(1993) 05 CAL CK 0016

In the Calcutta High Court

Case No : C.O. No. 1578 of 1992

Sri Dasarathi Chakroborty and Others — APPELLANT

Vs

Sri Somenath Banerjee and Others — RESPONDENT

Date of Decision : 04-05-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10, 115, 151
Partition Act, 1893 — Section 4
Transfer of Property Act, 1882 — Section 44

Citation : (1993) 2 CALLT 64 : 97 CWN 1161

Hon'ble Judges : Samir Kumar Mookherjee, J;Amal Kanti Bhattacharji, J

Bench : Division Bench

Advocate : Mrinal Kanti Das and Somenath Ghosh, for the Appellant;Ranjit Kr. Banerjee and S. Chakraborty, for the Respondent

Judgement

Samir Kumar Mookherjee, J.—One Brojobala Chakraborty, claiming to be purchaser of 1/4th share from one of the four sons of the absolute owner of the suit property, instituted Title Suit No. 97 of 1958 in the 7th Court of the learned Assistant District Judge at Alipore for partition impleading therein two sons of the sole owner and the auction purchaser of the share of one of the four sons. The present petitioners 1 to 7 and petitioner No. 8 before this Court are the heirs of the original plaintiff and the auction purchaser mentioned above. The said suit was ultimately decreed in preliminary form, inter alia, declaring the right of defendant No. 2 to purchase (pre-empt) the share of the plaintiff and the then defendant No. 3. In compliance with the preliminary decree the defendant No. 2 filed an application for pre-emption, which was registered as Misc. case No. 59 of 1963. Thereafter, from time to time, different Commissioners were appointed for determination of valuation of the respective shares of the parties but due to absence of finality of Commissioner''s report upto the year 1987, the plaintiffs filed an application for partition by metes and bounds, and, by order No. 300 dated 6.2.1988 a pleader Commissioner was appointed in terms of prayer of the plaintiffs. After passing of the said order, on or about 14th June, 1990, the defendants, opposite parties 1-3, filed an application u/s 151 of the Code of Civil Procedure, inter alia, for modification and/or recalling of the aforesaid order No. 300 dated 6.2.88 and for a direction upon the pleader Commissioner for ascertaining the valuation of the shares of the respective parties and by the impugned order No. 340, dated 16th September, 1991, order No. 300 was modified by directing the pleader Commissioner to ascertain the valuation of the shares of the respective parties, instead of effecting partition of the suit property.

2. Before us the only point which has been urged on behalf of the petitioners is that the Court below had no jurisdiction and/or acted with material irregularity and illegality in the exercise of the jurisdiction in directing valuation of the shares of the parties in terms of the order dated 19th May, 1965, which valuation must relate to and be based on the present market value.

3. We have, therefore, been called upon to fix up the valuation date for the purpose of exercise of right of pre-emption as granted under the preliminary decree. It is well settled by series of judicial authorities that the sale in implementation of a right of pre-emption u/s 4 of the Partition Act is a forced sale and as such the Court is required to be alert and careful in the matter of determination of the value of the share preemptible in compliance with Section 4 of the Partition Act, so that no injustice is inflicted on either the pre-emptor or the pre-emptee. The legislative intent is to prevent intrusion of stranger into a joint family dwelling house. It is also well settled that such a right of pre-emption, exercisable against the stranger purchaser, subsists till the termination of the suit and long pendency of a suit for partition is a common feature, which has also been taken into consideration by judicial authorities in directing valuation of the respective shares on the basis of market value. Reference in this connection may be made to the cases of Subol v. Gostho (60 CWN 829); Birendra Nath Banerjee Vs. Sm. Snehalata Devi and Another, and Gopal Chandra Mitra and Others Vs. Kalipada Das and Others, .

4. Possibilities of the above contingencies render it necessary that the fixation of the valuation date or determination thereof must be left to be made by the Court and also justifies our proposed view not to lay down any rigid formula for fixation of such a date. This discretion of the Court may be exercised upon consideration of the different factors pertaining to each particular case, including the conduct of the parties and its nature. If a pre-emtor co-sharer is found by the Court to have unnecessarily dragged the proceeding upon a pretence of exercise of his right or removal of a prejudice or by failure to take necessary steps preceding the pre-emption, the Court must lean in favour of the pre-emptee by fixing a more recent date as the valuation date. If on the other hand the pre-emptee is found to have unnecessarily dragged the proceeding on the pretext of existence of legal flaws or technical lacunae so as to add to the difficulties of the pre-emptor/purchaser in vindicating his right of pre-emption by enhancing the valuation on the basis of higher market value, the Court is empowered to fix up the date of the application for pre-emption or of the preliminary decree or the

date of the undertaking filed by the pre-emptor as the valuation date. From a perusal of the records of the instant proceeding it appears, as stated already, that on 30th July, 1987, the plaintiff filed an application for appointment of a Commissioner for effecting partition by metes and bounds without disclosing therein that there was a previous order for appointment of Valuation Commissioner in terms of the preliminary decree, declaring the right of pre-emption of the defendants/opposite parties here, which resulted in ex parte order being order No. 300. Prior to the said order or the date of making of the application by the plaintiff there was no fault of either of the contesting groups of parties which might be said to have contributed to the defaults on the part of the appointed Commissioner to submit a report. The pre-emptee stranger, therefore, is not entitled to the enhancement of the valuation by the delay caused by proceeding with his application filed on 30th July, 1987. The valuation date in this case, therefore, will be 30th July, 1987 since the date of the preliminary decree which is 28th June, 1963, if accepted, will result in inflicting financial prejudice on the stranger pre-emptee.

5. The revisional application is thus disposed of directing the Court to pass appropriate orders for completion of the work of the Valuation Commissioner in the light of the above observations, bearing in mind that the relevant date for the purpose of valuation will be 30th July, 1987. The Court is further directed to issue necessary directions for completion of the Commissioner''s work within a period of eight weeks from the date of appointment of the Commissioner.

There will be no order as to cost.

Let the records to send down to the Court concerned by special messenger at the cost of the opposite party and let such cost be put in by opposite parties within a week from today.

A.K. Bhattacharji, J.

6. I agree.

