

AFR

Court No. - 20

Case :- SECOND APPEAL No. - 202 of 2017

Appellant :- Yogesh Kesarwani And Anr.

Respondent :- Devi Shankar Shukla

Counsel for Appellant :- Ravi Nath Tilhari, Deepanshu Dass, Lalita Prasad Misra, Pradeep Chandola

Counsel for Respondent :- Brijesh Kumar, Ritesh Kumar Srivastava

Hon'ble Jaspreet Singh, J.

Introduction:-

1. The issue involved in the instant second appeal revolves around the scope and ambit of Section 4 of the Partition Act, 1893.
2. The present second appeal has been preferred by the plaintiffs/appellants being aggrieved against the judgment and decree dated 14.02.2017 passed by the First Appellate Court in Regular Civil Appeal No. 63 of 2016 whereby the Lower Appellate Court allowed the defendants appeal and set aside the judgment and decree dated 20.01.2016 passed by the Civil Judge, Senior Division, Lucknow in R.S. No. 436 of 2009 whereby the counter claim of the defendant was denied, as a result the counter claim has been decreed.
3. The instant second appeal was admitted on the following two substantial questions of law which read as under:-

"i. Whether the valuation of share of the stranger in house of the shareholder must be made by the court on the date of judgment determining the respective shares of the transferee and the co-sharer ? If yes, its effect on the decree passed by the lower appellate court.

ii. Whether the "Undertaking " must be un-conditional ? and if yes whether the absence of any finding recorded by lower appellate court in favour of the present respondent that he gave un-conditional 'undertaking to buy' the benefit of Sec. 4, partition Act could have been extended? and, if not, its effect?"

Factual Matrix:

4. In order to appreciate the controversy involved, it will be relevant to notice the facts giving rise to the present appeal.

5. Devi Shankar Shukla (the respondent herein and referred to as the co-sharer) instituted a suit bearing No. 4 of 2007 before the Court of Civil Judge, Senior Division, Lucknow, seeking a decree of declaration against the following defendants namely Vijay Shankar Shukla, Ravi Shankar Shukla, Smt. Pratibha Shukla, Dr. Kripa Shankar Shukla and subsequently by amendment Sri Satya Prakash Nigam (transferee) was also impleaded as a defendant.

6. It was the case of the respondent herein that one Smt. Sadhu Devi wife of late Sri Sarjudeen Shukla was the exclusive owner in possession of the house bearing old house No. 19 and 15/8 and New Nagar Nigam House No. 50/110 situate at Jai Narayan Road, Hussainganj, Lucknow having purchased the said house by means of registered sale deed dated 13.10.1917.

7. It was also pleaded that Sarju Deen Shukla had two sons from his first wife namely Shyam Sunder Shukla and Shyam Manohar Shukla while from his second wife namely Smt. Sadhu Devi, he had a son namely Gaya Shankar Shukla.

8. Sri Shyam Manohar Shukla died during the lifetime of Sri Shyam Sunder Shukla. The wife of Shyam Manohar Shukla namely Smt. Talsa Devi and Shyam Sunder Shukla both in their lifetime, on 14.11.1931, had relinquished their shares in favour of Smt. Sadhu Devi in respect of the property in question.

9. Thus, Smt. Sadhu Devi was the exclusive owner in possession of the property in question and after her death, the father of the respondent herein namely Gaya Shanker Shukla became its exclusive owner. The respondent herein was born in the said property and continued to live therein with his parents. His father expired on 15.11.1992 and his mother too expired on 16.10.2005, leaving behind the respondent and three other siblings and thus the respondent claimed 1/4th share in the property in question.

10. It was also pleaded that one of the brothers of the respondent namely Sri Anoop Shankar Shukla expired on 11.05.2004 and his share devolved on his wife namely Smt. Pratibha Shukla. It was also pleaded that though by means of the registered deed dated 14.11.1931. Smt. Talsa Devi and Shyam Chandra Shukla had relinquished their shares in favour of Smt. Sadhu Devi but later it came to light (through a sale deed executed by the defendants nos. 1, 2 and 3 of Suit No. 4 of 2007 in favour of the defendant no. 5) that Smt. Sadhu Devi had executed a gift deed in favour of the defendant no. 4 Dr. Kripa Shankar Shukla and thus, the respondent herein who was the plaintiff of the Regular Suit No. 4 of 2007 sought a declaration that the gift deed dated 14.11.1931 be declared as null and void.

11. During the pendency of the aforesaid suit, the original defendants nos. 1, 2 and 3 sold their share in favour of Satya Prakash Nigam. Thus, the respondent herein moved an application under Order 1 Rule 10 C.P.C. and impleaded Sri Satya Prakash Nigam as the defendant no. 5. During the pendency of the suit, the defendant no. 5 namely Satya Prakash Nigam further transferred the property in favour of Sri Yogesh Kesarwani and Dr. Mukesh Kesarwani (hereinafter referred to as appellants/ the stranger

purchasers).

12. Dr. Mukesh Kesarwani and Sri Yogesh Kesarwani (plaintiffs of Regular Suit No. 436 of 2009 instituted a suit for partition seeking separation of their 3/4th share in House No. 50/8, Jai Narayan Road, Hussainganj, Lucknow.

13. Both the suits related to the property in question between the same parties and their successors in interest, hence, they were consolidated by the Court of Civil Judge, Senior Division, Lucknow and R.S. No. 4 of 2007 was made the leading case.

14. In the suit for partition instituted by the stranger purchasers numbered as R.S. No. 436 of 2009, the defendant Devi Shankar Shukla (respondent herein) while filing his written statement also set up a counter claim wherein he raised the plea that since he was the co-sharer, hence, in exercise of his right conferred under Section 4 of the Partition Act, 1893 he sought to purchase the 3/4th share of the stranger purchasers at the price at which the stranger purchasers had purchased the property from Sri Satya Prakash Nigam or at such price to be determined by the Court.

15. After the exchange of pleadings, the Trial Court framed the following issues which emerged from the pleadings of R.S. No. 4 of 2007 which read as under:-

"(i) Whether in light of the averments made in the plaint, the plaintiff is entitled to 1/4th share in the ancestral house bearing 50/8 (old number) and 50/110 (new number) situate at Jai Narayan Road, Hussainganj, Lucknow, the boundaries of which are mentioned in paragraph 2 of the plaint? if yes, its effect.

(ii) Whether the plaintiff is entitled to get the gift deed dated 14.11.1931 executed in favour of the defendant no. 4 declared as null and void? if yes, its effect.

(iii) Whether in light of the pleadings, the plaintiff is entitled to get the sale deed dated 10.01.2007 executed in favour of the defendant no.5 declared as void, if yes, its effect.

(iv) Whether the defendants are illegally interfering in the peaceful possession of the plaintiff, if yes, its effect.

(v) Whether the plaintiff is entitled to any relief."

16. In light of the pleadings exchanged in Regular Suit No. 436 of 2009, the following issues were framed.

(vi) Whether the plaintiffs are entitled to get their 3/4th share separated from the defendant, if yes, its effect.

(vii) Whether the defendant is entitled to the relief claimed in his counter claim to buy the share of the stranger purchasers at Rs. 9,00,000/-and if so, its effect.

(viii) Whether the defendant is entitled to purchase the share of the stranger purchasers in terms of Section 4 of the Partition Act, 1893, if so, its effect.

(ix) Whether the plaintiffs and the defendants are entitled to any relief in terms of the prayer made in the plaint and the written statement containing counter claim ?

17. Since Regular Suit No. 4 of 2007 was made the leading case, accordingly, the evidence was led in the said suit. Sri Devi Shankar Shukla examined himself as P.W. 1 while he examined Sri Shailendra Kumar Mishra as P.W. 2 and filed documentary evidence.

18. The defendants examined Sri Yogesh Kesarwani as D.W. 1 and Priyank Shukla as D.W. 2 and also filed documentary evidence in support of their contentions.

19. The Trial Court held that the gift deed executed in favour of Kripa Shankar Shukla could not be declared as null and void as Sri Kripa Shankar Shukla died during the pendency of the Suit and the respondent herein admitted in his cross-examination that Kripa Shankar Shukla was survived by his legal heirs but they were not brought on record, hence, the suit abated. Accordingly, issue no. (ii) was decided in the negative against the respondent herein. However, while dealing with issue no. (i), it held that Devi Shankar Shukla (respondent herein) had 1/4th share in House No. 19, 50/8 (old) and 50/110 (new number) situate at Jai Narayan Road,

Hussainganj, Lucknow.

20. While dealing with issues nos. (vii) and (viii) which emerged from the suit for partition instituted by the stranger purchaser, the Trial Court found that the co-sharer did not give any un-conditional offer to purchase the share of the stranger purchasers at the market value, consequently, the said issues were decided against the respondent herein.

21. While dealing with issue no. (vi), the Trial Court concluded that since the stranger purchasers had purchased the 3/4th share from the other co-sharers after paying a valuable sale consideration and the said sale deed was duly registered, also, as the respondent herein had not given an unconditional offer to purchase the share of the earlier transferee Sri , Satya Prakash Nigam, hence, could not claim the benefit of Section 4 of the Partition Act, hence, the stranger purchasers were entitled to get their 3/4th share partitioned, accordingly, deciding the said issue in favour of the stranger purchasers/the appellant herein.

22. In light of the aforesaid findings, the issues nos. (iii) (iv) and (v) were decided against the respondent herein.

23. The Trial Court by means of judgment and decree dated 20.01.2016 held the suit bearing No. 4 of 2007 to have abated but declared the respondent herein/the co-sharer having 1/4th share in the property bearing 19, 50/8 (old) and 50/110 (new number) situate at Jai Narayan Road, Hussainganj, Lucknow. The suit of the stranger purchasers bearing No. 436 of 2009 was decreed declaring them to be owner of 3/4th share in the said property and entitled to get their share partitioned. The counter claim filed by Devi Shankar Shukla, the respondent herein was dismissed.

24. The respondent herein, being aggrieved against the said judgment and decree dated 20.01.2016 passed by the Trial Court preferred two Regular Civil Appeals under Section 96 C.P.C. The Regular Civil Appeal No. 62 of 2017 emerged from Regular Suit No. 4 of 2007 whereas Regular Civil Appeal No. 63 of 2016 arose from Regular Suit No. 436 of 2009. The Lower Appellate Court noticed that the respondent herein did not press the Regular Civil Appeal No. 62 of 2017 emerging out of Regular Suit No. 4 of 2007 and dismissed the said appeal as not pressed.

25. While dealing with Regular Civil Appeal No. 63 of 2016, the Lower Appellate Court framed the following points for determination:-

"(i) Whether the respondent herein (the appellant before the Lower Appellate Court was ready and willing to purchase the 3/4th share of the stranger purchasers in furtherance of Section 4 of the Partition Act.

(ii) Whether the Trial Court while passing the impugned judgment and decree dated 20.01.2016 has misconstrued the scope and ambit of Section 4 of the Partition Act, 1893."

26. Upon hearing the learned counsel for the parties, the Lower Appellate Court allowed the appeal and held that the house in question was a family dwelling house and in terms thereof the respondent herein was entitled to exercise his right under Section 4 of the Partition Act, 1893 and was entitled to purchase the share of the stranger purchasers for a sum of Rs. 9,00,000/-. It also recorded a finding that the date on which the respondent herein exercised his right of purchase was the material date on which the valuation was to be considered and directed the stranger purchasers to receive a sum of Rs. 9,00,000/- from the respondent herein and execute a sale deed in his favour within a period of 3 months on expenses and stamp duty to be payable by the respondent herein.

27. The stranger purchasers (the appellant herein) have assailed the said

judgment and decree dated 14.02.2017 passed by the Special Judge (Prevention of Corruption Act), Court No. 2/ADJ, Lucknow by means of the instant second appeal on the questions of law as enumerated hereinabove first:-

Submissions on behalf of the Appellants:-

28. Dr. L.P. Mishra, learned counsel for the appellants has primarily focussed his submissions on the following points.

(i) The Lower Appellate Court has committed a grave error in taking the date of valuation of the property in question as the date on which the respondents made his offer to purchase the share of the appellants in terms of Section 4 of the Partition Act. According to Dr. Mishra, the date on which the preliminary decree was passed ought to have been taken as the date of valuation of the property.

(ii) The other issue raised by Dr. Mishra is that the offer to purchase as made by the respondent was not un-conditional. It has been urged that though in the pleadings it was stated by the respondents that he was ready to purchase the share of the stranger purchasers on the market value or such value to be determined by the Court but during the course of the trial from his statement in the cross examination, he belied his pleadings and had made a statement which categorically established that the offer was conditional and this could not have been treated as substantial compliance of Section 4 of the Partition Act to enable the respondents to purchase the share of the appellants/stranger purchasers.

(iii) It was urged that the Lower Appellate Court failed to note that the respondent himself was responsible for delaying the proceedings, inasmuch

as, large number of adjournments were sought by respondent and thereafter it is not justified for the respondent to urge that the date on which he made his offer to purchase the share of the appellants should be taken to be the date of valuation of the share of the stranger purchaser rather in the aforesaid circumstances the date for valuing the share could not be prior to the date of passing of the preliminary decree i.e. the date on which the contentious issues raised by the parties were resolved and decided by the Trial Court, hence, the right of the party to enforce his right under Section 4 would accrue for the first time, once the decree was passed and not prior thereto.

(iv) The learned counsel for the appellants has also submitted that the Lower Appellate Court while decreeing the counter claim of the respondent and holding that the respondent was entitled to purchase the share of the stranger purchasers at Rs.9,00,000/- has erred in exercise of jurisdiction, inasmuch as, the legislative intent as reflected in Section 4 of the Partition Act requires the Court to determine the value of the share whereas no such determination was undertaken either by the Trial Court or the Lower Appellate Court, thus, holding the figure of Rs. 9,00,000/- as the value was not only contrary to the provision of the Act but was also without any basis, hence, the manner in which the Lower Appellate Court has arrived at the finding is perverse.

(v) It is also urged by the learned counsel for the appellant that the respondent was not entitled to exercise his right in terms of Section 4, inasmuch as, the evidence on record indicated that the house in question was not a family dwelling house. Unless and until it was established that

the house in question was a family dwelling house till then it was not open for the respondent to exercise the rights in terms of Section 4 of the Partition Act nor the Court was justified in decreeing the counter claim in favour of the respondent.

(vi) It has also been submitted by the learned counsel for the appellants that the Lower Appellate Court has further committed an error by relying upon the decision of the Apex Court in the case of *Malati Ramchandra Raut and Others Vs. Mahadevo Vasudeo Joshi and others reported in 1991 Supp (1) SCC 321* to arrive at its conclusion as the said decision was passed on the principles of Section 2 and 3 of the Partition Act which were not applicable in the present case as admittedly the instant case was squarely covered by Section 4 of the Partition Act. Hence, the reliance placed by the Lower Appellate Court on the decision of the Apex Court was not justified and moreover by doing so, in turn has negated the ratio of decision of the Apex Court in the Case of *Badri Prasad Narain Prasad Chaudhary and Others Vs. Nil Ratan Sarkar* reported in (1978) 3 SCC 30.

(vii) Lastly, the learned counsel for the appellants has also drawn the attention of the Court to C.M. Application No. 154367 of 2021 moved under Section 152 read with Section 151 C.P.C. with the averment that the decree which has been passed by the two courts requires to be corrected/amended, inasmuch as, the boundaries of the house which has been mentioned is not correctly stated and the effect is that under the garb of the said boundaries as mentioned in the decree, the respondent would be entitled to a much larger area and at the time of execution, it would create

unnecessary complications giving rise to unwarranted litigation.

(viii) It has also been pointed out and as evident from the facts narrated hereinabove, first, the respondent Devi Shankar Shukla had initially instituted a Regular Suit No. 4 of 2007 whereas the boundaries of the said house were larger and the suit of partition which was instituted by the appellants/stranger purchaser in the year 2009 was confined to a lesser area and though the suit no. 4 of 2007 stood abated but as the two suits i.e. Regular Suit No. 4 of 2007 and 436 of 2009 were consolidated and decided by the common judgment and decree, accordingly, the Trial Court as well as the Lower Appellate Court have taken the boundaries of Suit No. 4 of 2007 which could not have been done and to that extent it is urged that the application under Section 151 read with Section 152 C.P.C. be allowed.

29. The learned counsel for the appellants in support of his submissions has relied upon the following cases:-

(i) *Ilyas Ahmad and Others Vs. Bulaqi Chand and Others* reported in ***AIR 1917 (Alld.) 2;***

(ii) *Krushnakar and Others Vs. Kanhu Charan Kar and Others* reported in ***AIR 1962 (Ori) 85***

(iii) *An unreported case of Govind Ji Doase Vs. Kamji Mavji*, Civil Revision No. 18 of 1951, decided by the ***Court of Kutch Judicial Commissioner on 19.07.1951.***

(iv) *Kashi Nath Bhatt and Others Vs. Atma Ram and Others* reported in ***AIR 1973 (Alld.) 548;***

(v) *Gopal Chandra Mitra and Others Vs. Kalipada Das and Others* reported in ***AIR 1987 (Cal) 210 ;***

(vi) *Mt. Sumitra and Another Vs. Dhannu Bhiwaji* reported in *AIR 1952, Nagpur, 193*.

(vii) *Smt. Kamla Devi Vs. Sunni Central Board of Waqfs, U.P.* reported in *AIR 1949 (Alld.) 63*

(viii) *Girdhari Lal Batra Vs. Krishan Lal Batra and others* reported in *2018 SCC Online (Del) 12547*;

(ix) *Badri Narain Prasad Chaudhary and Others Vs. Nil Ratan Sarkar* reported in *1978 (3) SCC 30*

Submissions on behalf of the respondent.

30. Sri B.K. Saxena, learned counsel for the respondent has controverted the submissions of the learned counsel for the appellant and has supported the judgment passed by the Lower Appellate Court.

(i) Primarily, it has been urged by Sri Saxena that in so far as the present proceedings are concerned, the pleadings would indicate that there was actually no dispute in so far as the rights of the parties is concerned. He has submitted that the appellants/stranger purchaser in their suit for partition clearly stated that they had purchased 3/4th share from the erstwhile co-sharer whereas the respondent had 1/4th share in the property. This factual position was not disputed by the respondent while filing his written statement including in his counter claim.

(ii) It is stated that the respondent apart from the pleadings the enforcement of his right under Section 4 of the Partition Act in the written statement containing counter claim, the respondent had also moved a separate application seeking enforcement of his rights to purchase the share of the stranger purchaser. Thus, at the first given available opportunity, the

respondent had expressed undertaking and his willingness to purchase the share unconditionally.

(iii) It is, thus, urged that in light of the pleadings, there was actually no dispute and nothing prevented the Court to have passed the preliminary decree wherein the shares of the respective parties are determined. Hence, the date of filing of the written statement containing counter claim or in the alternative the date on which the respondent made a separate application seeking enforcement of his rights to purchase the share of the stranger purchaser would be the material date for determining the valuation of the share of the stranger purchaser and not the date of the preliminary decree. The respondents cannot be penalized to pay a higher sum prevailing at a subsequent point of time when he had already expressed his unconditional willingness to purchase the share in the first instance.

(iv) It is also urged by Sri Saxena that the submissions of the respondent in his cross-examination is being culled out in isolation to give an incorrect picture before the Court. It is stated that if the pleadings of the respondent in his written statement containing counter claim and seeing the line of questioning of the respondent during his cross-examination, it would indicate that the respondent had not made any condition to purchase the share of the stranger purchaser rather the respondent had merely turned down the suggestion of the appellant, that in case if a higher sum is offered to the respondent he would not sell his share to the appellants nor was he ready to purchase the share of the stranger purchaser at a price determined by the appellants. Thus, it is urged that the contention of the learned counsel for the appellant that the respondent had given a conditional offer

to purchase is quite incorrect & fallacious and is nothing but misreading of the evidence.

(v) The learned counsel for the respondent has also urged that admittedly the house in question was a family dwelling house. This was also evident from the statement of the witness examined on behalf of the appellants, yet, it was the appellants who had delayed the proceedings by taking a long time in filing the written statement to the counter claim filed by the respondent and thus, the delay in the proceedings cannot solely be attributed to the respondents rather the appellant himself has contributed to the delay and now having suffered a decree cannot cry foul to state that the respondent is not entitled to his right in terms of the decision rendered by the Apex Court in the case of *Malati Ramchandra Raut (Supra)*.

(vi) It is further urged by the learned counsel for the respondent that though Sections 2 and 3 on one hand and Section 4 of the Partition Act on the other hand apply on different fact situations but the fact remains that in so far as the manner of valuation and determination of value of share is concerned, the principles regarding the date on which valuation is to be done would remain the same.

(vii) It is also submitted that the Lower Appellate Court having noticed this aspect of the matter has rightly relied upon the decision of the Apex Court in **Malati Ramchandra Raut (Supra)** while coming to the conclusion that the valuation of the share in the property is to be done on the date when the right accrued and in the instant case, it would be the date on which the respondent had agreed to purchase the share of the stranger purchaser. It is further urged that relying upon the decision of Malati

Ramchadra Raut (Supra) by the Lower Appellate Court, it in no manner negates the ratio of the decision of Badri Narain Prasad Chaudhary (Supra).

(viii) The learned counsel for the respondents has placed much emphasis on the fact that during the pendency of the earlier suit No. 4 of 2007, the original co-sharers had sold their 3/4th share in favour of Sri Satya Prakash Nigam. The said sale deed was executed on 10.01.2007 for the total consideration of Rs. 8,00,000/-. Sri Nigam sold the same in favour of the present appellants on 22.07.2008 for a sum of Rs. 8,87,811/- but as the market value was Rs. 9,00,000/-, thus upon the said value the stamp duty was paid.

Moreover, when the appellants instituted the suit for partition in the year 2009 even then they had valued their share at Rs. 9,00,000/- and throughout the trial they never made any statement nor led any evidence to indicate that since the time of purchase of the 3/4th share from Sri Nigam till the date of filing of the suit or even till the date of filing of their written statement to the counter claim, instituted by the respondent, the prices of the property had enhanced.

(ix) In this situation where there was practically no dispute regarding the value and extent of the share of the stranger purchaser and that the respondent had 1/4th share, thus, the Court ought to have immediately permitted the respondent to purchase the share of the stranger purchaser which was not done. Even though an application was moved requiring the Trial Court to decide the application under Section 4 of the Partition Act by the respondent but the Trial Court passed an order that the said application would be considered after the parties lead evidence and in this manner, it

cannot be said that the respondent was responsible for the delay nor his bonafides could be disputed neither it could be said that the respondent had made a conditional offer.

(x) Lastly, it has been urged by Sri Saxena that in so far as the C.M.A. No. 154367 of 2021 regarding correction is concerned, as there is an apparent discrepancy in the boundaries as mentioned in the plaint of R.S. No. 4 of 2007 and 436 of 2009 to that extent the decree may be corrected to do substantial justice between the parties.

31. The learned counsel for the respondent in support of his submissions has relied upon the following decisions of

(i) *Smt. Saira Vs. Smt. Mariyam Sattar* reported in *AIR 2007 (All.) 179* ;

(ii) *Ghanteshwar Ghosh Vs. Madan Mohan Ghosh and Others* reported in *(1996) 11 SCC 446*;

(iii) *Malati Ramchandra Raut and Others Vs. Mahadevo Vasudeo Joshi and others* reported in *1991 Supp (1) SCC 321*;

(iv) *Woodland Manufacturers Ltd. Vs. Shankar Prasad and Others* reported in *2006 SCC Online (Calcutta) 304*.

Discussions and Analysis:-

32. The Court has heard the learned counsel for the parties and perused the record. The learned counsel for the parties have also submitted their written submissions along with the decisions upon which they have placed reliance. The Court has noticed the same and it shall be dealt with at the appropriate place later in the judgment.

33. Before dealing with the substantial questions of law as formulated, the Court proposes to deal with the submissions as to the house in question

not being a family dwelling house as argued by the learned counsel for the appellant.

34. The submission of the learned counsel for the appellants that the property in question is not a dwelling house hence the respondent is not entitled to claim benefit of Section 4, though, is not a question of law as framed but nevertheless since the argument has been raised, hence it is being dealt with.

35. Considering the material pleadings on record as well as from perusal of the evidence both oral and documentary, this issue was not raised before the Court below. The appellant did not raise this plea in his written statement to the counter claim. None of the parties led any evidence on the point as it was not an issue. Hence, at this stage, this Court does not deem appropriate to enter in the said issue afresh. Moreover, no material has been brought to the notice of the Court to indicate that the said house was ever partitioned before the institution of the instant proceedings.

36. Merely, at some point of time, the respondents and the other co-sharer (the predecessors in interest of the appellants) were residing as per their convenience in separate portions would not mean that the house in question was formally partitioned and it lost its character of a dwelling house. Even though the relations between the co-sharers was not cordial as suggested by the learned counsel for the appellants, yet it will not deprive the house of its character of being a dwelling house.

37. The two courts below have proceeded on the premise that the house in question is a family dwelling house, hence, this Court is not inclined to interfere with the said premise, accordingly, the submission of the learned

counsel for the appellants that the property in question is not a dwelling house and thus the respondent is not entitled for the benefit of Section 4 of the Partition Act is turned down.

38. Moving on to the substantial questions of law as formulated, the Court proposes to deal with the substantial questions of law formulated at serial no. (ii) first, relating to the undertaking given by the respondent to buy out the share of the appellants.

39. The submission of learned counsel for the appellant is that the undertaking must be un-equivocal and unconditional and only then the same can be relied upon.

40. The learned counsel for the appellant in support of his aforesaid submission has relied upon the decision of this Court in *Ilyas Ahmad and Others Vs. Bulaqi Chand and Others* reported in *AIR 1917 (Alld.) 2* wherein it was held that while enforcing the right under Section 4, there must be something more than a mere offer and the undertaking given to the Court should be unconditional and a person should not be able to resile from the same.

41. The other decision on the aforesaid point is *Krushnakar and Others Vs. Kanhu Charan Kar and Others* reported in *AIR 1962 (Orissa) 85* wherein Orissa High Court has also opined that the undertaking in terms of Section-4 of the Partition Act must be unconditional.

42. In the decision of the court of Kutch Judicial Commissioner in *Govind Ji Doase Vs. Kamji Mayji* passed in *Civil Revision No. 18 of 1951* and decided on 19.07.1951 a similar view has been expressed that the undertaking should be unconditional.

43. It has been urged that in the instant case, the respondent did not make an unconditional offer, hence, he was not entitled to the benefit of Section 4 of the Partition Act.

44. The learned counsel for the appellants in order to buttress his submissions has stated that the respondent throughout has stated that he is ready and willing to purchase the share of the appellant at Rs. 9,00,000/-. He has further drawn the attention of the Court to the extracts of the cross-examination of the respondent wherein it is stated that the respondent had responded by saying that he will purchase the share of the appellants at Rs. 9,00,000/- as mentioned in the sale deed. He also declined the offer of the appellant who proposed to buy the share of the respondent at Rs. 20,00,000/- This has been shown to state that the undertaking given by the respondent is only conditional and he was not ready to pay the share of the appellants at the market value rather he wanted to buy only at Rs. 9,00,000/-

45. The learned counsel for the respondent on the other hand submits that the respondent both in his written statement as well as in a separate application bearing Paper No. C-17 had clearly given his undertaking to purchase the share of the stranger purchaser and throughout he has been ready and willing to purchase the share and in the aforesaid facts and circumstances, it cannot be said that any conditional undertaking was given.

46. The learned counsel for the respondents has further submitted that the extracts of the cross-examination have been read out in isolation. It is submitted that on an conjoint and complete reading, it would indicate that

the reply by the respondent was in context of an unproved valuer's report which was put to the respondent during cross-examination to which he responded and turned down the suggestion and offer of the appellants to purchase the share of the respondent at a higher price so also the respondents declined the suggestion to purchase the share of the appellants at the price suggested by the valuer. Nevertheless, the respondent never refused to buy at the price to be determined by the Court. Thus, it cannot be said that the undertaking was conditional.

47. Having considered the aforesaid submissions and from the perusal of the record, it is no doubt true that an undertaking as contemplated under Section 4 of the Partition Act must be unconditional. Now in the instant case, the record reveals that the respondent in his written statement as well as in the Application bearing Paper No. C-17 had given a clear undertaking that he is ready to buy out the share of the appellee at Rs. 9,00,000/- or such other sum to be determined by the Court. Even from the perusal of the cross-examination of the respondent, it cannot be said that his offer was conditional. The answers in the cross-examination have to be seen in context with the questions and it would reveal that by referring to the valuer's report (which as already noticed had not been proved in accordance with law), the respondent had stated that he will not buy the share of the appellant at the rate given by the valuer and that even if a higher sum is offered to the respondent, he will not sell his share to the appellants. However, there has been no denial by the respondent to buy the share of the appellants nor any conditional offer was made by the respondent.

48. Considering this aspect of the matter, this Court holds that in so far as the undertaking is concerned, the same was unconditional and the respondent is entitled to exercise his rights under Section 4 of the Partition Act. The Lower Appellate Court has considered the issue in its entirety and has reversed the finding of the Trial Court on the issue of undertaking. The view of the Lower Appellate Court cannot be said to be against the settled legal principles, hence, on this point no interference is called for. The substantial questions of law at Serial No. (ii) stands answered.

49. Now, considering the substantial question of law as framed by the Court at serial No. (i) dealing with the valuation of the share of the stranger purchaser, this Court finds that while doing so it will necessarily involve consideration of the fact that (i) who is to make such a valuation and (ii) what would be the material date on which the valuation is to be determined.

50. At this stage, before proceeding any further, it would be meaningful to refer to Section 4 of the Partition Act, 1893 which reads as under:-

"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 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.

(2) If in any case described in sub-section (1) two or more members 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."

51. It will be interesting to note the legislative intent for enacting Section 4 of the Partition Act of 1893. Significantly, the Transfer of Property Act, 1882 was an enactment prior in time to the Partition Act. Section 44 of the Transfer of Property Act deals with transfer by a co-owner and the relevant

provision reads as under:-

"44. Transfer by co-owner.- *Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of transfer, the share or interest so transferred.*

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him of joint possession or other common or part enjoyment of the house."

52. The perusal of Section 44 of the Transfer of Property Act, would indicate that a stranger to a family who becomes the transferee of an undivided share of one of the co-owners in a dwelling house belonging to an undivided family can not claim a right of joint possession of the house with the other co-owners of the dwelling house. It clearly manifests the intention of the legislature that a stranger is to be kept out from the common dwelling house occupied by the co-sharer to ensure peaceful living, enjoyment of the dwelling house by the remaining co-owners being the members of the same family.

53. Now, in the aforesaid backdrop, the statements of objects and reasons for enacting the Partition Act, 1893, would indicate that the legislature proposed to give the Court the power of compelling a stranger who has acquired by purchasing a share in the family dwelling house, when he seeks for partition, to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court.

54. The statement of objects and reasons for enacting the Partition Act, 1893, is quoted hereinafter for ready reference:-

"It is also proposed in the Bill to give the Court the power of compelling a stranger who has acquired by purchase a share in a family dwelling house when he seeks for a partition, to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court. This provision is only an extension of the privilege given to such shareholders by Section 4, paragraph 2 of the Transfer of Property Act, and is an application of a well-known rule which obtains among Muhammadans everywhere and by customs also among Hindus in some parts of the country."

55. Thus, from the above, it can clearly be deciphered that the Act of 1893 intended to extend the privilege which was already available to a co-sharer in the family dwelling house in terms of Section 44 of the Transfer of Property Act.

56. It is in this backdrop, whenever an issue crops up before a Court regarding Section 4 of the Partition Act, it would be incumbent upon the Court to see that certain conditions as enumerated hereinafter are fulfilled before an order can be passed enforcing the right of a person in terms of the said Section 4 of the Partition Act, 1893.

(i) It is sine-qua-non that the disputed property must be a family dwelling house where the co-owners have undivided share and one or more of such co-owners have affected a transfer of their undivided share.

(ii) For invoking Section 4 of the Partition Act the transferee of an undivided share of the co-owner should be a stranger/outsider to the family.

(iii) Such a stranger purchaser must institute proceedings for partition and separate possession of his undivided share transferred to him by the co-owners in question.

(iv) When such a claim is instituted by the stranger purchaser then any member of the family who still has an undivided share in the dwelling house must come forward to press his claim of preemption by undertaking

to buy out the share of the stranger purchaser.

(v) At the time of accepting the claim for preemption made by the existing co-owners of the dwelling house in respect of the share of the stranger purchaser, it is the Court that should make a valuation of the share of the stranger purchaser and must make the existing co-sharer of the dwelling house to pay the value of the share of the stranger purchaser so that the existing co-owner is able to purchase by preemption the share of stranger purchaser in the dwelling house in its entirety so that the rights of the parties are completely satisfied and the stranger purchaser is left with no other right or share in the dwelling house and consequently, the stranger purchaser can be effectively denied entry in any part of the dwelling house.

57. The Court is required to examine in the first place and be satisfied as to the existence of the essential ingredients as enumerated above before it arrives at the conclusion whether the right of preemption can be enforced in favour of the existing co-owner. It is equally important to note that it is for the Court to determine the valuation of the share of the stranger purchaser.

The parties may assist the Court in arriving at a conclusion to determine the value of the share of such stranger purchaser but even if no effort is made by any party, yet, the Court cannot abdicate its duty to ascertain and determine the value of the share of the stranger purchaser.

58. Before embarking upon the exercise of determining the value of share of the stranger purchaser, the Court is also required to assess the undertaking given by the existing co-owner regarding his clear and unambiguous intention to buy out the share of the stranger purchaser. It is only when the aforesaid ingredients are met, the stage is set to determine

the value of the share.

59. Moving on to crucial issue pertaining to the date on which the valuation of the share of the stranger purchaser is to be valued. In this regard it will be worthwhile to glance through the decisions cited by the respective parties,

(i) In *Kashi Nath Bhatt and Others Vs. Atma Ram and Others* reported in *AIR 1973 (All.) 548*. The issue before the Court was regarding the valuation of the share of the stranger purchasers and the Trial Court had considered the date of preparation of final decree as the date on which the valuation of the share was reckoned. This was assailed before the High Court in a Civil Revision. Both, plaintiff and defendant had filed separate revisions. The plaintiff's civil revision was dismissed by holding that even though the defendant had sold out some portion of the land adjacent to the property in question after passing of the preliminary decree, yet, it would not deprive the defendant of claiming the benefit of Section 4 of the Partition Act in respect of the dwelling house in question. The Civil Revision preferred by the defendant was also dismissed and after considering the relevant aspects which may affect the valuation of the property, the Court held that Section 4 of the Partition Act does not restrict the power of the Court to fix the value of the stranger purchaser's share with reference to any particular date instead various factors have to be taken note of while determining the date of valuation and it held that no error could be found with the order impugned fixing the date of valuation as existing on the date of preparation of final decree.

Thus, the aforesaid decision does not lay down as a principle that the

date of valuation has to be the date of the preliminary decree.

(ii) In *Gopal Chandra Mitra and Others Vs. Kalipada Das and Others* reported in *AIR 1987 (Cal) 210* the Division Bench of the Calcutta High Court held that the relevant date for the purposes of determining the valuation under Section 4 of the Partition Act would be the date when the co-sharer undertakes to buy the share of the stranger purchaser provided such undertaking is given after the share of the transferee has been ascertained by the Court in the preliminary decree and even though an application under Section 4 of the Partition Act can be filed at any stage even before the preliminary decree is passed but the valuation has to be made as on the date of preliminary decree as it is only after ascertainment of share by such a preliminary decree, an application under Section 4 along with the undertaking becomes legally effective.

Upon considering the decision of the Division Bench of the Calcutta High Court in *Gopal Chandra Mitra (Supra)*, it would indicate that in paragraph 6 of the said judgment, it clearly mentioned as a fact that the stranger purchaser himself had purchased the share in the dwelling house after the preliminary decree was passed in the partition suit and therefore, the application intending to purchase the share of the stranger purchaser was made after the preliminary decree and in the aforesaid circumstances, it was stated that the valuation of the share would have to be made with reference to the date of such application and undertaking so filed. Thus, the decision of the Calcutta High Court is not a precedent that the date for ascertaining the valuation of the share of stranger purchaser is to be the date of passing the preliminary decree.

(iii) In *Mt. Sumitra and Another Vs. Dhannu Bhiwaji AIR (39) 1952, Nagpur, 193 (2)*, the issue before the Court was regarding the valuation of the share and the suit for partition itself was filed after more than 6 years from the date of purchase during which period the price had risen and in the aforesaid backdrop, it was held that the valuation would not be as on the date of purchase rather would be as per the value at the time of the suit. The aforesaid decision is not a clear precedent and the ratio which can be culled out is that the valuation as mentioned in the sale instrument may not be taken as the valuation of the share especially where the suit for partition was instituted after 6 years of purchase. Nevertheless, it does not hold that the date of the preliminary decree is the material date on which the valuation is to be ascertained.

(iv) The decision of *Smt. Kamla Devi Vs. Sunni Central Board of Waqfs, U.P. AIR 1949 (All.) 63* is not attracted in the present case as it is only for the proposition that the term "market value" of the property would mean the price for which it is possible for a property to be sold in the open market regardless of any consideration such as litigation. Since there is no dispute between the parties regarding the meaning to be ascribed to the term 'market value' hence', in the instant case the aforesaid decision may not have much relevance.

(v) In *Girdhari Lal Batra Vs. Krishan Lal Batra and others, 2018 SCC Online (Del) 12547* the issue before the Delhi High Court was more in respect of the manner in which the value has to be determined and the factors which is to be taken note of rather than the date to reckon the valuation of the share. This shall be evident from para 13 of the said

judgment wherein the issues before the Delhi High Court has been mentioned i.e.

(i) *Whether Section 4 of the Partition Act was applicable and ;*

(ii) *what has to be the mode of valuation.*

In the said case, the controversy did not relate to the date on which the valuation was to be made, hence, the said decision also is not a clear precedent and may not be very helpful in arriving at the conclusion.

(vi) In *Badri Narain Prasad Chaudhary and Others Vs. Nil Ratan Sarkar* reported in (1978) 3 SCC 30, Section 2 and 3 of the Partition Act was in issue and the defendant-respondent before the Apex Court was a tenant of the premises who had purchased 3/16 the share of his landlord on 25.03.1957. The plaintiffs appellants before the Apex Court had also purchased 13/16 share in the suit premise on 24.04.1957 from the other co-sharers and the suit for partition came to be filed in August, 1959.

In the said case, the parties contended that the property in question was not liable to be partitioned and a proposal was made to buy out the share of the plaintiffs. The valuation was fixed and thereafter the property was auctioned between the plaintiff and the defendant repeatedly and as late as in June, 1965, the highest bid of Rs. 50,000/- was made by the plaintiff. The defendant was given a chance to match the same but he could not do so. Therefore, the Court accepted the bid of Rs. 50,000/-. This decree was thereafter challenged and the High Court held that it was not right to take into account any increase in the share and fixed the valuation at Rs. 9,000/-. The Apex Court found that the valuation as fixed by the High Court was incorrect and since, the parties had already bid and a

value of Rs. 50,000/-had already been fetched taking that to be the price and factoring the increase in the value of the property, the Apex Court remanded the matter to the Trial Court to take note of the aforesaid observations as well as permitting the parties to lead evidence and thereafter dispose of the case.

(vii) In *Malati Ramchandra Raut and Others Vs. Mahadevo Vasudeo Joshi and others reported in 1991 Supp (1) SCC 321*, it was a case under Section 3 of the Partition Act. A suit for partition was filed in May, 1972, the shares of the parties were admitted. In July, 1972, the defendant in reply to an application for appointment of a receiver stated that he was ready to purchase the share of the plaintiffs and requested the Court to direct a valuation.

The Bombay High Court held that the date on which the application was made to buy out the share would be the relevant date for working out the valuation, this was assailed before the Apex Court. The Apex Court noticed that the right to buy having arisen and crystallized and this would be the date with reference to which the application of the shares in question has been made, consequently, it held that the valuation though made subsequently has to be made with reference to the time at which the right arose which in the said case, (before the Apex Court) was held to be July, 1972 when the defendant had filed his affidavit seeking leave of the Court to buy out the share.

(viii) In *Ghanteshwar Ghosh Vs. Madan Mohan Ghosh and Others* reported in *(1996) 11 SCC 446*, the share was sold out for a sum of Rs. 4,00,000/- which was determined to be the share of the stranger

transferee on 12.12.1986 on the date when the application was moved while the suit for partition was instituted in September, 1960 and the final decree was passed on 31.08.1971 and an application for purchase was moved during the pendency of the final decree proceedings. The aforesaid decision is an authority for the proposition to the extent that the application to purchase the share of the stranger transferee can be made at any time even during the final decree proceedings. It also considers the necessary ingredients for consideration of an application under Section 4 of the Partition Act. Further in the said case since the application was made during the pendency of the final decree proceedings hence the date of application was taken to be the material date.

(ix) In *Smt. Saira Vs. Smt. Mariyam Sattar* reported in *AIR 2007 (All.) 179* it was held that unless and until the final decree proceedings are decided in a partition suit till then an application under Section 4 of the Partition Act can be made.

(x) In *Woodland Manufacturers Ltd. Vs. Shankar Prasad and Others* reported in *2006 SCC Online (Calcutta) 304*, the Division Bench of the Calcutta High Court considered the date of making an application to buy out the share of the stranger purchaser as the material date but further found that since the value in terms of money at relevant time was not paid, hence, it allowed a reasonable accretion to the said amount in terms to appending interest on the valued amount.

60. In regard to the date of valuation, the learned counsel for the appellants has strenuously urged that the date of ascertaining the valuation cannot be prior to the date of the preliminary decree as it is for the first

time when the Court decides regarding the shares of the respective parties and other contentious issues and while doing so, it can determine the value of the share of the stranger purchaser.

61. On the other hand, it is urged by learned counsel for the respondent that the date of making an application would be the date of valuation. It is also urged that, in case, if the valuation is taken on the date of passing of the preliminary decree, then it would necessarily cause prejudice to the co-owner who would be required to pay a much higher price though the undertaking given to purchase the share of the stranger purchaser may have been given at the inception of the trial, as with passage of time the prices of real estate increase, ordinarily.

62. Considering the submissions and the decisions cited by the respective parties as discussed above, it would reveal that in almost all the Authorities the date of application has been taken to be the material date but in all such cases the application itself was moved after the preliminary decree was passed. Another aspect to be noted is that the decisions cited by the appellants, they are all prior in time to the decision of the Apex Court in the case of *Malati Ramchandra Raut (Supra)*.

63. The decision of the *Malati Ramchandra Raut (Supra)* is the only decision which has been brought to the notice of the Court wherein it has clearly been held that the valuation has to be made with reference to the time at which the right arose. For convenient perusal, the relevant paras 9 to 12 from the said report is being reproduced hereinafter;-

9. It is the duty of the court to order the valuation of the shares of the party asking for a sale of the property under Section 2 and to offer to sell the shares of such party to the shareholders applying for leave to buy them in terms of Section 3 at the price determined upon such

valuation. As soon as a request for sale is made by a shareholder under Section 2, any other shareholder becomes immediately entitled to make an application under Section 3 for leave to buy the shares of the former. The right to buy having thus arisen and become crystallised, the date with reference to which valuation of the shares in question has to be made is the date on which the right arose.

10. The learned Single Judge rightly observed that there was no dispute about the extent of shares held by the defendants. The fact that the legal representatives representing the estate of a deceased defendant had not yet obtained probate or letters of administration did not mean that the right which arose in favour of that defendant, upon his making an application for leave to buy under Section 3, was a right which did not accrue to the benefit of his estate, but was postponed till the legal representatives obtained probate or letters of administration. That right was never in abeyance; it had accrued in favour of the deceased during his life when he sought leave under Section 3 and came to be vested in his estate. That being a right of purchase, the valuation of the shares has to be made as on the date of accrual of the right, and valuation being a fact finding process must be resorted to as soon as possible after such accrual.

11. Accordingly, the valuation, though made subsequently, has to be made with reference to the time at which the right arose which, in the present case, as found by the learned Single Judge, was on July 5, 1972 when the defendants filed their affidavit seeking leave to buy, or, at any rate, on October 9, 1972 when they filed their written statement reiterating that request. In a case such as this, where the extent of shares held by the plaintiffs and the defendants is not disputed, the fact that the proceedings continued by reason of the appeal filed by the plaintiffs against the order refusing to allow them to amend their plaint, or for any other reason, was not relevant to the time of accrual of a right arising under Section 3. The fact that a preliminary decree may have to be passed before passing a final decree and that no such decree has yet been made is again not relevant, on the facts of this case, to the question as to the time of accrual of a right under Section 3.

12. In the circumstances, whenever the shares in question in the properties come to be sold to the persons entitled to buy them under Section 3, the price of those shares will have to be determined on the basis of the valuation made with reference to the time of accrual of the right. This, as found by the learned Single Judge, was the price prevailing in July 1972.

64. Another aspect which can be culled out from the provision of Section 4 of the Partition Act and the decisions as cited and noticed in the preceding paragraphs that the legislature has clearly vested ample jurisdiction and discretion with the Court to determine the valuation of the share and to give such directions as it thinks fit in this regard. Neither the legislature has put any fetters in the discretion of the Court in determining the valuation nor has the legislature put any restrictions regarding the date

on which the valuation is to be reckoned. It is also to be kept in mind that in a suit for partition where each of the parties is the plaintiff and the defendant and while making a partition of the property, the Court has to keep and balance the equities between the parties.

65. Another crucial aspect is that the co-sharer who exercises his right of preemption actually compels the purchaser to make a forced sale. In other words, a valid transaction of sale in favour of stranger purchaser is sought to be disturbed by the intervention of the Court at the behest of a co-sharer.

Thus, a casual approach to ascertain the valuation of the share would be fraught with danger to cause injustice to any one party. Accordingly, the Court has to be very cautious and must adopt an approach filled with care, precision and objectivity.

66. Illustratively, if a stranger purchaser, purchases a share in a family dwelling house and brings in a suit for partition after a long time and it is only then that the co-sharer can exercise his rights under Section 4 of the Partition Act and may make an application immediately on the date of filing of his written statement or may chose to make the offer to purchase the share of the stranger transferee at the time of passing of the preliminary decree or even at the stage of final decree proceedings. The fact remains that the date of valuation can never be the date of purchase or the date of institution of the suit or the date of preliminary decree but has to be at least the date on which the co-sharer makes the offer and undertakes to buy the share of stranger purchaser, whatever be the stage of the proceedings.

67. There may be another situation where though the application and undertaking may have been moved by the co-sharer at an early stage but he

does not cooperate in the proceedings , thus, causing delay in disposal of the suit then in such a situation whether the co-sharer can take the benefit of a lower price prevailing at the time of the application through the prices may have escalated by this time the application or the suit is decided.

68. Another situation may arise where after filing of the suit for partition and subsequent to making an application under Section 4 of the Partition Act but there may be certain circumstances which may lead to a sharp rise in the price of the property before the order could be passed then whether the stranger purchaser can be deprived of such enhancement at the behest of the co-sharer through a compulsive sale in terms of Section-4 of the Partition Act, if the date of application solely is taken as the criteria.

69. These are some of the circumstances which may affect the valuation of the property and it cannot be rigidly laid that only the valuation on the date of the decree or the date of the application is to be final. But as an age old adage says 'greater the power, more the responsibility'. Thus, where discretion is conferred upon the Court, such discretion has to be exercised with caution and ensuring that it does not work injustice to either party hence relevant factors affecting the valuation can be taken note of by the Court while determining the valuation.

70. It will be appropriate to note the observations of the Apex Court in ***Badri Narain Prasad Chaudhary (Supra)*** where in paras 19 to 21, it held as under:-

".....19. The suit property, being incapable of division in specie, there is no alternative but to resort to the process called owelty, 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. As rightly pointed out by K. Subba Rao, C.J. (speaking for a Division Bench of Andhra High Court in R. Ramaprasada Rao v. R. Subbaramaiah [AIR

1958 AP 647 : 1057 Andh LT 587 : (1957) 2 Andh WR 488 : ILR 1957 AP 566]), 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.

20. 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 9000 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 8, 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 9000, 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

21. 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 after hearing the parties, dispose of the case in conformity with the observations made in this judgment. There shall be no order as to costs in this Court."

71. In the instant case, as the facts would indicate that the suit for partition was instituted on 22.06.2009. The plaintiff/appellants herein, (the stranger purchaser) had purchased the share by means of registered sale deed dated 22.07.2008 and in paragraph 4, 5 and 6 clearly pleaded their right having 3/4th share while stating that the defendant-respondent had 1/4th share and that their 3/4th share be separated. They had valued their

share at Rs. 9,00,000/- for the purposes of payment of Court fee.

72. The defendant filed his written statement on 12.11.2009 and did not deny the fact that the plaintiffs had purchased 3/4th share and that the defendant had 1/4th share as shall be evident from paragraphs 25 and 26 of the written statement. The defendant in paragraph 20 had clearly made an averment that he undertakes to purchase the share of the plaintiffs. Moreover, in the counter claim in paragraphs 32 and 33, he sought a decree of mandatory injunction requiring the plaintiffs to sell their share in furtherance of Section 4 of the Partition Act. The defendant had also made a separate application bearing Paper No. C-17 dated 08.12.2009 wherein he specifically required the Court to pass orders regarding purchasing the share of the plaintiffs.

73. In the aforesaid backdrop of facts as narrated hereinabove, there was no dispute between the parties regarding the extent of share in the disputed property. In the said circumstances, the only relevant issue before the Trial Court was whether in terms of Section 4, the defendant respondent was entitled to purchase the share of the stranger purchaser and if so its valuation and on what terms.

74. The record indicates that the respondent herein had also filed regular suit no. 4 of 2007 wherein he had challenged a gift deed of 1931. Admittedly, in the aforesaid suit, Kripa Shankar Shukla was impleaded as defendant no. 4 and the gift deed in favour of Dr. Shukla of 1931 was under challenge. It is also an admitted fact that Dr. Shukla expired and his legal heirs were not brought on record. Thus, by operation of law, the suit against Dr. Shukla abated.

75. The only controversy left was regarding the mode and valuation of the share of the appellants and the respondent herein. An effort was made by the appellants herein, by bringing on record of the Trial Court the valuation report of the property in question from a valuer dated 04.09.2014 but the said valuation report was not proved in accordance with law as the valuer was not examined before the Trial Court.

76. The Trial Court upheld the shares of the parties but declined to grant the benefit of Section 4 to the respondents herein on the premise that in the suit instituted by him bearing No. 4 of 2007, he had not made any offer to Sri Nigam, hence, he was not entitled to the benefit of Section-4. These findings were reversed by the First Appellate Court and it held that the respondent was entitled to purchase the share of the appellants for a sum of Rs. 9,00,000/-

77. This Court in light of the discussion made in the preceding paragraphs finds that actually in terms of Section 4, the duty is cast upon the Court to determine the valuation of the share of the stranger purchaser. Admittedly, the same has not been done by either the Trial Court or the Lower Appellate Court. The Lower Appellate Court has merely taken the valuation as given by the appellants in their plaint and the value of the sale deed as the price upon which the appellants have been directed to sell the share to the respondents. There has been no determination regarding the valuation of the share.

78. At this stage, it will be relevant to notice that the valuation as disclosed in the sale deed is for calculation of the stamp duty in accordance with the Stamp Act and the U.P. Stamp Rules framed thereunder. They are

for the limited purpose of ascertaining the stamp duty on an instrument to protect the revenue of the Government. The market value as determined in terms of the Stamp Act is for the purposes of payment of Stamp Duty only.

79. Even the valuation of the plaint is for the limited purposes of ascertaining the Court fee in terms of the Court Fee Act, 1870. However, whenever an issue regarding valuation arises, the same has to be decided by the Court after permitting the parties to lead evidence in respect of their contention.

80. However, the share of the appellant which is required to be valued and ascertained in terms of Section 4 of the Partition Act is to be done in such a manner as the Court may think fit. Section-4 of the Partition Act does not use the word market value. Thus, while determining the valuation, it is the duty incumbent upon the Court to ensure that the valuation upon which the stranger purchaser is compelled to sell his share is not undervalued in the sense that the stranger purchaser is not penalized so also the co-sharer who is exercising his rights to purchase the share of the stranger purchaser should not make a windfall. It is in the aforesaid context that the Court has to be extremely cautious in determining the value and also adopting a reasonable and well accepted mode balancing the equities and rights of the respective parties.

81. The whole idea regarding the valuation being that the share must be valued as far as possible as at such price which can be fairly fetched in the free market without being influenced by any distressing circumstances which may suppress the value of the property in question. It is also to be seen that no artificial escalation is to be factored to give undue advantage

to stranger purchaser nor any suppression of value is to be countered to the advantage of the co-sharer intending to buy as in any case the sale under Section 4 of the Partition Act is under compulsion of a Court decree and for that reason it should not be artificially undervalued to deprive the stranger purchaser of fair valuation of his share.

82. It is in this backdrop, this Court is of the view that even though the date on which the right to purchase crystallizes i.e. on the date, the party makes an application and undertaking to buy the share of the stranger purchaser be taken as the threshold date on which the valuation of share of the property may be ascertained but at the same time it must be seen in context and proximity of time with the date on which the order regarding sale is passed by the Court and the surroundings circumstances of each and every case to provide for such reasonable appreciation to ensure that the stranger purchaser may not be put to any unnecessary loss on account of delay in time between the date of making the application and the date on which he receives the money for the sale in favour of the co-sharer.

83. Now, by taking the valuation of the share strictly on the date of the preliminary decree, for the aforesaid reasons it may then affect the right of the co-sharer too who though may have filed an undertaking to buy at the earliest yet for reasons beyond his control, the order of sale is passed after considerable time and in the meantime the prices if rise then the co-sharer will be required to pay the enhanced amount. It is in this context that the balance has to be fine tuned to render justice between the parties while noticing the natural accretion to the value of the property and its effect on the rights of the co-sharer and the stranger purchaser, as the case may, also

considering the rise or fall in the rates of real estates as applicable on the facts of each case and subject to evidence led by the parties.

84. In the instant case, though, the respondent had taken a plea in his written statement containing counter claim and also moved an application for purchasing the share of the appellants yet it was an offer, a plea to be considered and adjudicated by the Court. The respondent had not deposited the sum of Rs. 9,00,000/- before the Court so as to say that now if the natural accretion is taken note of, the respondent shall suffer immensely. Had the money been deposited, may be in such a situation, the plea of the respondent that the value alone in December, 2009 should be noticed without taking note of natural accretion and then upon the valuation made by the Court as prevalent in December, 2009 should be taken to be final and any difference between the amount deposited and value as ascertained by the Court alone be required to be paid by the respondent to buy the share of the appellants. However, it is not so. It is also noticed that though there is no requirement to deposit the money in law so for that reason, the natural and reasonable accretion is taken note of, unless proved otherwise, and as also noted in Badri Narain Prasad Chaudhary (Supra) and Woodland Manufacturers (Supra) to do complete justice between the parties.

85. In light of the detailed discussions, it would be seen that no straight jacket method can be adopted uniformly in all cases for valuation. The broader principles as noticed above will have to be kept in mind considering the facts and circumstances of each case. Ordinarily, the date of valuation would be the date when the right to purchase accrues, in other words, it cannot be a date prior but must be the date of making an

unconditional offer to purchase either by making a separate application or otherwise by making the undertaking in pleadings. Upon such application, the Court must make an earnest endeavour to arrive at the valuation as soon as possible. While doing so the Court will be competent to notice the conduct of the parties, the cooperation, readiness and willingness to honour their respective contentions as well as other factors which may affect the escalation or downfall in the valuation of the share.

86. Even in the case of *Malati Ramchandra Raut (Supra)* and *Badri Narain Prasad Chaudhary (Supra)*, the Apex Court, though, held that the valuation of the share be made on the date the offer was made and right having crystallized but it also provided for factoring the natural and reasonable accretion to the valuation up to date. Again the idea reflected is to ensure a fair and proper valuation and balancing the equities between the contesting parties.

87. In the instant case at hand, this Court finds that there is no worthwhile evidence regarding the valuation of the property. The valuation report as submitted by the appellants was not proved in accordance with law and also it relates to the year 2015 which at best indicates a natural rise in the valuation of the property over the years but cannot be relied for the actual valuation of the share.

88. In absence of any exercise undertaken by the court to determine the actual valuation and neither the parties provided any evidence regarding the mode of valuation, accordingly, this Court finds that the judgment and decree passed by the two Courts is not sustainable and this Court would not venture into the exercise of determining the valuation as the same would

require evidence, hence, it would be most appropriate that the matter be remitted to the Trial Court with the direction that it shall appoint a Government approved property valuer who would visit the property and determine the valuation of the property in question prevailing in December, 2009 i.e. the date when the defendant respondent herein made an application seeking enforcement of his rights to purchase the share of the stranger purchaser. The parties would also be entitled to lead their evidence in respect of the valuation and also indicate the natural/reasonable escalation/stagnation/fall in the prices of the property in question, as the case may be.

89. The Trial Court considering the evidence as well as the valuation report submitted by the valuer so appointed by it shall give his finding on the valuation also factoring for reasonable variation in the rise/fall in the prices of the property in light of the evidence on record in this regard. The entire exercise shall be completed within a period of six months from the date a certified copy of the judgment is placed before the Court concerned. Upon the valuation so determined, the respondent herein (the co-sharer) be first allowed to purchase the share of the plaintiffs within a reasonable period of four months thereafter and in case if he fails to do so, the parties shall be free to move the Court for getting their shares separated as per law provided there is no other legal impediment in doing so. Thus the substantial questions of law as framed at Serial No. (i) stands answered.

90. Now, in so far as the submission regarding the application moved by the appellant under Section 152 read with Section 153 of C.P.C. is concerned, since this Court has allowed the appeal and remanded the

matter to the Trial Court, no further order in respect of the application under Section 152 and read with Section 153 C.P.C. bearing *C.M.A. No. 154367 of 2021* is required. The application shall also stands disposed of, however, the parties shall be at liberty to approach the Trial Court in this regard if any need arises.

91. In light of the detailed discussions hereinabove, the instant second appeal deserves to be allowed and the judgment and decree dated 14.02.2017 passed by the First Appellate Court as well as judgment and decree dated 20.01.2016 passed by the Civil Judge (Senior Division), Lucknow in R.S. No. 436 of 2009 is set aside. The matter be remanded to the Trial Court before whom the parties shall appear on 07.03.2022 and who shall consider the issue regarding the valuation of the share of the appellants in light of the observations made in this judgment. It is made clear that in so far as the findings regarding the share of the respective parties as well as the house in question being a family dwelling house is concerned they have not been disturbed.

Resultantly, the second appeal stands allowed in the aforesaid terms. Costs are made easy. Record of the Court below be remitted to the Court concerned forthwith.

(Jaspreet Singh, J.)

Order Date :-17.02.2022

Asheesh Kumar