

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

**PRESENT:**

**Mr. Justice Muhammad Imman Ali**  
**Mr. Justice Hasan Foez Siddique**  
**Mr. Justice Mirza Hussain Haider**  
**Ms. Justice Zinat Ara**  
**Mr. Justice Abu Bakar Siddiquee**  
**Mr. Justice Md. Nuruzzaman**

**CIVIL APPEAL NO.19 OF 2008.**

(From the judgment and order dated 13.12.2005 passed by the High Court Division in Civil Revision No.3616 of 1994.)

Mrs. Jahanara Hossain and others : Appellant.

**=Versus=**

Surajit Kumar Das being dead his legal Respondents.  
heirs-1(a)(i) Obijit Kumar Das & others:

For the Appellants : Mr. Khair Ejaj Masud,  
Advocate instructed by Mr.  
Nurul Islam Bhuiyan,  
Advocate-on-Record.

For the Respondents : Mr. Bivash Chandra Biswas,  
Advocate-on-Record.

***Date of hearing on : 10.10.2018.***

***Date of judgment on : 11.10.2018.***

**J U D G M E N T**

**Hasan Foez Siddique, J:** This appeal is directed against the judgment and order dated 13.12.2005 passed by the High Court Division in Civil Revision No.3616 of 1994 reversing the judgment and decree dated 30.04.1994 passed by the then Subordinate Judge, 1<sup>st</sup> Court, Faridpur in Title Appeal No.53 of 1991 affirming those dated 10.01.1991 passed by the Assistant Judge, Temporary Additional Court, Faridpur in Title Suit No.753 of 1978.

The relevant facts, for the disposal of this appeal, are that the plaintiff instituted Title Suit No.753 of 1978 in the Court of Assistant Judge (Temporary Additional Court), Faridpur for partition in respect of 'Ka' schedule land to the plaintiff and for pre-emption under section 4 of the Partition Act in respect of "Kha" schedule land measuring an area of 0.32½ acre appertaining to plot No.2523/2525 of Mouza-Raghunandanpur under Police Station-Kotwali, District-Faridpur stating, inter alia, that the plaintiff and defendant No.2 were the owners of schedule 'Ka' land to the plaintiff having 8 annas share each, which was an undivided homestead of the plaintiff as well as of the defendant No.2. The land of plot No.2525 is ditch land. The defendant No.2, by a kabala deed dated 11.06.1975, sold schedule 'Kha' land to the plaintiff to the defendant No.1. There was no partition by metes and bounds between the co-sharers of the suit land. After purchase, the defendant No.1 forcibly entered into the undivided homestead of the plaintiff and made some constructions creating inconvenience to the plaintiff's peaceful possession in the said homestead. There having arisen inconvenience of the plaintiff's possession, he demanded partition by metes and bounds but the defendant Nos.1 and 2

denied the same. The plaintiff is a Hindu by caste and the defendant No.1 is a Mohammadan by faith. It will be inconvenient on the part of the plaintiff to live jointly with the defendant No.1. The persons, who have been residing in the 'Kha' schedule homestead on behalf of the defendant No.1 in an undivided dwelling house. The defendant No.1 tried to evict the plaintiff from his homestead exercising coercive force upon the family members of the plaintiff. There was no demarcation between the houses of the plaintiff and of the defendant No.2 and the suit homestead is situated in plot No.2523 as being the ancestral undivided homestead of the plaintiff and of the defendant No.2. The defendant No.2 sold 'Kha' schedule land to the defendant No.1 beyond the knowledge of the plaintiff. The 'Kha' schedule land, being a part of undivided homestead of the plaintiff, he is entitled to get the same by way of pre-emption under Section 4 of the Partition Act.

The defendant No.1 contested the suit by filing a written statement contending, inter alia, that he purchased 'Kha' schedule land to the plaintiff within the knowledge of the plaintiff. The defendant No.2 requested the plaintiff to purchase the suit land who denied the said proposal and, accordingly, this defendant purchased the land

under pre-emption and the plaintiff accepted him to be a good neighbour. After purchase, he filled up the ditch. He further contended that he has constructed pucca building having three rooms in the 'Kha' schedule land investing tk.2,00,000.00. The schedule 'Kha' property was not a part and parcel of ancestral homestead of the plaintiff and defendant No.2. There is no jointness of the homestead of the plaintiff and of the defendant No.2. Section 4 of the Partition Act has got no manner of application in the instant case. The suit should be dismissed.

The trial Court decreed the suit in part. It allotted saham to the extent of .30 acre of land to the plaintiff. However, the trial Court dismissed the prayer for buying up. The plaintiff preferred appeal, which was also dismissed by the appellate Court. Then he filed civil revisional application in the High Court Division and obtained Rule. The High Court Division, by the impugned judgment and order, made the Rule absolute. The High Court Division decreed the suit to extent of .66½ acre of land in favour of the plaintiff allowing the prayer for buying up holding that the defendant No.1 being an outsider and being not a member of the plaintiff's family, the land purchased by him comes within the

mischief of section 4 of the Partition Act. However, it allowed improvement cost of tk.40,000/- in favour of the defendant No.1.

Then, the heirs of defendant No.1 have preferred this appeal getting leave.

Mr. Khair Ejaj Masud, learned Counsel appearing for the appellants, submits that the instant prayer for pre-emption in partition suit under section 4 of the Partition Act was not maintainable, in view of the fact that the plaintiff is not the transferee of the impugned deed. He submits that since transferee did not sue for partition, the plaintiff was not entitled to get an order of buying up in view of the specific provision of section 4 of the Partition Act. He further submits that admittedly the defendant No.1, after purchase of the share of the defendant No.2 constructed dwelling homestead and has been living in the same so the instant prayers for partition and pre-emption were not at all maintainable.

Mr. Bivash Chandra Biswas, learned Advocate-on-Record appearing for the respondents, submits that the right under section 4 of the Partition Act is not lost by the fact that the stranger-purchaser has obtained possession in a portion of the dwelling house. Section 4 is to be construed

liberally so that such provision may be applied in such way as would promote and fulfill the object of the Partition Act, which is to preserve the integrity of the family dwelling house and to enable the members of the family to keep it for themselves as far as possible. He submits that the decisions of our courts in this regard are not uniform and the object of the provision of section 4 will be frustrated if the prayer for buying up is not entertained in the suit not filed by the transferee.

In the instant case, it appears from the pleadings of the parties and the evidence that the defendant No.1, after purchasing the land under pre-emption, took over possession of the same and constructed a building therein. The plaintiff as P.W.1 in his cross examination has said, "আমার বসত গৃহ হইতে বিবাদীর দালান (নাঃ ভূমিস্থিত) ২/৩ হাত দুরে উত্তর দিকে। উক্ত দালানের স্থলে পূর্বে ছনের ঘর ছিল যাহাতে ২নং বিবাদী বাস করিত।". That is, the P.W.1 specifically admitted that the defendant No.1, entering into the land under pre-emption, constructed a building therein. The High Court Division totally failed to consider the consequence of such admission of the plaintiff as to taking over possession and construction of the

building by the defendant No.1 in his purchased share of the land under partition.

Admittedly, the plaintiff is not the transferee of the share of a dwelling house. That is, in this case the transferee did not sue for partition rather the same has been filed by the co-sharer of the holding. Mr. Bivash, relying upon the case of Md. Maddu Bhuiyan V. Jabbar Haq reported in 11 DLR 355, submits that the instant prayer for buying up is maintainable inasmuch as the instant suit was not filed by the stranger transferee. According to him, otherwise the object of the provision for pre-emption under section 4 of the Partition Act will be nugatory. In the cited case, it was observed that the provision of section 4 of the Partition Act was enacted to safeguard the interest of the members of the undivided family giving an opportunity to purchase the share in the homestead sold by one of the co-sharers to a stranger. If the contention that section 4 will only come into play when the suit has been instituted by the stranger-purchaser then, in that case, section 4 of the Act will be nugatory inasmuch as when a suit is instituted by a member of joint family for partition, then in that case the stranger-purchaser will have a share in the dwelling house, which can not be the intention of

the legislature at all. Second citation of Mr. Bivash is the case of Sayesta Bibi and others V. Juma Sha and others reported in 41 DLR(AD) 53. In that case, this Division mainly discussed about the definition of dwelling house belonging to an undivided family and observed that the same is to be liberally construed. This Division did not draw any conclusion, after discussion, as to whether to get relief under section 4 of the Partition Act, it is a precondition that the transferee must sue for partition or not.

Section 4 of the Partition Act enables any member of an undivided family dwelling house to purchase the share of the stranger purchaser so that a partition of the family dwelling house is prevented. Section 4 has been held to be logical sequel of corollary to section 44 of the Transfer of Property Act and an extension of the privilege given to a co-sharer of an undivided dwelling house by the second part of section 44 of the Transfer of Property Act. A perusal of section 44 clearly indicates that even though the first part of section 44 entitles the transferee of a joint property to obtain whatever right the transferor had of joint possession in such joint property and also to file a suit for partition, yet in respect of undivided family dwelling house such right of



joint possession of the stranger purchaser to that dwelling house to obtain joint possession thereof has been taken away by the second part. Such a stranger purchaser of an undivided family dwelling house may restrain a (purchaser) by an order of injunction from exercising any act of joint possession in such undivided family dwelling house.

In India the expression 'such transferee sues for partition' in section 4 of the Partition Act have led to conflict of decisions. In the case of *Satyabhama v Jatindra* reported in AIR 1929 Cal 269 the question arose whether section 4 would be attracted only when a stranger purchaser himself files a suit for partition and not when a co-sharer files a suit for partition impleading the stranger purchaser as a defendant. A Division Bench of the Calcutta High Court observed that the contention of the respondent that section 4 would arise only when stranger purchaser sues for partition would defeat the object of the Legislature to secure the individuality of the dwelling house. It has given the liberal construction of the word 'sues'. It has been pointed out that in a suit for partition whether a party is a plaintiff or a defendant, he is at the same time a plaintiff as well as a defendant and

such dual capacity of a party in a partition suit cannot preclude even a defendant who is claiming a share in the undivided family dwelling house for being treated as plaintiff for the purposes of section 4. In *Netai Das V. Hari Das* reported in ILR(1967)Cal 301 the Calcutta High Court did not follow the series of decisions beginning from *Satyabhama V. Jatindra* and held that even if an application under section 4 of the Partition Act can be entertained when a stranger purchaser is arraigned as a defendant in a suit for partition, but before allowing the relief under section 4 it must appear to the court that the stranger purchaser has claimed the partition or separate allotment and an application under section 4 in a case where the stranger-purchaser does not claim or is not claiming a separate partition or separate allotment, section 4 is not attracted. But, the Special Bench of the Calcutta High Court in *Shiba Prosad V Bibhuti Bhusan* (AIR 1989 Cal 35) has overruled the decision of *Netai Das V Hari Das* and has held that section 4 will be applicable in every suit for partition whether stranger purchaser sues as a plaintiff or is sued as a defendant and this right can be enforced irrespective of the fact whether the stranger purchaser has actually applied for partition or

for separate allotment of his share or not and that parties in a suit for partition being interchangeable the right to claim separate allotment is germane in any party be he a plaintiff or a defendant in the suit for partition and right of pre-emption cannot be defeated only because on or before the filing of the application under section 4 of the Partition Act the stranger purchaser as a defendant did not ask for separate allotment. In two later decisions, the Calcutta High Court has followed the Special Bench decision. The High Courts of Nagpur, Orissa and Patna have expressed the similar view.

But the High Courts of Bombay and Madras have, however, interpreted the expression "such transferee sues for partition" strictly. The views of the above two High Courts are that a shareholder shall have the right to apply under section 4 of the Partition Act, only when the transferee sues for partition after acquiring a share in the undivided family dwelling house (Ref Kunde Rao V. Bal Krishan AIR 1922 Bom 121 and Ramaiah V Subba Rao AIR 1950 Mad 214).

Allahabad High Court in its full bench has taken a modified stand in the case of Shakhayat Ali V. Ali Hossain AIR 1957 All (FB). In that case it has been held that in a suit for partition by a

co-owner against a stranger purchaser the right of pre-emption cannot be denied in all cases, that even though a co-sharer will not entitle to buy a share of a stranger purchaser wherever he likes and cannot exercise such power until and unless the stranger himself is claiming partition either as the plaintiff or as the defendant. In another decision in the case of Prayag Narayon V Vishwanath AIR 1983 All 213 the same High Court allowed the prayer for pre-emption in a suit for partition filed by a co-sharer when the defence of the stranger purchaser was that there was previous partition and if the court did not believe the story of the previous partition of the undivided family dwelling house, the same might be divided between him and the plaintiff. In that case, as the defendant himself expressed the intention to the partition of the undivided family dwelling house between him and the plaintiff co-sharer, then the High Court has held that the right of pre-emption under section 4 of the Partition Act accrued to the co-sharer plaintiff.

The Supreme Court of India resolved the conflict of such judicial decisions in Ghanteswar Ghosh V Madan Mohan Ghosh reported in AIR 1997 SC 471. In that case the Supreme Court of India interpreted the expression "such transferee sues

for partition". It was observed that amongst other conditions, section 4 of the Partition Act requires for its applicability. When the transferee purchaser sues for partition and only in that eventuality the rights of pre-emption envisaged under section 4 can be made available to the other contesting co-owners. It is, however, pointed out that the said section does not provide for its applicability that such transferee must file a suit for partition, that the words "transferee sues for partition" are wider than the transferee suing for partition and the latter phraseology is conspicuously absent in section 4 of the Act. It takes note of the fact that the Partition Act does not define the words "suing for partition" and the term suing for partition would not necessarily mean filing a suit for partition by the transferee. In the instant case, the transferee from a co-owner who has obtained a decree sought for execution of such decree as a purchaser for the decree obtained by the transferor co-sharer. It was observed that the stranger purchaser can be held to have initiated a legal action for redressal of his decretal right as a stranger purchaser and, as such, the co-sharer at that stage can initiate the pre-emption proceedings against the stranger purchaser. The

Supreme Court of India has in that decision overruled the decision of the Calcutta High Court and also the decisions of Nagpur, Orissa and Patna High Courts and they upheld the decision of the Bombay and Madras High Courts taking the view that sec.4 has to be strictly construed and should not be interpreted liberally to give the right to the co-sharer to pray for pre-emption even if the stranger purchaser is simply arrayed as a defendant and did not take any action for partition and separate possession of his share. In Babulal v Habiboor Rahaman reported in AIR 2001 SC 2684 the same view has been reiterated. In that case, it was observed that when at any stage, prior to the filing of the petition under sec.4 of the Partition Act, defendant, the stranger purchaser did not seek any separate allotment in the suit for partition filed by a co-sharer, the petition at that stage was held to be not maintainable. In Gautam Paul V Debi Ram Pal reported in AIR 2001 SC 61 Indian Supreme Court also observed that in a suit for partition filed by a co-sharer, the stranger purchaser at any stage prior to the filing of the application for pre-emption under section 4 of the Act did not ask for partition or demand partition, the Supreme Court has dismissed the application under section

4 of the Act as the pre-mature. In *Srilekha Ghosh V Parth Sarathi Ghosh* (AIR 2002 SC 2500) it is also reiterated that the conditions for applicability of sec.4 of the Partition Act is that a dwelling belonging to an undivided family must have been transferred to a person who is not a member of the family and such transferee sues for partition and if the precondition is satisfied, then if any member of the family being the shareholder undertakes to buy the share of such transferee, the court is to make a valuation of such shares in such manner as it thinks fit and direct the sale of such share to such share holder. Relying on *Gautam Paul v Debi Ram Paul* (supra) the Supreme Court has again held that the right of pre-emption of a co-sharer under sec.4 will be available only if the transferee sues for partition. So, in a suit filed by a co-sharer, another defendant co-sharer cannot claim a right of pre-emption under sec.4 in respect of a portion of which has been alienated in favour of another person.

Recently, this Division in Civil Appeal No.59 of 2009 (*Haji Shamsul Alam Vs. Dr. Ashim Sarker and others*) has observed:

“When a co-sharer of an undivided family dwelling house has filed the suit for partition of that dwelling house

against another co-sharer, no right against another co-sharer accrues to the plaintiff co-sharer to seek the relief for pre-emption under section 4 of the Partition Act. Dwelling house belonging to an undivided family means family not decided qua dwelling house. The essence is that the house itself should be undivided although the co-sharers having defined shares. As long as there is a dwelling house which has not been divided qua the family it might be said to be a dwelling house belonging to an undivided family for the purpose of section 4(1) of the Act. The basic pre-requisites for an application under section 4 for exercising the right of buy up is that the property which is the subject matter of the application must be a dwelling house of an undivided family and the transferee must sue for partition."

In a suit filed by the stranger purchaser for partition, a co-sharer of the undivided family dwelling houses can apply for pre-emption under Section 4 of the Partition Act at any stage of the suit. But when a suit for partition is filed by a co-sharer against the other co-sharers and the



stranger purchaser, the right to apply for pre-emption would only arise when the stranger purchaser seeks separate allotment of the share. So long as such step is not taken, the co-sharer's petition filed under sec.4 of the Act is not tenable. When in a partition suit filed by the co-sharer, the stranger purchaser after passing of the preliminary decree applied for appointment of the commissioner for partition of the undivided family dwelling house by metes and bounds and allotment of his share to him on such partition, then the filing of the application for pre-emption after such steps had been taken by the stranger purchaser is maintainable. In the meantime, the right of the co-sharer shall be protected by the second part of sec 44 of the Transfer of Property Act and the stranger purchaser shall be resisted by injunction to take possession or even if he has taken possession, he can be evicted in an appropriate proceeding under the law.

In view of the aforesaid facts and circumstances, our considered opinion is that the instant prayer for pre-emption under section 4 of the Partition Act at that stage of the proceeding was not at all maintainable.

Accordingly, we find substance in this appeal.

Thus, the appeal is allowed without any order as to cost. The judgment and order of the High Court Division is set aside.

**J.**

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**The 11<sup>th</sup> October, 2018.**  
M.N.S./words-3659/