

BADRI NARAIN CHOUDHARY & ORS.

v.

NILRATAN SARKAR

March 10, 1978

[R. S. SARKARIA AND P. S. KAILASAM, JJ.]

*Partition Act, 1893 Ss. 2 and 3, scope of—Interpretation of the pleadings—Equity jurisdiction of the Courts—Powers of Court dehors provisions of Act.*

In a suit for partition of the suit property, which was very small in dimension measuring .013 acres only filed by the plaintiffs-appellants, the trial Court by its judgment dated 14-8-1961, decreed the suit and in doing so took recourse to the provisions of S. 3(2) of the Partition Act, 1893 as it could not be conveniently partitioned. The trial judge fixed the valuation of the suit premises at Rs. 11,250/- and directed "that the suit premises being incapable of partition shall be put to sale between the plaintiffs and the defendant, and the same shall be sold to that party who offers to pay the highest price above the valuation of Rs. 11,250/-". Since the highest bid in the last auction held by the Court in June 1965, was Rs. 50,000/- and by the plaintiffs the defendant was given an option to purchase the property at that price and deposit the sale money by July 1965. On his failure, the Court accepted the highest bid of the plaintiffs. Accepting the defendant-respondent's appeal, the High Court, held, "by making the averments in paragraphs 8 and 10(c) of this plaint, the plaintiffs have clearly made out a case to be dealt with u/s. 2 of the Act", and therefore, equity had to be worked out between the parties by allowing the defendant who was residing in the 1st floor and having a shop in the ground floor to purchase the share of the plaintiffs under the provisions of S. 3(1) r/w S. 2 of the Act. Taking Rs. 11,250/- as the price of the whole property in suit which was the valuation fixed by the trial Court, the High Court worked out the value of the plaintiffs' share as Rs. 9,000/-, and that of the defendant as Rs. 2,250/- and further directed that the defendant be allowed to purchase the plaintiffs' share in the suit property.

Allowing the appeal by special leave and remitting the case to the trial Court, the Court

HELD : 1. Under s. 3 r/w S. 2 of the Partition Act, the Court can exercise the power u/s 3; y(i) there is a request of any of the shareholders interested individually or collectively to the extent of one moiety or upwards, for sale of the property and its distribution and (ii) it reaches an opinion that by reason of the nature of the property or the number of shareholders or some 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. From the word "may" it is clear that even when both the conditions are satisfied, the Court has discretion to direct or not to direct a sale of the property and distribution of the proceeds. The request contemplated is a *sine qua non* for directing a sale because such a request necessarily signified his willingness to have his share converted into money so that the co-sharers may, by means of the procedure provided in s. 3, buy them out. The request for sale envisaged by s. 2 must be one for public sale. If no such request has been made to the Court s. 3 cannot be brought into operation.

In the instant case, it is clear from pleadings, that neither in substance nor in form any request within the purview of s. 2 had been made by any of the parties (co-sharers). That condition precedent for invoking s. 3(1) was lacking. The provisions of Ss. 2 and 3 of the Partition Act are therefore not applicable to the peculiar circumstances of the case. [470 F-H, 471 A-B, F-G]

2. 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

- A** the said Act. In a situation where it is found as a fact, that the suit property is so small that it cannot be conveniently and reasonably partitioned by metes and bounds without destroying its intrinsic worth, the Court can devise such other feasible method for affecting partition as may appear to it to be just and equitable, in the circumstances of the case. In the instant case the suit property, being incapable of division in specie, there is no alternative but to resort to the process called *Owely*, 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 such compensation to the other as may be a just equivalent of his share. [471 G-H. 472 A-B]

**B**

*Rama Prasada Rao v. Subramanian*, A.I.R. 1958 A.P. 647 approved.

**C**

[The Court observing, that a more equitable method would be to take the value of the property as Rs. 50,000/- which was the highest bid in 1963 and to allow a reasonable increase for the rise in price, since 1963 upto this date, directed the Trial Court to dispose of the case in conformity with its observations after hearing the parties and after taking such further evidence as may be required preferably within three months from the date of its order.]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2388 of 1968.

(Appeal by Special Leave from the Judgment and Decree dt. 20-3-1967 of the Patna High Court in First Appeal No. 488 of 1961)

**D**

*Lal Narain Sinha, F. C. Nariman, S. C. Aggarwala & Aruneshwar Gupta* For the Appellants

*A. B. N. Sinha, S. N. Prasad* for the Respondent

The Judgment of the Court was delivered by

**E**

SARKARIA, J.—This appeal by special leave, is directed against a judgment, dated March 20, 1967, of the High Court of Judicature at Patna. It arises from these circumstances :

**F**

The defendant respondent purchased  $\frac{3}{16}$  share for Rs. 2,250/- in the suit premises by a sale deed, dated March 25, 1957. Before this sale, the respondent was already in occupation of the premises as a tenant paying a monthly rent of Rs. 53/-, inclusive of water-tax, to the then proprietor.

**G**

The plaintiffs-appellants, who, at the material time, were members of a joint Hindu family governed by Mitakshara Law, purchased the remaining  $\frac{13}{16}$  share in the suit premises for Rs. 9,000/- by a sale deed, dated April 27, 1957. They already owned and possessed a parcel of land adjacent to the suit premises and they intended to open a market there after amalgamating the same with their share in the suit premises. They asked the respondent to partition and separate their share. The respondent did not agree. Therefore, on August 8, 1959, on the preceding facts, the appellants, instituted the suit (No. 64 of 1959) for partition of the suit property, in the Court of the Subordinate Judge, First Court, Patna.

**H**

In the plaint, it was *inter alia* alleged that since the suit property was of very small dimensions, measuring .013 acre only, and its partition by metes and bounds was not feasible. The plaint also contained

a proposal from the plaintiffs to purchase the defendant's share in the suit premises at a price which may be held reasonable and proper by the Court. A

The defendant resisted the suit. He pleaded that he was a permanent tenant in the suit premises and not a tenant from month to month; that the plaintiffs had purchased only the right to receive their proportionate share of the monthly rent, to the extent of Rs. 39/-, but they were not entitled to claim partition. An alternative proposal was made that the defendant was willing to buy the share and rights of the plaintiffs on a valuation that may be fixed by the Court. B

The Subordinate Judge by his judgment dated August 14, 1961, decreed the suit and in doing so, held that the defendant was not a permanent tenant but a tenant from month to month only, that the dimensions and the area of the suit premises being very small, it could not be conveniently partitioned and therefore, it was necessary to have recourse to Section 3(2) of the Partition Act, 1893. He fixed the valuation of the suit premises at Rs.11,250/- and directed "that the suit premises being incapable of partition shall be put to sale between the plaintiffs and the defendant, and the same shall be sold to that party who offers to pay the highest price above the valuation made by me". C

According to the suit property was repeatedly auctioned between the parties. The first was held in September 1963, the highest bid was offered by the plaintiffs. The last auction was held in June 1965, the highest bid being Rs. 50,000/- offered by the plaintiffs. The defendant was given the option to purchase the property at that price and deposit the sale money by July 19, 1965. The defendant failed to do so. The Court thereupon ordered that "the next highest bid of the plaintiffs to the extent of Rs. 50,000/- is accepted". D

Against the decree of the Trial Court, the defendant preferred an appeal to the High Court. The Division Bench who heard this appeal held that by making the averments in paragraphs 8 and 10(c) of the plaint, "the plaintiffs have clearly made out a case to be dealt with under Section 2 of the Act," and therefore, equity had to be worked out between the parties by allowing the defendant to purchase the share of the plaintiffs under the provisions of Section 3(1), read with Section 2 of the Act. Taking Rs. 11,250 as the price of the whole property in suit which was the valuation fixed by the Trial Court—the High Court worked out the value of the plaintiffs' share as Rs. 9,000/-, and that of the defendant's share as Rs. 2,250/- and further directed that the defendant be allowed to purchase the plaintiffs' share in the suit property, for Rs. 9,000/-. Accordingly, it accepted the defendant's appeal and dismissed the cross-objections of the plaintiffs. Hence, this appeal by the plaintiffs. E

Mr. Lal Narain Sinha, learned counsel for the appellants, contends that the High Court was in error in holding that the plaintiffs-appellants had made any request such as in contemplated by Section F

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H

**A** 2 of the Partition Act, 1893, and therefore, it was necessary to have recourse to Section 3 of the Act. It is submitted that Sections 2 and 3 of the Act did not apply to the case which had, in consequence, to be dealt with *de-hors* the Act in accordance with equitable principles. The High Court-proceeds the argument - has allowed to defendant-respondant to purchase the share of the plaintiffs in the suit property for Rs. 9,000/- only; while the current market value of his share would be more than 10 or 12 times of that figure, which was highly unjust and unfair to the appellants.

**B**

As against this, it is urged on behalf of the respondent, that once it is held that the Act does not apply, the Court has no power to sell the property. It is pointed out that the High Court had given the respondent the first option to purchase the plaintiffs share in the property at the value of Rs. 9,000/- because the equity was entirely on the side of the respondent, that the plaintiffs were residing away from the property, they owned 5 or 6 houses in Patna, while the respondent and his widowed sister were residing in the first floor of the suit property and the respondent was running a shop in the ground floor. It is further submitted that the value of the plaintiffs' 13/16 share fixed by the High Court was the price at which they had purchased it in 1957, and the suit for partition was filed in 1959, that in these circumstances the High Court was right in not taking into account any increase in its value subsequent to its purchase in 1957. It is maintained that it would work hardship on the respondent who was a poor man, to fix the value of the plaintiffs' share by auction between the parties.

**C**

**D**

**E** Before dealing with these rival contentions, it is necessary to ascertain whether the High Court was right in holding that the plaint contained a request such as is referred to in Section 2 of the Act, and therefore, the Court had but to accept "the prayer made by the defendant to buy the share and rights of the plaintiffs exactly in terms of Section 3 of the Act".

**F** Sections 2 and 3 of the Act are inter-linked. A perusal of Sections 2 and 3 will show that the Court can exercise the power under Section 3, if —

- G**
- H**
- (i) there is a request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, for sale of the property and its distribution, *and*
  - (ii) it reaches an opinion that by reason of the nature of the property or the number of shareholders or some 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.

Even when both these conditions are satisfied, the Court has a discretion to direct or not to direct sale of the property and distri-

tribution of the proceeds. This is clear from the word "may" used in this Section. A

It will be seen from the above analysis that the request contemplated in No. (1) is a *sine qua non* for directing a sale because such a request necessarily signifies his willingness to have his share converted into money, so that the co-sharers may, by means of the procedure provided in Section 3, buy them out. The request for sale envisaged by Section 2 must be one for public sale. If no such request has been made to the Court, Section 3 cannot be brought into operation. B

Now let us see whether the plaint contained any prayer which—as the High Court has held—substantially amounted to a request for such sale under Section 2. The material part of the plaint reads as follows : C

"8. That the premises in suit is very small in dimension, measuring .013 acre only, and if it is considered by the court that the separation of the defendant's share in the said premises is not feasible, the plaintiffs beg to offer a price held to be reasonable and proper to the defendant for his share in the said premises." D

Again, in Para 10(c) it is prayed : "That in the alternative when division of premises in suit is considered not feasible, sale of the defendant's share or of the premises be directed and the same be sold to the plaintiffs for reasonable and proper price."

By no stretch of language, the above extracts from the plaint, could be construed to contain a request under Section 2 that the suit property be publicly sold and its *sale proceeds* distributed *pro rata* between the parties. E

Nor could, by any reckoning, the alternative proposal contained in the defendant's written statement, to the effect, that he was prepared to buy out the plaintiffs' share at a valuation that may be fixed by the Court, amount to a request under Section 2. F

In short, neither in substance nor in form any request within the purview of Section 2 had been made by any of the parties (co-sharers). That condition precedent for invoking Section 3(1) was lacking.

Thus considered, it is clear that the provisions of Sections 2 and 3 of the Partition Act are not applicable to the peculiar circumstances of the case. At the same time, there is a concurrent finding of fact recorded by the courts below that the suit property is so small, that it cannot be conveniently and reasonably partitioned by metes and bounds, without destroying its intrinsic worth. This finding is unassailable. In our opinion in such a situation, the Court can devise such other feasible mode for effecting partition as may appear to it to be just and equitable in the circumstances of the case. G

The suit property, being incapable of division in specie, there is no alternative but to resort to the process called *Owerty*, according H

A 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. As rightly pointed out by K. Subba Rao, C. J. (speaking for a Division Bench of Andhra High Court in A.I.R. 1958 Andhra Pradesh 647), 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.

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C  
D  
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F  
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Now in the present case, the defendant is the smaller co-sharer and he is using the property as a shop-cum-residence. Equity requires 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 plaintiffs' share to them. The valuation of Rs. 9,000/- fixed by the High Court, was certainly not a fair compensation for the plaintiffs' 13/16 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 on 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 judgement 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.

H  
For the foregoing reasons, we allow this appeal and send the case back to the Subordinate Judge, Patna, with the direction that he should take such further evidence with regard to the increase in the value of similar properties in the locality since 1963, as the parties may wish to produce, and then and after hearing the parties, dispose of the case in conformity with the observations made in this judgement. There shall be no order as to costs in this Court.