

(1981) 04 GUJ CK 0036
In the Gujarat High Court

Salambin Amar Dowdi

APPELLANT

Vs

Huseinbin Salam Dowdi and Others

RESPONDENT

Date of Decision : 01-04-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 20 Rule 18
Partition Act, 1893 — Section 2, 3

Citation : (1981) 22 GLR 1246

Hon'ble Judges : V.V. Bedarkar, J

Bench : Single Bench

Judgement

V.V. Bedarkar, J.—This is an appeal filed by the original plaintiff whose suit, being Civil Suit No. 47 of 1972, was decreed by the learned Civil Judge, Junior Division, Dharampur, with costs, holding that the appellant-plaintiff was entitled to 1/7th share in the immovable property and to 1/2 share in the movable property. But he observed that it would not be possible to divide 1/7th and 1/2 shares in the immovable and movable properties and hand them over to the plaintiff, and the actual partition of both the properties would cause delay and expenses, and so the plaintiff be given alternative remedy and, therefore, he decreed the amount of Rs. 1,000/- as claimed by the plaintiff. He further ordered that the plaintiff may recover the decretal amount, from the person and properties of the defendants with 6 per cent interest from the date of decree till realisation.

2. Being dissatisfied with that order of the trial Court awarding a specific amount of Rs. 1,000/- instead of giving a share in the properties, the plaintiff-appellant approached the District Court, Bulsar at Navsari by way of Regular Civil Appeal no.

3. of 1978, and the learned District Judge by his order dated 15-3-1980 dismissed the appeal with costs. Hence this second appeal. 3. The main dispute which is raised in this second appeal is that after having come to the conclusion about the definite share of the plaintiff, whether the Court had erred in refusing to pass a decree for actual partition and separate possession in favour of the

appellant-plaintiff on the ground of monetary compensation of Rs. 1,000/-, and whether it would be sufficient? The second ground was whether it was not obligatory on the Courts below to have followed the provisions of the Partition Act, 1893 if it came to the conclusion that the properties were such which could not be partitioned, especially when the Partition Act has provided for such an eventuality? The third ground was, whether the lower appellate Court not erred in construing the provisions of Order 20, Rule 18 of the CPC as empowering the lower appellate Court to pass an alternative decree for compensation?

4. The suit was filed for partitioning immovable property bearing Nagar Panchayat No. 524 situated in Tasia/Falia, Dharampur, Dist. Bulsar, claiming it to be of joint ownership and possession of the parties. The movable properties were as mentioned in the Schedule to the plaint, and they were, one big wooden cupboard with class, another big wooden cupboard, radio Airmik, two benches, two chairs, two tables, one Patara, three cots, and utensils. There is no dispute now before me that the parties held this property jointly and also that the plaintiff had 1/7th share in the immovable property and 1/2 share in the movable proper ties, as ordered by the trial Court.

5. Mr. S.H. Sanjanwala, learned Advocate appearing for the appellant-plaintiff, submitted before me that the Courts below have committed a mistake in awarding an amount of Rs. 1,000/- only by mis-appreciating paragraph 8 of the plaint. In paragraph 8, the plaintiff merely showed the value of the properties for the purpose of Court-fees and jurisdiction and not that he had made an alternative prayer for claiming that amount. The plaintiff merely mentioned therein that the immovable property mentioned in Schedule I to the plaint has its market price of Rs. 4.200/- and, therefore, the value of his 1/7th share is Rs. 600/- and, therefore, Court-fee of Rs. 60/- was paid for this. He has further mentioned that the movable properties mentioned in Schedule II to the plaint have the market value of Rs. 1.400/- and, therefore, the value of his 1/2 share is Rs. 700/- and accordingly Court-fee of Rs. 70/- is paid. The total Court-fee of Rs. 130/- is paid. It is, therefore, the contention that this was only for the purpose of Court-fee, while the actual prayer in paragraph 10 of the plaint was for dividing his share and giving exclusive possession thereof, and any other relief according to the partition Act.

6. It is, therefore, the submission of Mr. Sanjanwala that both the Courts below committed an error in exercising the jurisdiction to evaluate the properties by giving his share by calculating at Rs. 1,000/- only. His argument centered round the provisions of Order 20, Rule 18 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") and the Partition Act, 1893 (hereinafter referred to as "the Act") and submitted that it was not open for the Courts below, firstly to direct the plaintiff to lose the right in the properties and to be satisfied by getting the monetary value only, and secondly that the value should not have been decided by the Courts below, but it should have been left to the Commissioner to decide the value of the properties according to the market

value prevalent at the time when the decree was passed.

7. Rule 18 of Order 20 of the Code reads:

Decree in suit for partition of property or separate possession of a share therein.

18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf in accordance with such declaration and with the provisions of Section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

It was, therefore, the submission of Mr. Sanjanwala that this Rule 18 of Order 20 of the Code postulates that in a partition suit, first of all there should be a preliminary decree declaring the rights of the parties interested even for immovable and movable properties, if the partition or separation cannot be conveniently made without further inquiry and thereafter the Court should give further directions as may be required. It is his submission that for further directions we have to look to the provisions of the Act.

8. Section 2 of the Act relied upon by Mr. Sanjanwala reads:

2. 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.

Mr. Sanjanwala also relied on Section 3 of the Act which reads:

3. (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 shares 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 3 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 share holders 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 applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

It is, therefore, the submission of Mr. Sanjanwala that if due to any cause the division of the property cannot be made, and if the Court comes to the conclusion that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, then the Court has to direct sale of the property and distribution of the proceeds. Of course, in Section 2 of the Act there is definite wording, "the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively, etc.". It, therefore, postulates that there must be a request of any of the shareholders interested for the sale of the property and distribution of the proceeds.

9. Mr. Arvind K. Shah, learned Advocate for the respondents there fore submitted that the evidence clearly shows that there was no such request. But Mr. Sanjanwala submitted that the stage for such a request is not reached yet because in the same judgment the trial Court came to the conclusion that the properties could not be partitioned and immediately ordered a particular amount to be paid to the plaintiff, and not any share in the properties. It is, of course true that Section 3 of the Act would come into operation when there is a request to the Court under the last foregoing section to direct a sale and then there should be permission to a shareholder to apply for leave to buy at a valuation the share or shares of the party or parties asking for a sals, and thereafter the other procedure would follow as provided by Section 3 of the Act.

10. Mr. Sanjanwala objected to the decree on the ground that the Courts below erroneously assumed the jurisdiction to order the payment of a particular amount by observing that the Court have inherent power. He specifically referred to the observations of the learned appellate Judge in paragraph 10 of his judgment when an argument was advanced before him that the trial Court committed an error in not granting a decree for partition. Bit having considered the property and the plaintiff having 3/7th share in the house, arid that the trial Court came to the conclusion that it was not feasible to divide the house and allot 1/7th share to the plaintiff to which he is entitled, the learned appellate Judge observed that the Court has inherent power to refuse to divide the property by metes and bounds and to adopt such other means, as may appear equitable, for effecting just partition. It is very strongly objected by Mr. Sanjanwala that the Court has no inherent power except as provided under Rule 18 of Order 20 of the Code or the Act, and if there is no provision in both the enactments, then the Court cannot exercise its inherent power to pass any

decree in a partition suit.

11. Another ground of attack of Mr. Sanjanwala was that a submission was made before the learned appellate Judge that the plaintiff is deprived of his right to get the possession of the ancestral property and this feeling should have been recognised by the learned trial Judge. The learned appellate Judge, however, brushed aside this important submission only on the ground that from the facts of the case, it transpires that the division was impossible and, therefore, the learned trial Judge was completely justified in awarding the amount of his share.

12. In order to show that the Courts have no inherent powers, Mr. Sanjanwala relied on the decision of the Calcutta High Court in *Nitya Gopal Samanta Vs. Pran Krishna Dau and Others*, . It is observed therein:

Joint owners have a right to enjoy the joint property in specie. A co-sharer as such has, in a suit for partition, a right to his undivided share in the property divided into a specific allotment and not merely to the money value of his share in the property. The Court has no inherent power of sale in case the Court finds that the property cannot be conveniently partitioned or that the partition thereof would affect the intrinsic value of the property. The Partition Act confers on the Court, in a suit for partition, a power of sale in certain specified cases. No general power of sale can be spelt out from the provisions of the Act.

Relying on these observations, Mr. Sanjanwala submitted that the appellate Court committed an error in holding that there is inherent power in the Court.

13. It is significant to note that this Court in *Hirachand Kikabhai v. Chandrasen Motichand* 7 GL R 121, has not approved the aforesaid decision of the Calcutta High Court and, therefore, it is no longer a good law so far as this Court is concerned. I will refer to that decision of this Court presently. But having realised this, Mr. Sanjanwala submitted that if the Court can come to the conclusion that the property cannot be partitioned, then valuation has to be made and the valuation made by the Court at random is not proper because by that valuation the plaintiff is forced to sell his share to the defendants only at an amount of Rs. 1,000/- which is not proper.

14. When the aforesaid decision of the Calcutta High Court is not helpful to Mr. Sanjanwala, it would be necessary for me to see as to what remedy was found available by this Court in *Hirachand's* case (Supra). In that *Hirachand's* case, the trial Court ordered partition in respect of four properties and a Commissioner was appointed directing him to divide the properties by metes and bounds and distribute them according to the respective shares of the parties. The Commissioner made a report in which he pointed out that it was not possible to conveniently partition those properties by metes and bounds owing to differences and disputes existing between the parties, and further that the properties were not capable of being physically partitioned and asked for directions permitting him to dispose them of by public auction. Respondents Nos. 1, 2 and 3 (the plaintiff and defendants Nos. 4 and 5) in that case, who, between them all, had a

one-third share in the said properties, submitted to the Court that they had no objection to the properties being sold by public auction. The petitioners in that case, being original defendants 1 and 2, who had a two-third share between them in the said joint family properties, were opposed to the properties being sold by auction. After hearing the parties in that case, the learned trial Judge came to the conclusion that the properties be sold by public auction. Therefore, the aggrieved party went to the District Court and as the appeal was dismissed, High Court was approached. On the facts and circumstances of the case, J.M. Shelat, C. J. (as he then was), who decided the matter, made very pertinent observations pertaining to the jurisdiction of the Court in a partition suit. It is observed:

A Court trying a suit for partition has the power to order sale of the suit property where it finds that owing to disputes between the parties or nature of the property, it cannot be conveniently divided between the parties.

It is further observed:

There is nothing in the CPC or in any other provision which restricts the power to partition to divide the property in specie, though wherever it can be conveniently done, the Court ordinarily would follow the course of dividing the property by metes and bounds and distribute the respective shares therein to the parties. But where it cannot be done, there is inherent in the power to partition the power to sell the property and divide it by distributing the sale proceeds thereof in accordance with the respective shares of the parties. Such a course would in such a case be partitioning the property in another form.

The Partition Act, 1893, did not entrench upon the power of the Court to effectuate a partition between co-owners by one or the other of the methods The Act conferred upon a sharer or sharers a right to request the Court to sell the property and to insist upon purchasing the former's share at a value fixed by the Court. Except to that extent and that provided by the other provisions of the Act, the power of the Court to partition the properties equitably by any of the methods was not in any way affected by the provisions of the Act.

In the aforesaid case before this Court *Nitya Gopal Samanta Vs. Pran Krishna Dau and Others*, and also *Probhat Kumar Dutt Vs. Rammohan Dutt and Others*, (which followed *Nitya Gopal Samanta Vs. Pran Krishna Dau and Others*, were not followed by observing in paragraph 7 as under:

...It will be noticed that these two decisions are based on two assumptions. One assumption is that the power of a Court is confined to divide the property and that there is no power even in unavoidable cases to divide the property otherwise than in specie. The other assumption is that as there is no power in the Court to order sale and such absence of power, it was thought, would result in practical difficulties, a limited power was given by the partition Act within a limited scope to the Court to order sale. But the then, if a limited power was given to avoid the mischief of a deadlock resulting in a suit for partition, such a power surely would

not have been made dependent upon a request to be made by a party or parties having individually or collectively an inherent equivalent to a moiety or more.

In the last portion of this paragraph 7, Shelat, C.J. observed that there is inherent in the power to partition the power to sell the property and divide it by distributing the sale proceeds thereof in accordance with the respective shares of the parties. While coming to this conclusion, Shelat, C.J. followed with approval the observations of Venkatasumma Rao, J. in Subbamma v. Veerapa AIR 1932 Mad 15. Those observations are:

It is well to bear in mind in this connection that independent of the Partition Act the Court has an inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable for effecting a just partition.

Furthermore, Shelat, C.J. also considered the observations of Subba Rao, C.J. (as he then was) and Ansari, J. in Ratnprasad Rao v. Subbaramaiah AIR 1958 A P 647. Those observations are reproduced by Shelat, C.J. in para 8 of his judgment. The relevant observations of the Andhra Pradesh High Court on which Mr. Sanjanwala has also relied are:

...A joint family or joint owners may be possessed of innumerable items of different extents, values, quality and nature. In dividing the properties among the various co-owners, it may not always be possible to divide every item into distinct share. A property will have to be allotted to one of the shares and the other has to be compensated with money. This is technically called owelty.

Mr. Sanjanwala submitted that this principle of owelty, has to be followed by the Court, meaning thereby, that the property should be put to auction and the parties should be permitted to bid themselves, and the highest bidder should be given the property and the amount that would be available from that bidding should be distributed to the other co-sharers according to their shares so that the property may remain-in the family and the amounts will be given to the sharers from the amount which will be received on the highest bid and not any notional or at random value fixed by the Court.

15. Mr. Arvind K. Shah submitted that in that judgment of the Andhra Pradesh High Court, the portion of which has been reproduced in para 8 of Hirachand's case (supra), it has been also observed:

...Sometimes, the property to be divided may consist of only one item, which cannot be conveniently and equitably be divided between the members in which case the Court may allot that item to one co-sharer and direct him to pay the value of the share of the other sharer in money.

It is, therefore, the submission of Mr. Shah that in view of these observations which have been approved by this Court, the order passed by the learned trial Judge and confirmed by the learned appellate Judge directing one co-sharer to pay the value of the share to the other sharer in money is not improper. But

what Mr. Sanjanwala objected to is that though this may not be improper or whatever may be in order to come to the conclusion about the value, the Court must have adopted a method permissible under the Act or at least the method which is reasonable and equitable. Merely by putting the value on the strength of the valuation of the properties made by the plaintiff for the purpose of paying the Court-fees cannot all of a sudden be reached as proper value of the property, nor according to him it was proper for the Court to consider that the plaintiff would not be in a position to pay proper price of the shares of others if the value would have been fixed and offered to the highest bidder.

16. In the portion reproduced from the aforesaid judgment of the Andhra Pradesh High Court in *Hirachand's case* (supra), there is further observation as follows:

...A court may also be confronted with a situation, namely, that the item of property is not capable of physical partition or is such that, if divided, it will loss its intrinsic worth. In such a case, that item is allotted to one and compensation in money value is given to the other and if such a course is not possible it is sold outright and the sale proceeds divided between the joint owners. All the aforesaid and similar other methods are adopted by Courts in making an equitable partition of the joint properties either with the consent of the parties or, where such consent is not forthcoming, in exercise of its own discretion.

It is, therefore, submitted by Mr. Arvind K. Shah that if these observations are appreciated, then the inherent jurisdiction against which Mr. Sanjanwala has made such a big grievance is implicit and no objection can be taken to the observations of the learned appellate Judge in the instant case. But it cannot be ignored that whatever method is adopted, it should be to implement the process of equitable partition, and that is what has been observed by the Andhra Pradesh High Court in the aforesaid judgment.

17. So, having conceded to the position that there is a power in the Court to effect a partition or order the payment of money to a party, in view of the decision of this Court in *Hirachand's case* (supra), Mr. Sanjanwala came out with a very relevant argument, as to when such amount can be fixed and how. It is his main grievance that the learned trial Judge fixed the amount arbitrarily without keeping it open for the parties to offer any higher price so that every sharer may get more money. Of course, he had to concede that the provisions of Sections 2 and 3 of the Act would not come into effect unless there is a request of any of the shareholders as contemplated in Section 2 of the Act. But it is his submission that the position for that request would arise when the Court offers a chance to the parties to make such a request.

18. In support of his argument, Mr. Sanjanwala relied on the unreported decision of this Court in *Dahyabhai Harkishandas v. Ramanlal Dahyabhai Civil Revision Application No. 630 of 1979*, decided by S.H. Sheth, J. on 11-7-1979, the notes of which are reported in 16 Gujarat Law Times 308. In that revision petition

before this Court, a preliminary decree was passed in a partition suit wherein the plaintiff and defendants Nos. 1, 2, 3, 4, 6 and 7 were given 1/7th share. Thereafter the trial Court appointed the Commissioner to effect the partition authorising him to sell the suit property by public auction if the property could not be partitioned by metes and bounds. The Commissioner reported to the trial Court that the suit property could not be divided or partitioned by metes and bounds and, therefore, proposed that it should be sold by public auction. At that time, defendants Nos. 1 to 6 filed an application praying for permission to bid. The permission was granted. Thereafter, they again gave an application stating that they together had more than one-half share in the suit property and, therefore, the suit property be sold to them. The plaintiff also made an application to bid at the auction. He was also given permission to bid. But because the preliminary decree contained a direction that the suit property be sold by public auction, the trial Court directed that the property be sold by public auction and negatived the plea that the property should be sold by private auction between the parties. This order of the trial Court was challenged in the aforesaid revision petition before this Court. After considering the provisions of Sections 2 and 3 of the Act, S.H. Sheth, J. observed: "Sub-sections (1) and (2) of Section 3 have been enacted with the object of retaining the property in the family itself where one shareholder undertakes to buy the share of another shareholder in case of a property which is found to be incapable of being partitioned." It was further observed:

Since both the sides have expressed their desire to purchase the share of the other side at the valuation ascertained by the Court, the learned trial Judge ought to have followed the procedure laid down in Section 3 and caused the valuation of the property made. After having ascertained the valuation, the learned trial Judge ought to have followed the following procedure. Since both the sides have expressed their desire to purchase the share of the other side, he ought to have sold the property to one who offered the highest bid at an auction confined to the two contesting sides. In case both the sides decline to purchase the suit property in accordance with the terms stated above, he can then order the property to be sold by public auction.

Mr. Arvind K. Shah submitted that this judgment would not be helpful to Mr. Sanjanwala because the facts clearly show that there was a request made by the parties so as to attract Sections 2 and 3 of the Act, while in the instant case there is no such request. Further, it was submitted by him that the Court was directed to ascertain the valuation and therefore, if the Court has fixed the valuation in the instant case by itself it cannot be said to be an action which can be agitated in second appeal. I do not find much force or relevancy in the argument advanced by Mr. Shah 951 mainly because S.H. Sheth J. specifically observed that ascertaining of the value by the Court would be by directing the Commissioner to cause of the valuation of the property to be made. A Judge presiding over the Civil Court may or may not be able to ascertain the value of the property, and it is not always equitable to fix the value only on the ground of

lie valuation considered by the party for paying Court-fee. Before me, the Supreme Court judgment is cited where in the guidelines for procedure for fixing the value is given, to which I will refer presently. But another grievance of Mr. Shah that there is no request, also gets an answer in ,at the judgment of S.H. Sheth, J. in the aforesaid revision petition. It is observed by him:

...In fact (when a preliminary decree was passed) it was not known at that stage whether the property would be capable of partition or not. The learned trial Judge gave the direction not as a result of the controversy which had arisen between the parties, but it was a mere routine direction.

Of course, S.H. Sheth, J. has not specifically stated as to how and when the stage of making a request in writing would arise. But the facts and circumstances of that case clearly go to show that the request was made only after the preliminary decree was passed and not at the stage when the suit was decided. So, at present, in the instant case, the stage of making a request has not arisen. I am endeavouring to decide this on the judgments cited before me where the cases have been considered as to when the provisions of the Act would be made applicable, i.e. when there is a request made by the parties. But I must mention at this stage that request would have been possible if the Court first passes a preliminary decree and then put before the parties the situation wherein the properties would not have been sold, and then it would have evaluated the properties through a Commissioner or put up the off-set price and directed the parties inter se to bid and give the property to the highest bidder in the auction, and then distribute the value amongst the other sharers. But as the final decree is outright passed, the situation of making a request has not arisen.

19. In R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao, , while considering the provisions of Sections 2 and 3 of the Act, the Supreme Court observed:

Section 3(1) does not contemplate a formal application being filed in every case. The words employed therein simply mean that the other shareholder has to inform the Court or to notify to it that he is prepared to buy at a valuation the share of the party asking for sale.

Of course, in that case, the defendant had made such a request, in the written statement. But as considered earlier, this Court in the aforesaid revision petition did consider that the stage would arrive even at the time when the final decree is to be passed. In paragraph 8, after considering the provisions of Sections 2 and 3, the Supreme Court observed:

...In such a situation (arising under those sections) it has been made obligatory that the Court shall order a valuation of the share or shares and offer to sell the same to the shareholder who has applied for leave to buy the share at price ascertained by the Court. The purpose underlying the section undoubtedly appears to be to prevent the property falling into the hands of third parties if that can be done in a reasonable manner... But having regard to the strong attachment of the people in this country to their landed possession the consent

of the parties interested at least to the extent of a moiety in the property was made a condition precedent to the exercise by the Court of the new power. At the same time in order to prevent any oppressive exercise of this privilege those share holders who did not desire a sale were given a right to buy the others out at a valuation to be determined by the Court.

From these observations, it is very clear that first of all the endeavour of the Court should be to see that the property should not fall in the hands of a third party. The Court must first try to ascertain the value, and if not, it is also open to it to have private auction between the sharers.

20. On consideration of the aforesaid decision of the Supreme Court in R. Ramamurthi's case (supra) this Court in Sangar Gagu Dhula v. Sangar Abharam Vela 18 G L R 257, observed that this power of the Court can be exercised at any time. In para 10, after reproducing the provisions of Sections 2 and 3 of the Act, it has been observed:

It would thus appear that in a suit for partition when it appears to the Court that for the reasons set out in Section 2, a division of the property cannot be reasonably and conveniently made and the sale of the property would be more beneficial, it can direct sale at the request of the shareholders interested individually or collectively to the extent of one moiety or upwards. The proceedings thereunder might be regarded as a sequel to or continuation of the partition suit and in order to give complete relief to the parties the Court would undoubtedly be authorised to make an order for sale.

It was further considered:

...Although on the decided cases it must be held that the Court had passed a final decree and it had become functus officio, that situation would be with reference to the provisions of Section 54 and Order XX, Rule 18(1) only. The power which the Court derives u/s 2 of the Partition Act would be an independent and distinct power to do complete justice between the parties and to give effect to its own final decree. There is no question whatsoever of an order for sale being made in execution proceedings.

If this is considered, then even after the order of the Court it can well be said that there is scope for the parties to make an application for the shares to be allotted to them.

21. In Badri Narain Prasad Choudhary and Others Vs. Nil Ratan Sarkar, , the Supreme Court considered how the price should be fixed and what was wrong in fixing the price at random. It was observed, following the decision of Andhra Pradesh High Court in AIR 1958 AP 647 (Supra) to which I have already referred to earlier as contained in para 8 of the judgment of this Court in Hirachand's case (supra):

In cases not covered by Sections 2 and 3 of the Partition Act, the power of the Court to partition property by any equitable method is not affected by the said

Act.

It was, submitted by Mr. Shah that if there is no request and Sections 2 and 3 of the Act are not made applicable, the equitable method is not affected, and therefore, I should not interfere. This is a very attractive argument, but the Court has to see that equitable decision is reached and if there is scope for following the provisions of Sections 2 and 3 of the Act, because preliminary decree is not passed and final decree is passed immediately, then there is scope for making some amends to the orders passed by the trial Court only for doing substantial justice between the parties. It has been further observed by the Supreme Court:

Where the suit property is so small that it cannot be conveniently partitioned by metes and bounds without destroying its intrinsic worth, there is no alternative but to resort to the process called *Owerty*, according to which, the rights and interests of the parties in the property will be separated only by allowing one of them to retain the whole of the suit property on payment of just compensation to the other.

Mr. Sanjanwala relied on these observations because they help in ascertaining that the process of *owerty* should have been followed and order should be made for payment of just compensation. It is his submission that offer should have been made to any one of the parties to retain the whole property by deciding just compensation which should be paid to the others. In the aforesaid case before the Supreme Court, the defendant was holding 3/16th share and he was a very small co-sharer. He was using the property as a shop-cum-residence and, therefore, it was observed by the Supreme Court that equity required that he should be given a preferential right to retain the whole of the suit property on payment of compensation being the just equivalent of the value of the plaintiff's 13/16th share to them. It was held by the Supreme Court that the valuation fixed by the High Court for the plaintiff's 13/16th share was not a fair compensation. So, when the Supreme Court considered that compensation was not fair, it interfered and reversed the order of the High Court. In paragraph 21, the Supreme Court observed:

...The valuation of Rs. 9,000/- fixed by the High Court was certainly not a fair compensation for the plaintiffs' 13/16th share. This was the price at which the plaintiffs had purchased their share on April 27, 1957. But in 1958, more than one year before this suit, which was instituted in August, 1959, a plan or scheme for converting this locality into a market had been approved by the authorities. This must have led to an immediate spurt in the value of the land in the locality. In this connection, it is pertinent to note that when in 1963, this property was, in execution of the decree of the trial Court, put to auction, the highest bid fetched by it was Rs. 50,000/-. It was, therefore, highly unfair to the plaintiffs to fix the value of their share at Rs. 9,000/-, even on March 20, 1967 when the High Court's judgment was pronounced. Although the value of the property could be fixed by auction between the two parties, we feel that this method would be

unsatisfactory in this case as the plaintiffs who own the major share and have unlimited resources, would outbid the defendant. In the circumstances, we think that the more equitable method would be to take the value of the property as Rs. 50,000/- in 1963 and allow a reasonable increase for the rise in price since 1963 to this date, taking into account the rise in price in the locality, and give the defendant the first option to retain the whole property on payment of 13/16 share of that valuation (including the increase) to the plaintiffs within a period of three months or such further period that may be granted by the Court of first instance, failing which the plaintiffs will be entitled to be allotted and put in possession of the whole of the suit property, on payment to the defendant of 3/16 share of the value of the property determined by the Subordinate Judge, Patna, in the manner aforesaid.

The Subordinate Judge was, therefore, directed to fix the share accordingly. It was, therefore, submitted by Mr. Sanjanwala that in the instant case fixing the value of the property at Rs. 1,000/- at random merely on the ground of the valuation put by the plaintiff for the Court-fees was not just and proper and, therefore, the trial Court should have sent the matter to the Commissioner to ascertain the value after passing the preliminary decree and then given scope to the parties to follow the procedure under the provisions of the Act.

22. I think, the submission made by Mr. Sanjanwala is quite justified and, therefore, though the over-all judgment of both the Courts below may be justified, the final order which has ultimately resulted in awarding only Rs. 1,000/- to the plaintiff who filed a suit for partition claiming his share in the ancestral property, being not equitable, I modify the order to the following effect. The order of the trial Court decreeing the suit of the plaintiff with costs and ordering that he is entitled to 1/7th share in the immovable property and 1/2 share in the movable property is confirmed. The finding of the trial court that it would not be possible to divide 1/7th share in immovable property and 1/2 share in the movable property is also confirmed, but the order of the trial Court awarding Rs. 1,000/- to the plaintiff is set aside, and the trial Court is directed to refer the matter to the Commissioner for valuation of the suit properties, and after receiving the valuation, the parties to the suit shall be at liberty to apply to the Court to be allowed to bid inter se in an auction in which the trial Court shall fix the up-set price, and the properties be given to the sharer who offers the highest bid above the valuation placed by the Commissioner.

23. In case the second alternative does not work, the properties be sold by public auction and each sharer be given the amounts as per his share. With the aforesaid modification, the appeal is partly allowed with no order as to costs.