GAUTAM PAUL

v.

DEBI RANI PAUL AND ORS

OCTOBER 17, 2000

[V.N. KHARE AND S.N. VARIAVA, JJ.]

Partition Act, 1893—Section 4—Right of pre-emption—Exercise of—Dwelling house belonging to undivided family—Transfer of share to a stranger—No suit for partition by stranger transferee—Effect of—Held, co-sharer family members do not acquire right of pre-emption.

Interpretation of statutes

Liberal interpretation—Grant of—Held, while giving liberal interpretation the legislative intent and clear wordings of the section should not be ignored.

Words & Phrases

"Dwelling-house belonging to an undivided family", "such family"—Meaning of in the context of Section 4 of the Partition Act, 1893.

A residential Property was sold by its original owner to a third party. After the death of the said third party, his heirs gifted the residential property in favour of three persons two of them being sons and the third being the grandson of the original owner. The said property was subsequently inherited by their legal heirs. Appellant, who was one of the legal heirs and continued to stay in one room of the suit premises after the death of his father, purchased 1/9th share of another legal heir in the dwelling house. Respondents 1 and 2 who were closely related to the appellant, filed a suit for partition of the property and for a declaration that sale in favour of appellant was illegal, void and not binding on them. They also file an application under S.4 of the Partition Act, 1893 claiming pre-emptive right to purchase the share sold to the appellant stranger. Trial Court while passing preliminary decree for partition, kept the application under S.4 of the Act pending for decision after recording evidence. However on appeal, High Court held that appellant was not a member of the family and respondents 1 and 2 were entitled under S.4 of the Act to pre-empt the sale made in favour of appellant. Hence the present appeal.

A On behalf of appellant-transferee it was contended that appellant was a member of the family as he was closely related to respondents through a common ancestor and therefore S.4 of the Act contemplating sale to an absolute outsider cannot be invoked; that the appellant had not sued for partition and therefore sale in his favour cannot be pre-empted under S.4 of the Act.
B

On behalf of respondents 1 and 2 it was contended that share in the dwelling house belonging to an undivided family of the grand son of the original owner, was sold to appellant who was not a member of the said undivided family and therefore S.4 was rightly invoked; that it was not necessary that the C stranger/outsider should actually file a suit for partition; that in any suit for partition filed by an outsider or member of family, the position of all parties was inter changeable and irrespective of whether the stranger/outsider asked for a separate allotment or not, any co-sharer can claim a right for pre-emption under S.4 of the Act.

D Disposing of the appeal, the Court

HELD: 1.1. The right to pre-empt purchase by co-sharer under S.4 of the Partition Act, 1893 cannot be exercised till the stranger/outsider sues for partition. There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus, strangers/outsiders can purchase E shares even in a dwelling house. However, Section 44 of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. F Thus, before the right of pre-emption, under Section 4, is exercised the condition *inter alia* laid down therein that the outsider must sue for partition must be complied with. [744-G, H; 745-A, B]

1.2. Though S.4 of the Act should be given a liberal interpretation but giving liberal interpretation does not mean that the wordings of the section G and the Legislative intent should be ignored. The legislature did not provide that the right for pre-emption could be exercised "in any suit for partition". The Legislature only provided for such right when the "transferee sues for partition." Mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. In the instant case, at no stage has the appellant asked H for partition or demanded possession of his shares. Thus, High Court was

not justified in allowing Respondents 1 and 2 to exercise a right of pre-emption under S.4 of the Act. [743-F; 745, E, F; 746-C] A

2. Appellant-transferee could not be said to be a member of the family within the meaning of S.4 of the Partition Act, 1893. The relevant wordings in the Section are "dwelling house belonging to an undivided family". The further requirement is that the transfer must be to a person who is not a member of "such family". The words "such family" necessarily refers to the undivided family to whom the dwelling house belongs. In the instant case, the undivided family is not the undivided family of the common ancestor but that of his grandson. Appellant has not claimed that he is a member of the undivided family of the latter. Consequently, appellant cannot be said to be a member of the undivided family to whom the dwelling house belongs. Merely because he is related by blood through a common ancestor does not make him a member of the family within the meaning of the term as used in S.4 of the Act. Thus, the High Court was justified in holding that the sale was not to a member of the family. [743-F, G, H; 744-A, B] B C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5942 of 2000.

From the Judgment and Order dated 11.9.98 of the Calcutta High Court in F.A. No. 152 of 1993.

S.B. Sanyal, Atanu Saikia and Avijit Bhattacharjee for the Appellants. E

Bhaskar Pd. Gupta, G.S. Chatterjee, Raja Chatterjee, Ms. Aruna Mukherjee and Soumya Ray for the Respondents.

The Judgment of the Court was delivered by F

S.N. VARIAVA, J. Leave granted.

This Appeal is against an Order dated 11th September, 1998 passed by the High Court of Calcutta.

Briefly stated the facts are as follows : G

One Dr. Jonoranjan Paul was the owner of premises No. 14-C, Sambhu Lane, Calcutta-14. This three-storied building is hereinafter referred to as suit property. The said Dr. Jonoranjan Paul had six sons, namely, Satish, Kiron, Biren, Nilratan, Nirmal and Bimol. During his life time the said Jonoranjan Paul had sold the suit property to one Dr. Trollukya Nath Ghosh. After the death H

A of Dr. Trollukya Nath Ghosh the suit property went to his heirs. The heirs executed a Gift Deed dated 2nd June, 1947. By this they gifted the suit property to Nilratan Paul, Nitrogen Baran Paul and Bimal Chandra Paul. As stated above, Nilratan Paul and Bimal Chandra Paul were two sons of Jonoranjan Paul. Nirode Baran Paul was the son of Kiron Chandra Paul.

B Nilratan Paul's share went to his son Bejoy Ratan Paul. On 25th February, 1957 Bejoy Ratan Paul sold his share in the property to Nirode Beran Paul. Even though Bijoy Ratan Paul sold his share to Nirode Baran Paul he continued to staty in one room in the premises. By a Deed of Partition executed on 25 June, 1957 Bimal Chandra Paul took property at 14 S.B. Lane. The suit property C came to Nirode Baran Paul.

Nirode Baran Paul died on 7th February 1965. On his death his mother Naras Nandini Paul, his wife Debi Rani Paul and his daughter Radha Rani Paul each got a 1/3 share in the property. The 1/3 share of mother Naras Nandini Paul went to her sons Banwari Lal Paul, Barid Baron Paul and daughter D Elbhuti Paul. They each got a 1/9th share. It is thus that Bibhuti Paul got a 1/9th share in the suit property. The 1/9th share of Banwari Lal Paul went to his son Sujit Paul and three daughters Gita, Chabi and Rubi, They each got a 1/36th share in the suit property.

The Appellant is the son of Bejoy Ratan Paul. As stated above, even E though Bejoy had sold his share to Nirode, he continued to occupy one room in the suit property. After the death of his father Appellant continued to stay in that room. On 3rd December, 1988 Appellant purchased the 1/9th Share of Bibhurt Paul in the suit property. He then also occupied the room which had earlier been occupied by Bibhuti Paul.

F Debi Rani Paul and Radha Rani Paul (wife and daughter of Nirode) filed Suit No. 4 of 1989 against Bibhuti Paul (Defendant No. 1) Gautam Paul (Defendant No. 2), Sujit, Gita, Chabi and Rubi (Defendant 3 to 6 respectively). The suit was for partition of suit property. In this suit a declaration was also sought that the sale by Bibhabati Pal in favour of Goutam Paul was illegal and G void and not binding on the Plaintiffs. In this suit an application was made under Section 4 of Partition Act. The Plaintiffs sought to buy over the share of Bibhuti Paul, which had been sold to Goutam Paul.

On 27th August 1992 the Trial Court passed a preliminary decree for partition. It was declared that the Plaintiffs had 7/9th share in this Property. H It also held that Goutam Paul had 1/9th share in the property. The Trial Court

kept the proceeding under Section 4 of the Partition Act pending, to be decided later on after recording evidence.

Being aggrieved, by their application under Section 4 of the Partition Act not having been decided, the Plaintiffs (i.e. Respondents 1 and 2 herein) filed a First Appeal, which was ultimately numbered as 152 of 1993. This Appeal was allowed by the impugned judgment dated 11th September, 1998. By this judgment the preliminary decree for partition has been upheld. It has also been held that Respondents 1 and 2 are entitled to pre-empt under Section 4 of the Partition Act. It is held that the Appellant (herein) is not a member of the family. It is held that, as the sale is to a person who was not a member of the family, Respondent Nos. 1 and 2 were entitled to purchase over the share which had been sold to the Appellant.

Mr. S.B. Sanyal submitted that Kiron Chandra Paul and Nilratan Paul were two sons of Jonoranjan Paul. He submitted that they belonged to one family. He pointed out that Respondents (1 and 2) were the wife and daughter of Nirode Baran Paul (who was the son of Kiron Chandra Paul) whereas the Appellant was the grand son of Nilratan Paul. He submitted that Section 4 contemplates a sale to an absolute outsider, who has no connection with the family. He submitted that a sale to a member of the family cannot be pre-empted under section 4.

Mr. Sanyal relied upon the case of *Ghantesher Ghosh* v. *Madan Mohan Ghosh and Others,* reported in [1996] 11 SCC 446. In this case it has been held that before Section 4 can be invoked the following conditions must be fulfilled *viz.*

(1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;

(2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;

(3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned.

(4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out

A the share of such transferee; and

(5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-
B owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate
C possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house.

It is also held that Section 4 has been enacted for the purpose of insulating the domestic peace of members of undivided family occupying a
D common dwelling house from the encroachment of a stranger transferee of the share of one undivided co-owner as the remaining co-owners are presumed to follow similar traditions and mode of life and to be accustomed to identical likes and dislikes and identical family traditions. It is held that the scheme seeks to protect the family members from the onslaught on their peaceful
E joint family life by stranger-outsider to the family who may be having different outlook and mode of life including food habits and other social and religious customs. It is held that entry of such outsider in the joint family dwelling house is likely to create unnecessary disturbances not germane to the peace and tranquillity not only of the occupants of the dwelling house but also of neighbours residing in the locality. It is held that keeping these object in view
F the right flowing from Section 4 cannot be restricted in its operation only up to the final decree for partition. It is held that crystallization of share may take place but separation and partition take place only by actual division by metes and bounds and delivery of possession of respective shares to the respective shareholders. It is held that this can be achieved only at the stage of execution
G of the final decree. It is held that only after execution, separation and partition the court would become *functus* officio. It is held that the provisions of Section 4 would, therefore, be available at all stages of the litigation till the litigation reaches its terminus by means of full and final discharge and satisfaction of the final decree for partition. It is held that if a stranger transferee enters the arena of contest at any stage and seeks to get his share
H separated he can be said to be suing for partition and separate possession

with in the meaning of Section 4. It has been held that such a transferee may come on the scene prior to the final decree or he may come on the arena of contest even in execution proceedings as a transferee of the decretal right. It is held that in either eventuality it would be said that such a stranger is suing for partition.

Mr. Sanyal also relied upon the case of *Kshirode Chunder Ghosal* v. *Saroda Prosad Mitra*, reported in XII Calcutta Law Journal 526. In this case it is held.

> "The term "family" is not defined in the Partition Act, and we do not think that it would be possible or desirable to frame a comprehensive formula or exhaustive definition to indicate all that is easily understood by the term " family." As was well observed by *Kindersley, V.C. in Green* v. *Marsden*, (1953) 1 Drewry 646 (651), 61 E.R. 598, the word "family" is, in itself, a word of a most loose and flexible description. It is, in fact, as *Wickens V.C. said in Burt* v. *Hellyar*, (1872) L.R. 14 Eq. 160, a popular and not a technical expression, and its meaning is often controlled by the context. As is pointed out in the Oxford Dictionary, Vol. IV, page 55, although the term "family" is sometimes used to include those descended or claiming descent from a common ancestor, it has, very often, a much wider import; it is often used to indicate a body of persons formed by those who are merely connected by blood or affinity; it is sometimes used to include even a body of persons who live in the house or under on head. In the case of *Wilson* v. *Cochran*, (1869) 31 Texas 677, 98 Am. Dec. 553, the matter was put clearly and concisely as follows: "The term family embraces a collective body of persons living together in one house or within the curtilage. In legal phrase, this is the generic description of a 'family'. It embraces a house-hold comprised of parents or children or other relatives or domestic servants, in short, every collective body of persons living together within the same curtilage, subsisting in common, and directing their attention to a common object, the promotion of their mutual interests and social happiness. This is the most popular acceptation of the word." The description herein suggested may, perhaps, be deemed, in some respects, too wide. But one thing is, in our opinion, beyond dispute. The word "family", as used in the Partition Act, ought to be given a liberal and comprehensive meaning, and it does include a group of persons related in blood, who live in one house or under one head or management. There is nothing in the Partition

A Act, to support the suggestion that the term "family" was intended to be used in a very narrow and restricted sense, namely, a body of person who can trace their descent from a common ancestor."

Mr. Sanyal also relied upon the case of *Paluni Del* v. *Rathi Mallick and Ors.*, reported in AIR 1965 Orissa 111. In this case the question was whether B a married daughter, who was residing with her husband at some other place, could be said to be a member of the family. It was held that the word "family" as used in the Partition Act must be given a liberal and comprehensive meaning and should include a group of persons related in blood, who live in one house or under one head or management. It is held that there is nothing C in Partition Act to support the suggestion that the terms "family" was intended to be used in a very narrow and restricted sense, namely, a body of persons who trace their descent from a common ancestor. It was held that it is not necessary that the terms "dwelling house" belonging to an undivided family should include a house where a group of persons related by blood live and that it was not necessary that they should descend from a common ancestor D or should constantly reside in the dwelling house or that they should be joint in mess so long as the members of the family have not abandoned their intention to reside in it.

Relying on the above authorities Mr. Sanyal submitted that the common ancestor was Jonoranjan Paul. He submitted that from the beginning the E Appellant has been residing in the suit property alongwith his father Bejoy Ratan Paul. He submitted that the Appellant was residing in the suit property as a member of the family. He submitted that Respondent Nos. 1 & 2 were also members of the same family. He submitted that under these circumstances it could not be said that the Appellant was a stranger or outsider. He submitted F that, therefore, the High Court was wrong in holding that the Appellant was not a member of the family. He submitted that the impugned judgment was required to be set aside on this ground.

Mr. Sanyal further submitted that in any event Appellant had at no stage "sued for partition". He submitted that as the Appellant had not sued G for partition Section 4 could not be invoked. He submitted that, even on this count, the High Court was wrong in allowing the Plaintiff to pre-empt by purchasing the share of the Appellant.

As against this Mr. Gupta submitted that Section 4 can be invoked if a share in the dwelling house belonging to an undivided family has been H transferred to a person who is not a member of such family. He submitted that

admittedly this dwelling house belonged to members of the family of Nirode Baron Paul. He submitted that it was admitted that Bejoy Ratan Paul had sold his share to Nirode Baron Paul. He submitted that a sale to a person who was not a member of the family of Nirode Baron Paul would be a sale to a person who was not a members of such family. He submitted that Section 4 would thus become applicable. He submitted that the High Court had correctly held that the Appellant could not be considered a member of such family. A B

Mr. Gupta admitted that the Appellant had not filed any suit for partition. He submitted that it was not necessary that the outsider or a stranger should actually file a suit for partition. He submitted that in any suit for partition, whether filed by the outsider or by a member of the family, there would be partition and then a division by metes and bounds. He submitted that each sharer would become entitled to receive possession of his share. He submitted that in a suit for partition, the position of all parties is inter-changeable. He submitted that separate allotment can be claimed by any party irrespective of whether he was plaintiff or Defendant. He submitted that if a stranger is a Defendant, in a suit for partition, then irrespective of whether he asks for a separate allotment or not, any co-sharer can claim a right for pre-emption under Section 4 to the Partition Act. C D

In support of his submission he relied upon the authority of Special Bench of the Calcutta High Court in *Siba Prosad Bahttacharyya and Others* v. *Bibhuti Bhusan Bhattacharjee and another*, reported in AIR 1989 Calcutta 35. He points out that this authority has upheld the consistent view of the Calcutta High Court. In this case it has been held that Section 4 must be liberally construed in favour of the co-sharers of an undivided family dwelling house. It has been held that the co-sharer has a right to buy the share of the stranger irrespective of the fact that the stranger is a Plaintiff or a Defendant. It has been held that in a partition suit the parties are interchangeable. It is held that in a suit for partition it makes no difference whether a party is Plaintiff or Defendant. It is held that a party, whether a plaintiff or Defendant, can claim a share in the dwelling house. It has been held that the expression "to sue" would include not only " to prosecute" but also "to defend". It is also held as follows: E F G

> "The object of Section 4 is to prevent the disintegration of the family dwelling house by preventing to introduce stranger therein. The stranger is adequately compensated by the market, value of the property purchased so that dwelling house of the family be preserved. The view that it must be strictly construed and that until and unless the H

A stranger either sues for partition as a plaintiff or asks for separate allotments as defendant (sic) be accepted then the whole object of Section 4 would be frustrated. In a suit for partition parties are interchangeable. The defendant can, at any time before the decree for partition is finally passed, ask for separate allotment. The right under Section 4 is available to the co-share as soon as a preliminary decree B is passed. The defendant may frustrate the right of the co-sharer to buy out the share by not asking for separate allotment up to the last moment. The possibility cannot be ruled out that after the co-sharer's right of pre-emption u/s 4 is rejected on the ground that the defendant has not asked for separate allotment, the defendant could ask for C separate allotment. In this way if the view of *Netai Dass's* case be accepted great injustice will be caused to the co-share of an undivided family dwelling house."

It must be mentioned that in the above mentioned case it was noted that a similar view was also taken in the case reported in AIR (1937) Nag. 4, AIR D (1950) Pat 317 & AIR (1971) Orissa 127. It was also noted that a contrary view has been taken in the cases reported in AIR (1957) All 356, AIR (1922) Bom 121 and AIR (1950) Mad 214.

Mr. Gupta submitted that the Calcutta High Court has consistently taken this view. He points out that the impugned judgment is by the Calcutta E High Court. He submits that it thus could not be said that there was any error in the judgment.

Mr. Gupta also relied upon the *Ghantesher Ghosh* case (supra). He submitted that this case also lays down that Section 4 operates at all stages of the litigation even up to the execution proceedings. He submitted that in F *Ghantesher Ghosh's* case a decree had already been passed. Thereafter a stranger purchaser applied for execution of that decree. He points out that this Court held that even though it was in execution the provisions of Section 4 would apply. He submitted that in every partition suit there is bound to be a division of the property by metes and bounds and a separation of the shares. He submitted that the object of Section 4 is to ensure that no outsider G comes to a dwelling house even though the outsider is merely a Defendant in the suit. He submitted that if a contrary view is taken then on a partition the outsider is bound to get a share and take possession of that share. He submitted that that would defeat the laudable object of Section 4. He submitted that object would be achieved only if the other co-sharers are entitled to pre-H empt and purchase over the share of the stranger, so long as the stranger is

a party to the suit for partition. A

We have heard the parties and considered the rival submissions. In this Appeal the main questions which arise for consideration are:-

(a) Whether the Appellant could be said to be a member of the family within the meaning of Section 4 of the Partition Act? and B

(b) Whether in the absence of the transferee suing for partition a shareholder can invoke Section 4 and buy over such share?

For a consideration of these questions it would be appropriate to set out, at this stage, Section 4 of the Partition Act. Section 4 reads as follows: C

> "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 shareholder shall undertake to buy the share of D 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. (emphasis supplied)
>
> (2) If in any case described in sub-section (1) two or more members E of the family being such shareholders severally undertake to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

A mere perusal of this Section shows that for its applicability the conditions as set out in *Ghantesher Ghosh* case (Supra) have to be fulfilled. F

Let us now consider whether the sale to the Appellant by Bibhuti Paul can be said to be a sale to an outsider or a stranger to the family. Undoubtedly, Section 4 should be given a liberal interpretation. However giving a liberal interpretation does not mean that the wordings of the Section and the clear interpretation thereof be ignored. The relevant wordings are G "dwelling-house belonging to an undivided family". Thus it must be dwelling house belonging to an undivided family. The further requirement is that the transfer must be to a person who is not a member of "such family". The words "such family" necessarily refers to the undivided family to whom the dwelling house belongs. In this case the undivided family is not the undivided family H

A of Jonoranjan Paul. Admittedly the undivided family which owns the dwelling house is the undivided family of Nirode Baron Paul. It is not Appellant's case that he is a member of the undivided family of Nirode Baron Paul. In the case relied upon by Mr. Sanyal the persons concerned were members of the family to whom the dwelling house belonged. In the case the Appellant, not being a member of the family of Nirode Baron Paul cannot be said to be a member B of the undivided family to whom the dwelling house belongs. Merely because he is related by blood through a common ancestor i.e. Jonaranjan Paul does not make him a member of the family within the meaning of the term as used in Section 4. To that extent the High Court was right in coming to the conclusion that the sale was not to a member of the family.

C

The next question is whether it can be said that the Appellant had sued for partition. Undoubtedly the decisions of the Calcutta High Court in *Bhattacharyya* case (supra) and the cases reported in AIR (1937) Nag. 4, AIR (1950) Pat 37 and AIR (1971) Orissa 127, support the interpretation sought to be placed on Section 4 by Mr. Gupta however, as noted above there is conflict D of opinion between the various High Court on this point. The cases reported in AIR (1957) All 356, AIR (1922) Bom, 121 and AIR (1950) Mad 214 take a contrary view. In our view for reason set out hereinafter the opinion held by the Calcutta, Patna and Orissa High Court is not correct and cannot be sustained. It must be mentioned that this Court has in the case of *Babu Lal* E v. *Hablnoor Khan,* reported In AIR [2000] 5 SCC 662 already considered the correctness of the view taken in AIR 1971 Orissa High Court took the same view as the Calcutta High Court. This Court held as follows in respect of the view taken by the Orissa High Court:

> "If the ratio of the aforesaid decision is held to take the view that F a stranger-purchaser who does not move for partition of the joint property against the remaining co-owners either as a plaintiff or even as successor of the decree-holder seeks execution of the partition decree can still be subjected to Section 4 to the Partition Act proceedings, then the said view would directly conflict with the decision of this Court in Ghantesher Ghosh case and to that extent it must be G treated to be overruled."

We are in agreement with this opinion.

There is no law which provides that co-sharer must only sell his/her share to another co-share. Thus stranger/outsiders can purchase shares even in a H dwelling house. Section 44 of the Transfer of Property Act provides that the

transferee of share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of pre-emption, under Section 4, is exercised the conditions laid down therein have to be complied with. As seen above one of the conditions is that the outsider must sue for partition, Section 4 does not provide the co-sharer a right to pre-empt where the stranger/outsider does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider anytime he/she wants. Thus even though a liberal Interpretation may be given, interpretation cannot be one which gives a right which the Legislatures clearly did not intend to confer. The Legislature was aware that in Suit for Partition the stranger/outsider, who has purchased a share would have to be made a party. The Legislature was aware that in a Suit for Partition the parties are inter-changeable. The Legislature was aware that a Partition Suit would result in a decree for Partition and in most cases a division by metes and bounds. The Legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share. Yet the Legislature did not provide that the right for pre-emption could be exercised " In any Suit for Partition". The Legislature only provided for such right when the "transferee sues for partition". The intention of the Legislature is clear. There had to be initiation of proceedings or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger/purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition. The Interpretation given by the Calcutta, Patna, Nagpur and Orissa High Courts would result in nullifying the express provisions of Section 4, which only gives a right when the transferee sues for partition. If that interpretation were to be accepted than in all cases, where there has been a sale of share to an outsider, a co-sharer could simply file a suit for partition and then claim a right to purchase over that share. Thus even

A B C D E F G H

A though the outsider may have, at no stage, asked for partition and for the delivery of the share to him, he would be forced to sell his share. It would give to a co-sharer a right to pre-empt and purchase whenever he/she so desired by the simple expedient of filing a Suit for Partition. This was not the intent or purpose of Section 4. Thus the view taken by Calcutta, Patna, Nagpur and Orissa High Courts, In the aforementioned cases, cannot be said to be good law.

In this case we have seen the written statement and the additional written statement filed by the Appellants. We have also seen the evidence given by the Appellants. At no stage has the Appellant asked for partition or demanded possession of his share. All that he has claimed, which he was bound to and entitled to, is that he has a 1/9th share in the property. Under these circumstances, the High Court was wrong in allowing the Respondents 1 and 2 to exercise a right of pre-emption under Section 4 of the Partition Act. In this case, the condition of a transferee suing for partition had not been fulfilled.

In this view of the matter the impugned judgment requires to be and is set aside. The decree of the Trial Court dated 27th August, 1992 is restored except that the application under Section 4 shall now stand dismissed as being premature. Respondents 1 and 2 are at liberty to apply to the Trial Court, if they so desire for a final decree of Partition. We however clarify that if at any stage the Appellant applies for partition and for separation and possession of his share Respondents 1 and 2 and/or any other co-sharer will still entitled to move under Section 4 of the Partition Act.

The Appeal stands disposed off accordingly. There will be no order as to costs.

S.V.K.I. Appeal disposed of.