right in co-sharer. When the share holder informed he Court by the share of the stranger plaintiff, the plaintiff stranger made an application to withdraw the suit. In that context, the Hon''ble Apex

 

Court held that since vested right has accrued in favour of co-sharer as soon as sought leave to purchase, the plaintiff cannot withdraw the suit.

The Hon''ble Apex Court in Mrs. Malati Ramchandra Raut and others Vs. Mahadevo Vasudeo Joshi and others, has also recognized the right under Sec. 3 as vested right in the estate and that right accrues when a request for sale is made under Sec. 2 and as held by the Hon''ble Apex Court in Ghantesher Ghosh''s case, this right survives upto the litigation comes to final terminus when trial Court becomes functus officio. Here it may be submitted with all respect that the objections raised on behalf of the plaintiff-respondent and the auction purchaser-respondent are fundamentally misconceived because they have raised all the objections treating the proceeding for preparation of a final decree as an execution proceeding by relying on provisions of Order 21 Rule 89 CPC which has no application in the present case. The judgment reported in 1999(3) RLW (Raj.) 1849 has been referred on behalf of the plaintiff-respondent has no relevancy in the present case as it as a case of execution of a money decree for recovery of amount. Here it may be submitted that provisions of the Partition Act, 1893 are substantive law and not procedure. The procedural laws are the hand made of justice and not mistress is a well settled preposition of law.

It is, therefore, most respectfully and humbly requested that the revision petition may kindly be allowed.

14. Learned counsel Mr. M.C. Bhoot relied upon he following decisions in support of his contentions.

1. Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others,

2. Baldeo Das and Others Vs. Kishanlal and Another,

3. Smt. Chandrawati Vs. Kallu and Others,

4. Harendra Nath Mukharjee Vs. Shyam Sunder Kuer and Others,

5. Chern Taong Shang and Others Vs. Commander S.D. Baijal and Others,

6. R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao,

7. Mrs. Malati Ramchandra Raut and others Vs. Mahadevo Vasudeo Joshi and others,

15. On the other hand, Mr. O.P. Mehta, learned counsel appearing for auction purchaser - Jagdish Arora and Mr. S.D.N. Bhat, learned counsel appearing for legal representatives of Chotu Singh - decree holder vehemently opposed the present revision petition and prayed for its dismissal with exemplary costs as they submitted that it is a sheer abuse of the process of the court and the present petitioner - judgment debtor, Ganga Singh, has no right to claim any preferential or preemptive right to purchase the 3/10 share at this stage when the auction of the entire house has already been held by the Court in execution of preliminary decree of partition dated 2.12.1991 under Order 21 Rule 82 to 89

 

CPC read with Section 7 of the Partition Act after rounds of litigation in execution of the decree obtained by Chotu Singh way back in 1991. They submitted that respondent No. 2, Jagdish Arora, who has paid the full price of the auction finalized in his favour and auction sale has already been confirmed by he impugned order dated 2.7.2011 and the stage or purchasing the 3/10 share of Chotu Singh, who also purchased the said 3/10 share in an auction held earlier in pursuance of execution of his money decree no 9.10.1968 in execution case No. 7/72, when the sale certificate dated 26.2.2976 was issued in his favour, has gone and Ganga Singh - present petitioner has no right of now purchasing the 3/10 share of Chotu Singh u/s 3 of the ct now when the entire suit house of the co-sharers was put to auction and same has been purchased by respondent No. 2., Jagdish Arora on 13.4.2011 and has also paid the full price thereof and sale stands confirmed on 2.7.2011. The petitioner has not followed the procedure for setting aside the auction sale in terms of Order 21 Rule 89 C.P.C. by depositing 5% of auction price and 3/10th share money of decree-holder. The petitioner merely wants to delay the execution of decree somehow and he is not interested in depositing any money. Therefore, he public auction sale already held cannot be set aside at his instance.

16. They vehemently submitted that in earlier auction held in 1996, the reserved price of Rs. 3 lacs was upwardly revised to Rs. 10 lacs in pursuance of directions of this Court in order dated 1.7.1998 while disposing of earlier revision petition No. 628/1996 (Mst. Bhanwari Devi & Ors. vs. Chhotu Singh & Anr.) and this Court had clearly indicated that co-sharer can exercise their right u/s 3 of the Partition Act in para 40 and 41 but present petitioner never exercised his such right at that stage, therefore, the same cannot be exercised after auction has been held and sale finalized in favour of respondent No. 2 - Jagdish Arora which cannot be upset on purported application of Ganga Singh u/s 3 of he Act of 1893 and same is nothing but an abuse of the process of the Court and an effort of present petitioner merely to delay the execution of a very old decree of 1991. The exercise of option u/s 3 or 4 of the Partition Act is not allowed at multiple stages and is not an endless process. The public auction of entire house held cannot be a method to determine the valuation of the suit house for the purpose of Section 3 and 4 of the Partition Act.

17. Drawing attention of the Court towards Order 21 Rule 89 CPC, learned counsels for the respondents submitted that under Order 21 Rule 88 not only the petitioner co-sharer had an option to have participated in the auction held on 13.4.2011 but having not done that, the only recourse to him to get the sale set aside was under Order 21 Rule 89 CPC, which stipulates that where an immovable property is sold in execution of decree, any person claiming interest in the property sold at the time of the sale or at the time of making he application, may apply to have the sale set aside on his deposition in Court (a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and (b) for payment, to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less

 

any amount if already received by the decree-holder. They submitted that nothing of this sort has been done by the judgment debtor-Ganga Singh and, therefore, now filing application u/s 3 and 4 of the Partition Act, 1893 when that stage no more survives for him, it is a sheer abuse of the process of the Court on his part. They submitted that the petitioner Ganga Singh has not deposited any money with the trial Court for satisfaction of decree of Chotu Singh and his application u/s 3/4 of the Partition Act is not at all bona fide and therefore the learned court below was perfectly justified in rejecting his application by the impugned order dated 2.7.2011 and present revision petition being misconceived deserves to be dismissed with exemplary costs.

18. Learned counsels for the respondents also relied upon the following judgments in support of their contentions :

(i) Baldeo Das and Others Vs. Kishanlal and Another,

(ii) Manik Lal Dutt & Ors. vs. Pulin Behari Pal & Ors. - AIR (37) 1950 Cal 431

(iii) Nitish Chandra and Another Vs. Promode Kumar and Others,

(iv) Haridev Shourie Vs. Madan Mohan,

(v) Dr. Kishore Chand Kapoor and Others Vs. Dharam Pal Kapoor and Others,

19. The gist of written submissions filed by Mr. O.P. Mehta, learned counsel appearing for the auction purchaser, Jagdish Arora, is as under:

2. In fact, so far as Sec. 4 of the Partition Act is concerned, it has no application in the present matter. It dos not come at all in the picture. The petitioner, without any reason and rhyme, unnecessarily also tried to amalgamate Sec. 4 in the matter. Learned Senior Counsel for the petitioner tried to amalgamate two different situations of Sections 2 and 3 vis-?-vis Sec. 4 of the Partition Act.

Sees. 2, 3 and 4 of the Partition Act are applicable in different spheres. Section 2 of the Act comes into picture when the Court finds that the property in question, by reason of nature of the property, number of shareholders in the property or any other special circumstances, division of the property reasonably or conveniently cannot be made and the sale of he property and distribution of proceeds would be more beneficial for all the shareholders and as such, directs sale of the property and distribution of proceeds in that circumstances.

When order is made under this provision, thereafter right has been conferred in next provision i.e. Section 3 of the Partition Act, which allows family members and shareholders in the property to apply for purchase of share at the valuation so ascertained in the auction sale.

Section 4 of the Partition Act is envisaged for different context. By bare reading of provisions of Section 4 of the Act, it clearly stipulates that where share of he dwelling is going to be transferred to a person, who is not a member of such family and that person sues for partition; and member of the family, being shareholder in the property, shall undertake to buy share of such transferee, making the evaluation of such share in such manner as it thinks fit and thereby, directs sale of such share for such shareholder.

From a bare reading of this provision, it is very much clear that when a share in the property is going to be transferred to a person who is not member of the family and shareholder has right to buy that share.

In the present matter, it is not at all case that share in the property is going to be transferred. Rather, learned court below during proceedings of final decree held that the property cannot conveniently and reasonably be partitioned and sale of the property is more beneficial and valuation of was made at Rs. 3 lacs, which, however, was challenged by Smt. Bhanwari Devi, who is mother of the petitioner-Ganga Singh. Then, after conducting inquiry, valuation of the property was made at Rs. 10 lacs.

Upto that stage or even to sale, the petitioner did not apply to purchase share in the property and as such, learned executing Court put the property for public auction and actual took place i.e. actual sale took place.

3. That the humble respondent No. 2 - auction purchaser was highest bidder, he deposited 1/4th of bid amount at the pot and remaining 3/4th amount within period of 15 days from the date of auction sale, as envisaged under Order 21 Rule 55 C.P.C.

4. That since the actual sale took place, which cannot be set aside by mere filing an application u/s 3 of he Partition Act and in this regard, it has already been submitted earlier that after the actual sale took place. Sale can only be set aside by resorting to provisions of Order 21 Rule 89 or Order 21 Rule 90 C.P.C. However, the petitioner chose not to avail that recourse and as such, the application of the petitioner was rightly rejected by the learned Court.

20. The Partition Act, 1893, which is a short Act comprising of 10 sections only and the interpretation of certain provisions of which is called for in the present case is reproduced hereunder in extenso including its Statement of Object and Reasons and ready reference :

Introduction

The law dealing with he partition of land paying revenue to the Government, besides various local laws, was enshrined in Sections 265 and 396 of the CPC Act, 1882 (14 of 1882). Section 265 simply enacted that the partition would be made only by the Collector, and need not, therefore, be noticed further. Section 396 laid down the procedure which was to be adopted in the partition of lands not paying revenue to the Government. That section only authorized he court to divide the property, and in some exceptional cases where an equal division was not practicable to award a money compensation for the purpose of equalizing the value of shares. In making an equal division, in many cases, practical difficulties were faced by the courts. The Courts in such cases were either powerless to give effect to their decrees or were driven to all kinds of shifts and expedients in order to do so. The overcome such like difficulties and to properly amend the law relating to partition throughout the country. The Partition Bill was introduced in the Legislature.

Statement of Objects and Reasons

The present statutory law on the subject of partition, apart from various local laws delaying with the partition of land paying revenue to government, is contained in sections 265 and 396 of the Code of Civil Procedure. Section 265 simply enacts that the partition or separation of a revenue -- paying estate shall be made only by the Collector, and need not, therefore, be noticed further, as the present Bill leaves untouched all local laws dealing with the partition of such property. Section 396 lays down the procedure which should be adopted in the partition of lands not paying revenue to government. That section, however, only authorizes the court to divide the property, and in some exceptional cases where an equal division is not practicable to award a money compensation for the purpose of equalizing the value of the shares. But as the law not stands, the court must give a share to each of the parties and cannot direct to sale and division of the proceeds in any case whatever. Instances, however, occasionally occur where there are inseparable practical difficulties in the way of making an equal division, and in such cases the Court is either powerless to give effect to its decree or is driven to all kinds of shifts and expedients in order to do so. Such difficulties are by no means of very rare occurrence although in many cases where the parties are property advised they generally agree to some mutual arrangement, and thus, relieve the court from embarrassment.

It is proposed in the present Bill to supply this defect in the law by giving the Court, under proper safeguards, a discretionary authority to direct a sale where a partition cannot reasonably be made and a sale would, in the opinion of the court, be more beneficial for the parties. But, having regard to the strong attachment of the people in this country to their landed possession, it is proposed to make the consent of the parties interested at least to the extent of a moiety in the property a condition precedent to the exercise by the Court of this new power. In order at the same time to prevent any oppressive exercise of this privilege, it is proposed to give such of the shareholders as to do not desire a sale the right to buy the others out at a valuation to be determined by the Court. The power, moreover, which it is proposed to give to the Court will be discretionary one to be exercised on a consideration of all the circumstances of the case. It should be added that where the court is obliged to direct a sale, a right of pre-emption is given by the bill to the parties similar to that conferred on shareholders by Section 310, Civil Procedure Code.

It is also proposed in the bill to give the Court the power of compelling a stranger, who has acquired by purchase a share in a family dwelling house when he seeks for a partition, to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court.

 

This provision is only an extension of the privilege given to such shareholders by Section 44, paragraph 2 of the Transfer of Property Act and is in application of a well-known rule which obtains among Mummamedans everywhere and by custom also among Hindus in some parts of the country.

The other sections of the Bill only deal with the matters of procedure and do not call for any detailed notice.

Whereas, it is expedient to amend the law relating to partition; it is hereby enacted as follows :

1. Title, extent and saving.--(1) This Act may be called The Partition Act, 1893.

(2) It extends to he whole of India [except the State of Jammu and Kashmir]

(4) But nothing herein contained shall be deemed to affect any local law providing for the partition of immovable property paying revenue to Government.

2. Power to Court to order sale instead of division in partition suits.-- Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

3. Procedure when sharer undertakes to buy.--(1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or sharers of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offer to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the application or applicants shall be liable to pay all costs of or incident to the application or applications.

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 share-holder 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-sec. (2) of the last foregoing section.

5. Representation of parties under disability.--In any suit for partition a request for sale may be made or an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability.

6. Reserved bidding and bidding by shareholder.--(1) Every sale u/s 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) On any such sale any of the shareholder shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purpose-money or any part thereof instead of paying the same as to the Court may seem reasonable.

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

7. Procedure to be followed in case of sales.--Save directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely :-

(a) If the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction on, the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar;

(b) If the property be sold under a decree or order of any other Court, such procedure as the High court may from time to time by rules prescribe in this behalf, and until such rules are made, the procedure prescribed in the CPC in respect of sales in execution of decrees.

8. Order for sale to be deemed decrees.--Any order for sale made by the Court under Sec. 2, 3, or 4 shall be deemed to be a decree within the meaning of Section 2 of the Code of Civil Procedure.

9. Saving of power to order partly partition and partly sale.--In any suit for partition the Court may if it shall think fit, make a decree for a partition or part of the property to which the suit relates and a sale of the remainder under this Act.

10. Application of Act to pending suits.--This Act shall apply to suits instituted before the commencement thereof, in which no scheme for the partition of the

 

property has been finally approved by the Court.

21. Below are discussed the judgments relied upon by the learned counsel for the respondent, Mr. O.P. Mehta and Mr. S.D.N. Bhatt.

22. In the case of Baldeo Das and Others Vs. Kishanlal and Another, the learned Single Judge of this Court dealing with Section 3(1) and Section 2 of the Partition Act held that in absence of words "before a Court makes an order under Sec. 2" in Sec. 3, it cannot be said that the sharer must apply to court to buy the property before the Court orders sale by public auction under Sec. 2. However, if a sale has actually taken place no application under Sec. 3(1) can be made till that sale is set aside. Para 6 and 7 of the judgment are quoted below for ready reference :

6. I have carefully considered the reasoning given in the Madras and Calcutta decisions. I am respectfully in agreement with he view taken in the Calcutta case. The words "before a Court makes an order under Sec. 2" are not to be found in Sec. 3. All that Section 3 requires is that the application should be filed after a request has been made by the co-sharers under Sec. 2 of the Act for the public sale of the property. In the absence of any restrictive provision in Sec. 3 it cannot be held that limiting point of time when the application should be made under that section is the date on which the order under Sec. 2 is made.

7. Of course if a sale actually takes place no application under Sec. 3 can be made till that sale is set aside.

23. In the case of Manik Lal Dutt and Others Vs. Pulin Behari Pal and Others, the learned Single Judge of Calcutta High Court held that in the foundation for attracting the provisions contained in Section 3is the earlier application u/s 2 of the Act. An application u/s 2 may be preferred after the passing of the preliminary decree. It is incontestable accordingly that the procedure laid down u/s 3 may be initiated after an application is made u/s 2 of the Act. The passing of a preliminary decree will not be a bar to Section 3 being attracted. The election by he defendant afforded u/s 3 need not be exercised immediately after an application u/s 2 is made and before the order for sale. In para 13 of the judgment, the Court has held as under:

It is not for the Court to enter into a discussion as to the reasonableness or otherwise of a clear and direct provision made, by which one particular party is given an advantage over the other. As indicated in the different cases, while interpreting Sec. 4 of the Act, the provisions of the Partition Act are to, be liberally interpreted so as to apply those provisions to case which come within the purview of those provisions. There is no reason why a similar interpretation should not be pat on the provisions contained in Sec. 3 of the Act. I do not see any reason why before the sale actually take a place, it will not be open to the defendant to exercise the option which is given to him under Sec. 3 of the Act.

24. Similarly the Division Bench of Calcutta High in the case of Nitish Chandra vs.

 

Pramode Kumar reported in AIR 1953 Calcutta 18 held in para 12 of the judgment that an application u/s 3 could be made at any time after the request is made u/s 2 and before a sale has actually been held u/s 2, para 12 to 15 of the said judgments are quoted below for ready reference:

12. On a plain reading of the section, it seems to us that an application under Sec. 3 can be filed after the request has been made to the Court under Sec. 2, Partition Act. The section does not provide for any limit of time after which the application cannot be entertained. In these circumstances, on a plain reading of the section we would hold that an application under Sec. 3 could be made at any time after the request is made under Sec. 2 and before a sale has actually been held under Sec. 2.

13. Mr. Gupta appearing for the opposite parties has argued that an order under Sec. 2, Partition Act, is a decree, and if that decree is not set aside by appropriate proceedings, it cannot be set aside merely by an application under Sec. 3. We are afraid that we are unable to accept this view. An order under Sec. 2, Partition Act, is dependent upon a further order made under Sec. 3 of the said Act. If the Court makes an order under Sec. 3, the order for sale under Sec. 2 will disappear.

14. Reliance is also placed upon the decision of the Madras High Court in Angamuthu Mudaliar vs. Ratna Mudaliar, 48 Mad 920, where it has been held that the proper time to apply under Sec. 3 is after the request has been made by co-sharers owning a moiety share or upwards that the property should be sold under S.2, and "before a court makes an order under Sec. 2." In our opinion, this decision proceeds upon a narrow construction of Sec. 3. The words, "before a Court makes an order under Sec. 2", are not to be found in Sec. 3, all that Sec. 3 requires is that the application should be filed after a request has been made by the co-sharers under Sec. 2 of the Act. In the absence of any restrictive provision in Sec. 3, we are unable to hold that the limiting point of time when the application should be made under that section is the date on which the order under Sec. 2 is made. We are accordingly unable to accept the view of the Madras High Court as to the scope of Sec. 3, Partition Act.

15. The view as to the scope of Sec. 3, Partition Act which we have taken is justified by the decision of this Court given by my learned brother Mookherjee, J. in Manik Lal Dutt and Others Vs. Pulin Behari Pal and Others, where after a review of the decisions of this and other High Courts and the different sections of the Partition Act, my learned brother came to the conclusion that the provisions of Ss. 2, 3 and 4, Partition Act should be liberally construed, and it was definitely held in that case that there is no reason why before the sale actually takes place under Sec. 2, Partition Act, it will not be open to the co-sharers to exercise the option which is given to them under Sec. 3 of the Act.

Thus, the Division Bench affirmed the view of learned Single Judge of Calcutta High Court in the case of Manik Lal vs. Pulin Behari (supra).

25. The learned Single Judge of Delhi High Court in the case of Haridev Shourie Vs. Madan Mohan, clearly held that application u/s 3 of the Partition Act cannot be filed at the time of confirmation of sale and the point of time for making such application is when the court is requested to direct the sale of property by co-sharers. The relevant extract from para 2 of the judgment is quoted below :

As I look at this Section, the point of time for making such application is when the Court is requested to direct the sale of property. In the present case, it is not disputed that the Court was requested by an application and notice of that application was served on the applicant and it is only after hearing the parties that this Court had directed the sale of the property. The Court auction can only be set aside under Order 21 Rule 90 of the CPC on the ground of material irregularities or fraud in publishing or conducting the sale. There is no such allegation in the present case. The Court in its inherent powers cannot set aside the Court auction when there is a specific provision in the Code itself. The Calcutta High Court in the cases ''Manik Lal Dutt vs. Pulin Behari Pal" and Manik Lal Dutt and Others Vs. Pulin Behari Pal and Others, respectively has held that an application u/s 3 could be made at any time after a request is made for auction and before the auction has actually been held. The view was not accepted by the Bombay High Court in the judgment referred to above. I am in respectful agreement with he view taken by the Calcutta High Court. Further, I find that in the Bombay case the application u/s 3 of the Partition Act was filed on 7.1.1977 and the sale took place on 30.3.1977 i.e., after the application under Sec. 3 had been filed.

26. The Hon''ble Supreme Court in the case of Dr. Kishore Chand Kapoor and Others Vs. Dharam Pal Kapoor and Others, of the judgment negatived the contentions of the respondents that the property should be put up for auction sale so that the highest bid in the auction may determine the market value of the property and held that the respondent No. 1 being in possession of the property wants to prolong the proceedings as much as possible. Para 8 and 9 of the said judgment are reproduced hereunder for ready reference :

8. It is next contended on behalf of respondent 1, that, as prayed by the plaintiff-appellants and respondent 2, the property should be put up for auction sale so that the highest bid in the auction may determine the market value of the property. This was exactly the order that was passed by the learned single Judge of the High Court, but respondent 1 felt aggrieved by the said order and preferred an appeal to the Division Bench of the High Court. Such a contention is not only, devoid of any merit, but also is not maintainable at the instance of respondent 1, who has expressed his willingness by an application under Sec. 3(1), Partition Act, to buy up the shares of the other parties at a valuation. Respondent 1, therefore, cannot be allowed to blow hot and cold. The contention is, therefore, rejected.

9. There is also no merit in the contention of respondent 1 that the plaintiff-appellants having prayed for the sale of the property by public auction under

 

Sec. 2, Partition Act, cannot oppose the prayer of respondent 1 for such sale. It appears to us that respondent 1 being in possession of the property wants to prolong the proceedings as much as possible.

27. A few more Supreme Court decisions on Partition ct beside the judgments cited at bar before me by both the sides, deserve to be noticed.

28. In the case of Babulal Vs. Habibnoor Khan (Dead) by LRs. and Others, the Hon''ble Supreme Court has held that one of the basic conditions of applicability of Section 4 is that the stranger transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned and 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 u/s 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. Previous decision of the Hon''ble Supreme Court in the case of Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others, was followed in this case. The relevant extracts of para 9 and 10 of the judgment are reproduced hereunder for ready reference :

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 some, 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 u/s 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. The condition is totally lacking in the present case. To recapitulate, respondent No. 1-decree holder himself, after getting final decree, had moved an application u/s 4 of the Act. Applicant, 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. Only on this short ground, therefore, the application under Sec. 4 of the Partition Act has to be treated as not maintainable.

29. In the case of Srilekha Ghosh (Roy) and Another Vs. Partha Sarathi Ghosh, the Hon''ble Supreme Court held that the condition for application u/s 4 of the Act 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. Therefore, where a gift was made on a partition of the suit property by the mother in favour of daughter, who could not be said to be

 

stranger to the family nor is there any material to show that they have expressed their intention not to reside in the suit property or to transfer their interest in the same to a person who is a stranger to the family, the application filed by the brother u/s 4 of the Act was not maintainable and was liable to be dismissed as premature. Relevant extract from para 7, 10 and 20 of the judgments given in the head note is reproduced below for ready reference :

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 pre-condition 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.

Section 4 of the Act deserves a liberal construction because is very object and purpose is to preserve the integrity of the dwelling house. In stricto senso the provision of Sec. 4 of the Partition Act has no application in the case. Neither can the plaintiffs who are daughters be said to be strangers to the family nor is there any material to show that they have expressed their intention not to reside in the suit property or to transfer their interest in the same to a person who is a stranger to the family. It is also to be kept in mind that the plaintiffs have acquired interest in the property by gift from their mother. Therefore, they have stepped into the shoes of their mother. Under the circumstances the petition filed by the defendant u/s 4 of the Partition Act was not maintainable and was liable to be dismissed as premature, keeping in view the object and purpose of preserving unity of the family dwelling house for occupation of members of the family the plaintiffs cannot be given a right to transfer their interest in the family dwelling house in favour of a stranger. If they decide not to reside in the suit dwelling house and desire to transfer their interest then they must make an offer to the defendant and if he is willing to purchase the interest of the sisters then he will be entitled to do so on payment of the consideration mutually agreed for fixed by the Court.

30. In the case of Rani Aloka Dudhoria and Others Vs. Goutam Dudhoria and Others, the Hon''ble Apex Court held that predetermining valuation in regard to suit property under Sec. 3 of the Act and fixation of reserve price of the property in question as mandatory before auction could take place. The relevant extract from head-note is reproduced hereunder for ready reference :

For passing of order in terms of Section 2 of the Partition Act, 1893 in relation to sale of properties involved in partition suit instead of division thereof, what is necessary is that there should be a request in that regard from a shareholder; a formal prayer to that effect may not be necessary; a positive finding that the property is incapable of division by metes and bounds and that the property cannot be reasonably or conveniently be partitioned, would not be necessary.

 

In the present case, the properties concerned were kept out of the lots since they were incapable of partition by metes and bounds. No mechanism could be agreed upon for division of the said properties. It was therefore, a case where the requirement of Section 2 of the Partition Act were clearly attracted. (Para 51)

Thus, once it is held that the provisions of the Partition Act are applicable, the court was bound to comply with the provisions thereof. The Court had no power to direct sale dehors the provisions of the Partition Act. (Para 50, 60)

Further more, Section 6(1) of the Partition Act mandatorily requires fixation of a reserve price. But for the conduct of auction-sale in the present case, no reserve price had been fixed, the respondents in their application dated 22.1.1997 prayed for a direction from the High Court to the Commissioner of Partition that "they may be given leave to sell the said properties without fixing any reserve price" as also ''that a liberty be given to the Commissioner of Partition to permit the parties present to purchase the said properties at their own valuation''. If the provisions of Section 6 of the Partition Act are imperative in nature any such prayer could not have been entertained. Such a leave/liberty had not been granted to the Commissioner. (para 61 to 63)

31. The Single Judge of the Bombay High Court in the case of Taherbhai Abdulalli Vs. Nagindas Gokuldas Saraf and Others, taking note of the fact that the order directing a sale may be a decree, but it cannot be a final decree, inasmuch as in all court sales, confirmation of the sales is necessary and until confirmation, therefore, the Court has power to direct a sale. However, the Court must be circumspect in granting the request u/s 3, once the request u/s 2 is granted by ordering a sale. Equities in favour of third parties arise and any orders that may be passed must be passed so as to save those equities. Para 12 to 14 of the said judgment are relevant and they are reproduced below for ready reference :

12. Considering the two Sections together, in the light of Sec. 8 of the Partition Act, 1893, which makes the orders passed by the Courts as decrees, I am of the opinion that in the absence of any words of limitation in Sec. 3 the Section requires to be liberally construed so as to enable the sharers in a partition decree to sell the property among themselves. The terminus a quo in such cases for making an application under Sec. 3 arises after an application is made under Sec. 2, requesting the Court to direct a sale.

13. The order directing a sale may be a decree, but it cannot be a final decree, inasmuch as in all court sales, confirmation of the sales it necessary and until confirmation, therefore, the Court has power to direct a sale. So, that will be the last point of time before which an application could be made under Sec. 3.

14. However, the Court must be circumspect in granting the request u/Sec. 3, once the request u/S. 2 is granted by ordering a sale. Equities in favour of third parties arise, as in the present case, and any orders that may be passed must be so passed as to save those equities.

 

In para 21 of the judgment, the Bombay High Court even said that Section 3 was not a ruse for protracting the proceedings but was really an effective application and therefore, directed that sale in favour of auction purchaser - appellants should be confirmed in the event of the applicants u/s 3 not completing the sale within a reasonable period. Para 19 to 22 of the said judgment are also reproduced hereunder:

19. In my opinion, however, when liberally construing Sec. 3, as suggested by the Division Bench of the Calcutta High Court, it is not possible to limit the point of time up to which the application could be made under Sec. 3 as the time when the sale is actually held. It must be the time when the Court can no longer give any directions of sale under Sec. 3, it can no longer do so after the confirmation of the sale. Therefore, the time must extend up to the point of time when the Court confirms the sale which is actually held.

20. The learned Second Joint Civil Judge was, therefore, right in holding that even though the sale was actually held, the application u/s 3 could be considered by him, before the confirmation of the sale.

21. However, the learned Judge was not right in not confirming the sale held by the Commissioner and in ordering the repayment of the price received from the appellant before it was clear that the application under Sec. 3 was not a ruse for protracting the proceedings but was really an effective application. He should have given the applicants under Sec. 3 sufficient time to effect a sale under Sec. 3 before ordering the repayment of the price. I am told that the amount is still lying in Court and the stay was ordered by this Court when admitting the above first appeal.

22. In the circumstances, the second para of he learned Second Joint civil Judge''s order deserves to be deleted and instead it will have to be ordered that the sale should be confirmed in favour of the appellant in the event of the applicants under Sec. 3 not completing the sale within a reasonable period.

32. Having scanned the judgments on the issue carefully and provisions of law, the legal position which emerges is like this.

33. The application u/s 3 and 4 of the Partition Act, 1893 giving preemptive right to co-sharers to purchase the share of party, who is not the member of the family, who has asked for division and partition of the property by metes and bounds and such a division cannot reasonably and conveniently be made and court directs such sale of property, such co-sharer can exercise his right u/s 3 of the Act at any stage of litigation in a partition suit from its inception till its termination and the mandate of Section 3 of the Act is that the Court shall direct the valuation of the property so as to determine the valuation of the share or shares of the party asking for sale and offer the same to such hare holder at the price so ascertained so as to achieve the object of the Act itself enshrined in the said provision, namely, having regard to the strong attachment of the people in this country to their landed possession, to give opportunity to such co-sharer to

 

exercise his pre-emptive right to purchase the share of party asking for such sale. The power given to the Court u/s 3 of the Act is discretionary one to be exercised on consideration of the circumstances of the case. Such pre-emptive right is an equitable right and therefore can be defeated by the circumstances like waiver, acquisence etc.

34. The questions which would necessarily arise in the background of the facts of the present case are as to whether the petitioner Ganga Singh can be allowed to exercise his right u/s 3 by moving an application u/s 3 of the Act on 28.4.2011 when the auction of the house has already been struck in favour of respondent No. 2 Jagdish Arora on 27.4.2011, on he previous date and the matter was kept on 28.4.2011 for confirmation of sale only, especially when such a right could very well be exercised upon valuation of the property earlier done and reserve price was fixed by the trial court on 4.5.1996 at Rs. 3,00,000/- which upon revision petition filed before this Court and in pursuance of the judgment of this Court dated 1.7.1998 in S.B. Civil Revision Petition No. 628/1996, this Court clearly gave parties a liberty to exercise their rights as laid down u/s 2, 3 and 4 before proceedings under Sections 6, 7, 8 and 9 of the Partition Act (para 41 of the judgment) and the present petitioner Ganga Singh admittedly also filed an application u/s 4 of the Partition Act read with Order 26 Rule 10 C.P.C. which came to be allowed by the trial court also on 12.7.2006 asking him to produce evidence as to the valuation and after considering the entire evidence only, the learned trial Court fixed the reserve price at Rs. 8,96,300/- vide order dated 26.4.2006 on the basis of report of Executive Engineer, PWD and later on further increased the reserve price at Rs. 10,00,000/- vide order dated 30.7.2009 and thereafter proceeded to hold auction in question on 13.4.2011 and having not exercised his option at such valuation arrived at by the learned trial Court to purchase the share of stranger Chhotu Singh, the question is whether the petitioner Ganga Singh, co-sharer can now be permitted to exercise his preemptive right to purchase the share of decree holder Chhotu Singh after auction of entire suit house has been finalized in favour of respondent No. 2, a third party Jagdish Arora and can such a public auction or a sale at Rs. 43,21,000/- held can be said to be only a method of arriving at the valuation of suit property as envisaged u/s 3 or 4 of the Act. In the considered opinion this Court, the answer has to be in negative.

35. In fact, the application of petitioner even though labeled to be u/s 3 of the Partition Act is in fact an application u/s 4 of the Act only, because Section 3 applies only to cases where an order for sale has been made in respect of decree passed in partition suit filed prior to commencement of Partition Act, 1893 only. Therefore, having lost his right u/s 4 of the Act once his previous application u/s 4 of the Act dated 14.2.2001 on which order dated 12.7.2006 was passed by the Court, the second such application by the same applicant Ganga Singh would not be even maintainable as he should be deemed to have waived or given up his right of pre-emptive purchase of stranger decree holder''s share u/s 4 of the Act.

 

36. The pre-emptive right of purchasing the stranger''s share in the property who claims partition by metes and bounds, has to be exercised within reasonable time before a sale by public auction is held by Court in accordance with Order 21 of C.P.C., applicability of which is mandated u/s 7(b) of the Partition Act itself. It is indisputable that even preliminary decree of partition is an executable decree and it is in execution of such a decree in favour of plaintiff Chhotu Singh dated 2.12.1991 only, the present auction was held on 13.4.2011. It may be noticed here that the plaintiff decree holder Chhotu Singh had himself purchased 3/10th share in execution of his original money decree in execution proceedings No. 7/1972 in execution of money decree dated 9.10.1968 in Civil Suit No. 42/1968 and in the auction proceedings held, when the sale certificate was to be issued to Chhotu Singh on 26.2.1976, it is at that point of time also present co-sharer Ganga Singh could raise his preemptive right u/s 3 and 4 of the Act to purchase out the 3/10th share of Chhotu Singh at that time. Having not done that, again when decree of partition in a suit for partition filed by Chhotu Singh for 3/10th share was decreed on 2.12.1991 while decreeing civil suit No. 206/1985, the said petitioner Ganga Singh could claim his preemptive right u/s 3 of the Act on 4.5.1996 when the trial Court made the valuation of the property at Rs. 3 lacs and directed the suit property to be put to public auction on reserve price of Rs. 3,00,000/-, which was the valuation arrived at by the learned trial Court in accordance with Section 2of the Partition Act. The petitioner Ganga Singh lost yet another opportunity to raise such a claim in last, when High Court upon revision petition, remanded the case back to the learned trial Court for re-determining the reserve price on 1.7.1998 in S.B. Civil Revision Petition No. 628/1996 and it was so fixed at Rs. 8,96,300/- vide order dated 26.4.2006 and at Rs. 10 lacs vide order dated 30.7.2009 of the trial Court, but at none of these stages, the petitioner Ganga Singh filed such application u/s 3 or 4 of the Partition Act claiming his preemptive right. Therefore, the question is that after sale by public auction has already been held on 13.4.2011 and highest bid at Rs. 43,21,000/- was only to be confirmed on 28.4.2011 in favour of respondent No. 2 Jagdish Arora, can co-sharer Ganga Singh file such an application u/s 3 or Section 4 of the Act on 28.4.2011 and whether the learned Court below as justified in rejecting such application as has been done by the impugned order dated 2.7.2011. The answer has to be in affirmative and again the present petitioner. The judgment relied upon by Mr. M.C. Bhoot in the case of Ghantesher Ghosh (supra) that such right can be exercised at any point of time during the pendency of partition suit, could be of any help to the present petitioner, if he had exercised his right at any of the aforesaid stages but before the public auction or sale was held on 13.4.2011. The aforesaid Supreme Court decision does not lay down that public auction can be set aside or sale would not be confirmed if such application under Sec. 3 or 4 of the Act is filed after such public auction is held, nor does it say that such public auction can be a method to determine the valuation of property for the purpose of Section 3 or 4 of the Partition Act.

37. The purpose of giving preemptive right u/s 3 or 4 of the Act is not to

 

frustrate the execution of even a preliminary decree of partition which could be executed upon the Commissioner''s report obtained in the year 1995 and that was possible only by sale of suit property as division by metes and bounds was not possible and practicable. The execution proceedings cannot be frustrated by claiming such preemptive right once 3rd party rights are created by holding such public auction. Equity is clearly in favour of respondent No. 2 Jagdish Arora, whereas the conduct of the petitioner Ganga Singh clearly disentitles him from any relief. He has failed to exercise his right u/s 3 and 4 of the Act, at any of the appropriate stages in the matter, once when the partition suit was decreed in favour of Chhotu Singh on 2.12.1991 and valuation of the property was made in the year 1996 and again after remand by the High Court on 1.7.1998 and later on valuation was fixed at Rs. 8,96,300/- vide order dated 26.4.2006 and at Rs. 10,00,000/- on 30.7.2009 and only after auction was held on 13.4.2011, having failed at all these stages to claim his pre-emptive right to purchase the share of stranger Chhotu Singh, the co-sharer Ganga Singh could not be permitted to buy h share of stranger Chhotu Singh after the auction in favour of third party Jagdish Arora was actually held on 13.4.2011 and such a sale has been confirmed on 2.7.2011.

38. In the opinion of this Court, the petitioner Ganga Singh did not really and effectively exercise his right u/s 3 or 4 of the Act at any point of time nor he has deposited any point of time upon the valuation of 3/10 share of property, so as to satisfy the decree in favour of Chhotu Singh and the purpose of filing of such application u/s 3 and 4 of the Act on 28.4.2011, therefore, cannot be said to be bona fide, even if technically and for argument sake such an application could be moved at this stage as per decision in the case of Ghantesher Ghosh (supra). He should be deemed to have waived or given up his preferential or pre-emptive right at various stages in 1991 when 3/10th share was purchased by Chhotu Singh, in 1996 when valuation of Rs. 3 lacs was fixed, in 2006 when valuation of Rs. 10 lacs was fixed by the Court below, when these valuation were fixed during the pendency of partition suit by stranger Chhotu Singh and partition by metes and bounds was not found practicable and suit property was directed to be put up for sale and reserve price as per Section 6 of the Act was fixed by the Court. The Court below had allowed petitioner Ganga Singh''s application u/Sec. 4 of the Act vide order dated 26.4.2006 and the valuation of Rs. 8,96,300/- was arrived at and later on was raised again to Rs. 10 lacs vide order dated 30.7.2009 but petitioner Ganga Singh failed to deposit 3/10th of said valuations on both occasions and buy out the share of decree holder Chhotu Singh.

39. In a sale held under Order 21, Rule 82 to Rule 96 of Order 21 CPC clearly apply in the facts of the present case in execution of the decree dated 2.12.1991 and such a sale could have been set aside only in terms of Order 21 Rule 89 which requires that any person claiming an interest in the property sold at the time of the sale or at the time of making the application or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in Court for payment to the purchaser, a sum equal to five percent of the purchase

 

money and for payment to the decree holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, but nothing of such deposits have actually been made by the petitioner Ganga Singh. Therefore, even assuming for the argument''s sake that such an application u/s 3 and 4 of Partition Act could be filed by the petitioner Ganga Singh even at this stage, said application has rightly been rejected by the learned court below as not being bona fide and not satisfying the conditions of Order 21 Rule 89 C.P.C. The conduct of petitioner every time is merely to thwart the execution and to mock the actual sale. He has no bona fides in the matter, as at no point of time any actual deposit of money has been made by him. The impugned order dated 2.7.2011 of court below, therefore, does not require any interference in revisional jurisdiction of this Court.

40. This Court is of the further view that auction sale actually held cannot be made a mere method of arriving at the valuation of the suit property for the purpose of Section 3 of the Partition Act, 1893. The valuation as envisaged u/s 3 of the Act is naturally to be based on evidence to be led by the parties upon such application u/s 3 or 4 of the Partition Act about the market value of the suit property. The experts opinion or valuation by Chartered Engineers can be piece of such evidence besides oral evidence. Such valuation in the present case had already been made not only at Rs. 3,00,000/- vide order dated 4.5.1996 but at Rs. 8,96,300/- vide order dated 26.4.2006 and at Rs. 10,00,000/- vide order dated 30.7.2009 after remand by the High court while deciding the earlier revision petition on 1.7.1998. The petitioner Ganga Singh failed to exercise his option u/s 3 of the Act at all the stages to buy 3/10th share of Chhotu Singh at these stages and therefore, now when the final public auction has been held of entire suit property and third party rights have been created by such public auction and the respondent No. 2 Jagdish Arora has fully paid the auction amount and sale in his favour has also been confirmed, there is no occasion to put pre-emptive right of the co-sharer Ganga Singh, over and above the rights of such third party, namely, respondent No. 2 Jagdish Arora and therefore, the learned court below was justified in rejecting the application u/s 3 of the Act.

41. The right of preemption u/s 3 of the Partition Act is akin to right of preemption of purchase by co-sharer enshrined under Rajasthan Preemption Act, 1966. Dealing with said Rajasthan Preemption Act, 1966 in the case of Indira Bai Vs. Nand Kishore, the Hon''ble Supreme Court held that right of pre-emption under the said Act could be defeated by estoppel and it is a weak and inequitable right. It is useful to quota para 3 and relevant extract of para 5 of the said judgment as under:

3. Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustice may have been perpetrated. Present case is a glaring example of

 

it. True no notice was given by the seller but the trial Court and appellate Court concurred that the pre-emptor not only came to know of the sale immediately but he assisted the purchaser-appellant in raising construction which went on for five months. Having thus persuaded, rather misled, the purchaser by his own conduct that he acquiesced in his ownership he somersaulted to grab the property with constructions by staking his own claim and attempting to unsettle the legal effect of his own conduct by taking recourse to how to curb and control such unwarranted conduct the Courts have extended the broad and paramount considerations of equity, to transactions and assurances, express or implied to avoid injustice.

To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or, the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means''. Such being the nature of right it is harsh to claim that its extinction by conduct would amount to statutory illegality or would be opposed to public policy. The distinction between validity and illegality or the transaction being void is clear and well known. The former can be waived by express or implied agreement or conduct. But not the latter. The provision in the Act requiring a vendor to serve the notice on persons having right of pre-emption is condition of validity of transfer, and therefore a pre-emptor could waive it, failure to serve notice as required under the Act does not render the sale made by vendor in favour of vendee ultra vires. The test to determine the nature of interest, namely, private or public is whether the right which is renunciated is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it maybe difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct. The Act does not provide that in case no notice is given the transaction shall be void. The objective is to intimate the pre-emptor who may be interested in getting himself substituted. The Act does not debar the pre-emptor from giving up this right. Rather in case of its non-exercise within two months, may be for the financial reasons, the right stands extinguished. It does not pass on to anyone. No social disturbance is caused. It settles in purchaser. Giving up such right, expressly or impliedly cannot therefore be said to involve any interest of community or public welfare so as to be in mischief of public policy.

42. The said decision was later on followed by the Hon''ble Supreme Court in the case of P.A. Rahim & Anr. vs. P.K. Raveendran @ Ravi Chandra & Ors. ((2005) 13 SCC 176) and the Hon''ble Supreme Court held that although no notice in writing was given to the respondents who claim such right of preemption who were living in adjoining plots on the western side abutting the suit property and aware of the fact that the appellants were spending huge amount for making improvement thereon and thus, they knew about the impending sale and they promoted the appellant to make improvement, it will be implied to have given up their right of pre-emption to purchase the suit property.

 

43. Almost in similar circumstances, this Court also in the case of Radhey Shyam vs. Vinod Kumar and Anr. - SBCFA No. 18/1997 decided on 23.2.2007 (2008(1) RLW Raj. 540) following the judgment in the case of Indira Bai (supra) held that preemptor even though not served with notice as required u/s 8 of the Rajasthan Preemption Act, would be deemed to have waived his right of pre-emption if he had even constructive notice of sale. The relevant extract of para 19 is quoted below for ready reference :

In view of aforesaid discussion on statements of various witnesses, the conclusion arrived at by the trial Court that the plaintiff had acquiesced in the matter and waived his right of pre-emption, cannot be faulted. It cannot be believed that the defendant no. 1 having taken possession of said portion of the property in 1979 having carried out some repair work and having let out two rooms to two different persons and he himself also continued to live there. All these facts would escape the notice of the plaintiff Radhey Shyam who is living in another portion of the same property and coupled with the fact that he was put to notice before giving registered sale-deed in favour of defendant No. 1 and his presence on different occasions and still keeps silent and refused to purchase the said property at the consideration offered by defendant No. 1 clearly leads to the conclusion that he waived his right of pre-emption over the said portion of the property. The notice u/s 8 of the Act is not required to be in writing unless it is served through the civil court under sub-sec. (2). Therefore, even on oral or constructive notice to the preemptor can be established in view of the circumstances of the case.

44. Thus, the right of preemption under Sec. 3 and 4 of the Partition Act, 1893 also cannot be said to be an absolute and overriding right which cannot be defeated by estoppel or equity and in the present case, this Court has found that such a right having not been exercised by the petitioner co-sharer Ganga Singh at the point of time when valuation was made by the trial Court at Rs. 3,00,000/- and after remand by the High Court on 17.1998 at Rs. 8,96,300/- on 26.4.2006 and at Rs. 10,00,000/- on 30.7.2009, cannot now claim such a right and ask the public auction sale to be declared a nullity. As already aforesaid, the public auction held by the learned Executing Court below cannot be made a mere method of again arriving at a valuation of suit property and the auction purchaser respondent No. 2 Jagdish Arora cannot be made a scapegoat or fool despite and highest amount bid given by him and accepted by the learned executing Court and full money having been deposited by him and auction sale also having been confirmed by the learned executing Court below. Therefore, this Court respectfully agreeing with the decision of Rajasthan High Court in Baodeo Das vs. Kishan Lal (supra), Delhi High Court in the case of Haridev Shourie vs. Madan Mohan Shourie (supra), Calcutta view in Nitesh Chandra vs. Pramode Kumar (supra) and Bombay High court view in Taherbhai Abdulalli (supra), is of the opinion that right of preemption now claimed by the petitioner Ganga Singh under Sec. 3 and 4 of the Partition Act, 1893 has rightly been rejected by the learned Court below and auction sale in favour of the respondent No. 2, Jagdish

Arora, has been rightly confirmed on 2.7.2011, the impugned order dated 2.7.2011 is accordingly upheld. Consequently, the present revision petition of Ganga Singh is found to be devoid of any merit and the same is accordingly dismissed. No order as to costs.

 