(1968) 05 CAL CK 0013

In the Calcutta High Court

Khanta Kali Bhattacharya and Others APPELLANT

Vs

Radharani Debi and Others RESPONDENT

Date of Decision : 10-05-1968

Acts Referred:
Partition Act, 1893 — Section 2, 3, 4, 9

Citation : 72 CWN 837

Hon'ble Judges : S.A. Masud, J

Bench : Single Bench

Advocate : C.R. Dutt, for the Appellant;N.C. Roy Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

S.A. Masud, J.—The short point to be decided in this application is whether in a partition suit the court can direct sale of the property apart from the provisions of the Indian Partition Act, 1893. the facts of the case may be stated briefly as follows: -

2. On 12th September 1957, one Phatik Bhattacharyya instituted the present suit against his co-sharers, Phelu Bhattacharyya and Mritunjoy Bhattacharyya for partition of the only joint family property being premises No. 43/1, Amherst Street, Calcutta. On 11th June, 1959, Phelu Bhattacharyya died leaving Respondents Nos. 1 to 4 whose names have been duly substituted in the present proceedings. On 1st of December 1956, a preliminary decree was passed declaring Phatik Chandra Bhattacahryya, Mritunjoy Bhattacharyya and heirs of Phelu Bhattacharyya as owners of 1/3rd share each. The Registrar of this Hon''ble Court was appointed the Commissioner of Partition. On 16th of May 1963, the Registrar submitted his report stating that the property could not be divided into three parts and also asked the parties to take directions from the court. On 20th June 1963, Mritunjoy Bhattacharyya died. In the same year the Registrar also retired and Mr. S. K. Banerjee became the Registrar and Commissioner of Partition. ON 6th of March 1966, Phatick Chandra Bhattacharyya and Mritunjoy Bhattacharyya were duly recorded. Thereafter, on

1st of July 1967, the present application was made by the heirs of Phatik Bhattacharyya for an order directing the sale of the said premises No. 43/1, Amherst Street, Calcutta, by public auction to the highest bidder or by private treaty as he may think fit subject to a reserved price to be fixed by Mr. K. C. Pal, the Surveyor appointed therein in the manner and under the conditions in which sales have been conducted by the Commissioner of Partition in a partition suit. They also wanted an order that the parties might be given leave to bid at the sale.

3. Admittedly, the present Petitioners are only owners of 1/3rd share in the property and, as such, the application cannot be described as an application u/s 2 of the Partition Act. Mr. C. Dutt, learned Counsel for the Plaintiff, has urged that his client is asking for the sale of the property by public auction as such sale would bring higher value and benefit to his client. Mr. N.K. Roychowdhury, learned Counsel for the Respondents, has contended that this Court has no jurisdiction to pass such an order. According to him, his clients are owners of 2/3rd share and are in possession of the property and the only effective way to partition the properties is to pay 1/3rd price to them by way of compensation at a valuation to be fixed by this Court.

4. It is now for me to examine whether this Court has got an inherent power to direct sale by public auction apart from the Partition Act. Recently the Appeal Bench of this Hon''ble Court has delivered a judgment in (1) Gadadhar Ghose v; Janaki Nath Ghose, 72, CWN 299, where the learned Judges have come to the conclusion that a sale u/s 2 of the Partition Act must be a public sale and cannot be limited to a sale among the co-sharers only. Mr. Roychowhdury relied on some observations in the judgment in the same case where the learned Judges in separate judgments have made some observations to the effect that the court has no inherent power to direct the sale of the property in a Partition suit except under the provisions of the Partition Act. Mr. Dutt, on the other hand, has stated that the said observations are only obiter dicta and are not binding on me. In my view, the facts of the said appeal are clearly distinguishable from the facts of the present case. There the parties wanted an order on an application u/s 2 of the Partition Act and Ray, J. has made the following observations at page 300.

The appeal raises an important question. The question is whether the learned Judge was right in directing the sale of the premises in suit to the parties or co-owners only.

In that case the learned trial Judge had directed sale of the property to the highest bidder among the parties themselves. The Appeal Court after discussing large number of English and Indian decisions came to the conclusion that in an application u/s 2 of the Partition Act the sale cannot be limited to co-sharers only and, as such, the order of the Court below was set aside. In the instant case, admittedly, the Petitioners are not owners of a moiety or more. Thus the present application cannot be an application u/s 2 of the Act. In my opinion, the learned Judges made the said observations in the context of cases under the Partition

Act. The substance of the said decision is that once a party has made an application for sale u/s 2 of the Act, the court has no powers to direct a sale among the co-owners only.

5. In this case, the Commissioner of Partition has asked the parties to take necessary directions from the Court as early as 11th June 1963. The Petitioners are not residing in the suit premises. They are not getting any advantage by delaying the matter and in those circumstances they have made this application. Unfortunately, they have not asked for any direction other than a sale by public auction. Be that as it may, it is argued before me that I have no inherent power to direct the sale of the property by public auction.

6. Mr. C. Datta has argued that this is a fit and proper case where the Court should direct a sale of the suit premises by public auction. He has drawn my attention to decision in (2) Debendra v. Haridas, 15 CWN 552, where Mukherjee and Sarfuddin, JJ., have held that the co-sharer should not be compelled to transfer his share to the to the other co-sharer at a valuation fixed by the Court. In (3) Basanta v. Motilal, 15 CWN 555, a co-sharer was compelled to transfer his share at a valuation fixed by the Court, but there the property to be partitioned was a family dwelling house and the person who was compelled to transfer his share was stranger to the family. According to Mr. Dutt the court has an inherent power to direct sale of the property, if the property cannot be divided among the co-sharers by metes and bounds. In support of the said proposition, reliance has been placed on (4) L. Ram Prasad Vs. Mt. Mukandi and Another, , (5) Darbhamulla Subbamma Vs. Valivetti Veerayya and Others, (6) R. Ramaprasada Rao Vs. R. Subbaramaiah and Others, . In the Original Side of this Hon''ble Court, three Judges sitting singly also were of opinion that the Court can direct the sale of the property apart from the provisions of the Partition Act. In (7) Mohit Kundu v. Pranab Kundu, 52 Cal LJ 68, S. K. Ghose, J., came to the conclusion that on the application of a co-sharer not being the owner of a moiety, the court can direct the sale of the property among the co-sharers by auction. Similarly, S. B. Sinha (8) Pannalal Dutta v. Hrishikesh, 86 CLJ 144, 149, (1949) 1 Cal. 192, held that the Court has jurisdiction apart from and independently of the provisions of the Partition Act to direct sale of the property between the parties. Bachawat, J., also came to the same conclusion in (9) Narendra Das v. Jnanendra Das, 90 CLJ 147. Mr. Roy Chowdhury has, on the contrary contended that the court has no inherent jurisdiction to direct sale of the property apart from the cases provided in the Partition Act. In support of the said proposition of law, he has relied upon the judgment of Das and Guha Roy, JJ., in (10) Nitya Gopal Samanta Vs. Pran Krishna Dau and Others, and also Mallick, J., in (11) Pronab v. Ram Mohan. According to him, before the Partition Act, the court had no inherent power to direct sale of suit premises in a Partition suit even when the property could not be divided by metes and bounds among the co-sharers. The Partition Act was introduced only to enable the Partition Court to direct sale of the suit premises in a limited number of cases. The view that a Court has undefined inherent power to direct sale of the property in the interest of equity and justice

contradicts and negatives the provisions of the Partition Act.

7. It is obvious that the learned Judges of eminence have different opinions on the subject. It is not necessary for me to discuss the facts of the large number of cases cited at the Bar inasmuch as they have already been discussed in Nritya v. Pran Krishna, (Supra), Rao v. Subramaniah, (Supra), and Godadhar Ghose v. Janki Nath Ghosh, (Supra). In my view, there is force in the divergent views expressed by the learned Judges, but before I express my view, it is necessary to appreciate the circumstances under which a sale may be asked for by one or more parties. When the co-sharers including the assignees of a co-sharer''s interest cannot amicably divide the property among themselves, a partition suit is filed by one or more parties against the others. The whole object of instituting a partition suit is to divide the property in species among themselves according to their respective shares. Some of the parties may agree to have a joint allotment and some may want allotment in severalty. The court should, therefore, assist the parties at the first instance to partition the property among themselves and not to enable the parties to take recourse to sale as a normal procedure. As far as possible the court should pass order for allotment of the property among the shareholders. If it is not possible to divide all the properties by metes and bounds, the court may allot some of the properties in severalty among the parties with or without owelty money and may allow other properties of an indivisible nature like a tank of a puja dalan to remain in joint possession. The parties may agree that as the properties cannot be divided by metes and bounds, the partition may be effectively achieved by payment of compensation to a party in consideration of his not getting full share in the property. But, in all such cases, a sale of the property to a stranger is not contemplated nor is it desirable. The court should not be hustled into a sale of the joint property on the ostensible plea that without a sale by public auction or by private treaty the highest price will not be available and the maximum pecuniary will not be achieved by the parties.

8. An analysis of the cases decided before the Partition Act would show that the Court was reluctant to direct sale of the property. Before the Partition Act, a party could not demand a sale of the property as a matter of statutory right. the Partition Act was enacted to met particular contingencies where justice is denied to the parties if sale is not permitted by the Court as a matter of their right. Section 2 of the Partition Act contemplates cases where a person holding a moiety or more share in the joint property can apply for sale of the suit premises if such premises cannot be divided by metes and bounds. Thus a limited power of sale is expressly provided in the statute for the first time. The obvious reason is that a co-sharer holding less than a moiety share cannot be allowed to disintegrate the joint family property by taking directions from court to sell such property to strangers. But, as the parties who have larger share in the property might compel the party with smaller share to agree to a sale to a stranger in the family, provision has been made in Section 3 under which such party can apply to buy the share or the shares of the parties who want a sale at a price to be

fixed by the Court. Further legislature by enacting Section 3 has negatived the argument that sale by public auction brings maximum benefit to the parties and, therefore, is the most equitable way to partition the property. Then, again a co-sharer has got an absolute right to sell his share of the property under the Transfer of Property Act and such a co-sharer may bonafide or malafide sell the property to an outsider who would disturb the harmony among the other members of joint family. Section 4 therefore provides a right of pre-emption in favour of the co-sharers who could buy up the shares of such a stranger transferee. Thus, Section 4 also does not contemplate sale by public auction. It is clear that the Legislature thought it best that if the parties do not by consent agree to a sale among the members of the public or if the owner of moiety or more shares does not make a request to the court for sale without any further request u/s 3 or Section 4, the court should not direct sale by public auction. Different situations may arise in different cases, but the court should always remember the fact that the parties want partition or allotment of the properties according to their shares and not a sale of the joint property at the first instance. It is from this point of view some of the learned Judges were of the view that the court cannot direct a sale of the joint property apart from the provisions under the Partition Act. There is a logic in such a view inasmuch as the Legislature by expressly providing for sale in certain contingencies has excluded the court''s power to direct sale in other cases. But such a view would nullify the main object of partition in a partition suit, if there is inherent lack of the Court''s jurisdiction to direct sale in all situations. A situation may arise where great injustice might occur in not allowing sale to the detriment of some of the co-sharers who would materially suffer in the partition of the joint property. In such a situation, the court alone can determine the mode and manner by which the proper value of the shares could be best achieved. Such an injustice can only be avoided if the court is invested with power to direct sale in a proper case. Difficulties may arise to lay down one uniform standard yard-stick for determining the best mode by which the parties may get full justice. In view of the provisions of the Partition Act, the court should not allow a sale by public auction where a stranger to the family has stepped into the shoes of a co-sharer. Even in cases where there is no stranger claiming partition of the joint family property, the co-sharers in possession of the property should not be compelled to sell the property in accordance with the desire of some other co-sharers who do not feel attached to the joint family property and want to leave the joint family and frustrate the wishes of other co-sharers who have sincere attachment to their ancestral property. In such a case, a co-sharer may be compelled to sell his share to other co-sharers at a valuation fixed by the court or in a sale among the co-sharers.

9. It may be said that if a sale is limited to co-sharers only, the property may not fetch a higher price and the compensation payable to the party who wants the sale may not get the maximum pecuniary benefit. The only safeguard in such a case would be for the Court to appoint one or two surveyors to find out the correct valuation of the property at a price prevailing in the market. The learned

Judges who are of opinion that the court has inherent power to sell the property otherwise than the conditions prescribed in the Partition Act are right when the court''s power to sell a property is invoked by a party in cases not contemplated under the Partition Act. But, it is one thing to say that the court cannot direct sale of the property apart from the provisions of the Partition Act and another thing to say that the Court has no inherent power to direct sale among the members of the public even in a case where the Court feels that the payment of compensation by the other rich co-sharers at a valuation to be fixed by the court is not in consonance with justice. There may be cases where a person who is a holder of a small share is not financially strong to buy up other co-sharers. Similarly there may be other co-sharers who are not rich enough to pay the value of the share of other party or parties who have lost interest in the joint family for good or bad reasons. In my view, a co-sharer should not be compelled to sell his share to the other co-sharers at a valuation fixed by the court in every case. But, if the co-sharer is a stranger then this can be done both under or outside the provisions of the Partition Act. The Partition Act is not a comprehensive act replacing all laws relating to partition prevalent before the Partition Act. The Partition Act has only amended some laws relating to partition with reference to particular situations. The reliefs granted under the Partition Act were not granted as a matter of course. The court''s power to sell u/s 2, or Section 9 is discretionary, whereas, under Sections 3 and 4 of the Partition Act, the co-sharers were given statutory rights to avoid sale, unfettered by court''s discretion, under specific conditions. In the later case if the conditions are fulfilled, the court has no other alternative but to pass an order according to the provisions of the Partition Act. But if the conditions prescribed under the Act are not fulfilled, the Court cannot be said to be a helpless spectator although the court feels that, in the facts and circumstances of a particular case, justice would not be done unless an order for sale is made. As stated earlier it may be logically argued that because the parties'' right to avoid sale u/s 3 and Section 4 are specifically granted by the legislature, the parties'' right to ask for sale under other conditions have not been taken away. I am, therefore, inclined to agree to the views expressed by Mr. Justice Subba Rao in Rao v. Subramaniah (Supra), by Ghosh Judge, in Mohit Kundu v. Pranab Kundu (Supra), by S. B. Sinha, J. in Pannalal Dutt v. Hrishikesh (Supra), and by Bachaat, J. in Narendra Das v. Jnanendra Das (Supra).

But, in view of the fact that a Division Bench of this Hon''ble Court in Nitya v. Pran Krishna (Supra), has categorically stated that the court has no inherent jurisdiction to sell the property apart from the provisions of the Partition Act, it is not possible for me to direct sale of the registered office by public auction as desired by the Petitioners in this case. The observations of the Appeal Court in Gadadhar Ghose v. Janaki Nath Ghose (Supra), also support the principles of law laid down in the earlier Bench decision. Admittedly, this application is not made under the Partition Act. Further, in the instant case, the parties, holders of 2/3rd shares are already enjoying possession of the suit premises. The Petitioner, as it appears from the cause title, does not reside in the ancestral house. I have asked Mr. Dutt if he would agree to the partition of the properties if the other parties pay him the value of his share at a valuation to be fixed by this Hon''ble Court or by an approved surveyor. In fact, the Respondents have offered to buy up his share at any reasonable price, but the Petitioners did not show any enthusiasm to such a suggestion. Further, in this application, the Petitioner has not asked for any alternative relief other than a sale by public auction. The property is an old partly three storied building in a lane on a land comprising an area of about 1 cot. Mr. K. C. Pal, a valuer from the Court''s panel, has valued the property but the valuation is not accepted by the Petitioners.

10. As stated earlier, the Respondents who are the holders of 2/3rd share are already in possession of the property and a sale by public auction to a stranger might not only disintegrate the family but they might become homeless for not getting accommodation in these difficult days. Thus even assuming that the court has inherent jurisdiction to direct sale of the property by public auction, in my view, this is not a fit and proper case where I should direct a sale of the property by public auction. As the Petitioner has not asked for any other relief, the application must be dismissed with costs.

