Ghantesher Ghosh vs Madan Mohan Ghosh & Ors on 18 September, 1996

Equivalent citations: AIR 1997 SUPREME COURT 471, 1996 (11) SCC 446, 1996 AIR SCW 3858, (1996) 8 JT 410 (SC), (1996) 4 ICC 819, (1997) 1 CALLT 26, (1996) 2 RENTLR 644, (1996) 2 LJR 506, (1997) 1 RECCIVR 89, (1997) 1 ALL WC 253

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Bench: S.B Majmudar, N.P Singh

PETITIONER:
GHANTESHER GHOSH

Vs.

RESPONDENT:
MADAN MOHAN GHOSH & ORS.

DATE OF JUDGMENT: 18/09/1996

BENCH:
MAJMUDAR S.B. (J)
BENCH:
MAJMUDAR S.B. (J)
SINGH N.P. (J)

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T MAJMUDAR, J:

A short question falls for determination of this Court in this appeal by special leave against the decision of the Division Bench of the High Court of Calcutta in Civil Revision Application No.2250 of 1987. The question is whether Section 4 of the Partition Act, 1893 (hereinafter referred to as 'the Act') can be pressed in service in

execution proceedings arising out of a final decree for partition, by one of the co-owners of a dwelling house belonging to an undivided family against a stranger transferee of a share therein belonging to another erstwhile co-owner of the said dwelling house. The learned Second Assistant District Judge, Howrah, before whom the said application was moved took the view that Section 4 of the Partition Act could not be pressed in service against the stranger purchaser of such share. The said view was not accepted by the Division Bench of the High Court of Calcutta by the impugned judgment.

In order to appreciate the correct contours of the controversy in respect of the aforesaid question, it is necessary to glance through a few background facts leading to the proceedings. The premises in question are a residential house situated at No.6/1 Ghoshal Bagan Lane, Howrah. It was originally owned by one Kalipada Ghosh and on his death his three surviving sons, namely, Pran Krishna, Gour Mohan and Kamal Krishna became owners of 1/3rd share each. On 7.9.1948, Kamal Krishna died leaving behind him his widow Smt. Radha Rani. Thus, she inherited 1/3rd undivided share of her husband in the said dwelling house. On the coming into operation of the Hindu Succession Act, 1956, Smt. Radha Rani became full owner of 1/3rd share of her deceased husband in the said house. She filed a suit for partition on 5.9.1960 claiming separation or her 1/3rd share in the said house amongst other properties. In the present proceedings, we are concerned only with the aforesaid family dwelling house. The suit was filed against the other two co- owners, namely, Pran Krishna and Gaur Mohan. Ultimately, after the preliminary decree a final decree came to be passed in favour of Smt. Radha Rani on 31.8.1971. Accordingly, she became entitled to partition and separation of her 1/3rd share in the said dwelling house. She made an abortive attempt to get the final decree executed but therein she did not get any relief of actual possession for number of years. In the meanwhile, on 8.10.1979 she executed and got registered a deed of gift in favour of her brother, the present appellant, gifting her 1/3rd undivided interest in the said dwelling house as decreed to her pursuant to the final decree for partition. Armed with that gift deed, the appellant-donee who obviously was a stranger tc the joint family, filed execution petition on 14.12.1981 for executing the final decree obtained by his predecessor in interest, namely, the donor Smt. Radha Rani. Pending the execution proceedings taken out by the appellant donee, one of the judgment-debtors Pran Krishna, original first defendant, died in July 1982. In his place, his son present Respondent No.1, Madan Mohan Ghosh was brought on record as his legal heir in the execution proceedings. The executing court by its order dated 17.1 1985 issued a writ of possession by appointing a Pleader Commissioner to undertake the task of suggesting partition of the suit house by metes and bounds. Then in September 1985, pending the execution proceedings original judgment debtor Defendant No.2 Gaur Mohan also died. It appears that thereafter the real contest remained between the appellant on the one hand and Respondent No.1 on the other. Respondent No.1 filed an application on 12.12.1986 before the executing court under Section 4 of the Act for enforcing his claim of pre-emption against the appellant stranger transferee of 1/3rd

undivided interest of the original title-holder Smt. Radha Rani. The executing court by its order dated 13.8.1981 dismissed the said application of Respondent No.1 on the ground that the said application was not maintainable after the final decree was passed in the partition suit. As stated earlier, the said view of the executing court was not approved by the Division Bench of the Calcutta High Court in the revision application. It took the view that the said petition under the Act was maintainable as still the final decree had not got fully executed and satisfied by actual division of the property by metes and bounds and delivery of actual possession to the stranger transferee who had taken out the execution proceedings. By its order dated 17.12.1990, the High Court directed the executing court to dispose of the application of Respondent No.1 under Section 4 of the Act on merits with a further direction to complete the said proceedings within six months. It is the aforesaid order of the High Court which is challenged in the present appeal by special leave, as noted earlier.

RIVAL CONTENTIONS :

Dr. Ghosh, learned senior counsel for the appellant, vehemently contended that on the express language of Section 4 of the Act, the application moved by Respondent No.1 was not maintainable. Dr. Ghosh relied upon a number of decisions which had taken the view canvassed by him. His submission in short was that Section 4 of the Act can be availed of by any of the parties to the litigation in the partition suit till its culmination into a final decree for partition. That even during the appeal against the final decree Section 4 can be pressed in service. That once the final decree comes to be passed and gets finally confirmed by the ultimate court of appeal the suit comes to an end.

Thareafter, when execution proceedings are taken out for executing such final decree, Section 4 of the Act would be out of picture and cannot be pressed in service against the stranger transferee of the decretal rights of one of the co- owners in the family dwelling house. Dr Ghosh also vehemently tried to submit that the finding reached by both the courts below that the suit property consisted of a family dwelling house and was not an open land, was also not sustainable. On the other hand, learned counsel for the respondents submitted that Section 4 is a beneficial provision which seeks to avoid the interference by the stranger transferee of co-owner's right in a joint family dwelling house and if such strangers are permitted to come into possession of any part of such dwelling house, the peace and tranquility of the rest of the occupant members of the joint family would be order to avoid such a contingency and possible strife the legislature in its wisdom had enacted this provision which has stood the test of time spread over more than a century and there was no reason to restrict the application of such a benevolent section only upto the stage of final decree and not during further proceedings in execution of such final decree. It was submitted that beneficial provision of Section 4 can rightly be made applicable during execution proceedings till the final decree gets fully satisfied by division of property by metes and bounds and by actual delivery of possession of respective portions of the joint family dwelling house to the concerned shares. It is only at that stage that the executing court would become functus officio. That till that stage is reached Section 4 of the Act can be legitimately pressed in service by any of the remaining co-owners claiming pre-emptive right to

purchase the share of the stranger transferee from one of the co-owners. Learned counsel also in his turn relied upon a decision of the Division Bench of the Patna High Court in Harendra Nath Mukharjee vs. Shyam Sunder Kuer & Ors. (A.I.R. 1973 Patna

142). He also submitted that in a partition suit till the decree gets fully satisfied and executed each contesting party remains as good as a plaintiff and consequently the beneficial provision of Section 4 can be pressed in service by any of the contesting co-owners till the final decree in such a suit for partition gets fully executed and implemented and consequently curtain drops on the partition proceedings between the parties for ever.

It is in the background of these rival contentions that we address ourselves to the consideration of this question. Before we refer to the cleavage of judicial opinion amongst different High Courts on the scope and ambit of Section 4 of the Act, it would be profitable to have a look at the provision itself. The Statement of Objects and Reasons for enacting the Partition Act, 1893 amongst others, provided as under :

> "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 share holders by section 44, paragraph 2 of the Transfer of Property Act, and is an application of a well-
>
> known rule which obtains among Muhammadans everywhere and by custom also among Hindus in some parts of the country."

It is obvious that the Act intended to extend the privilege already available to a co-sharer in a family dwelling house as per Section 44 of the Transfer of Property Act, 1882 (hereinafter referred to as the T.P. Act'). Section 44 of the T P. Act dealing with cases of transfer by one of the co-owners of immoveable property, reads as under:

> "44. Transfer by one co-owner -
>
> Where one of two or more co-owners of the immoveable 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 the 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 to joint possession or other common or part enjoyment of the house".

It is obvious that by the time the Act came to be enacted, the legislature had in view the aforesaid parent provision engrafted in section 44 of the T.P. Act to the effect that a stranger to the family who becomes the transferee of an undivided share of one of the co owners in a dwelling house belonging to undivided family could not claim a right of joint possession or common or part enjoyment of the house with other co-owners of the dwelling house. Implicit in the provision was the legislative intent that such stranger should be kept away from the common dwelling house occupied by other co-sharers. It was enacted with the avowed object of ensuring peaceful enjoyment of, the common dwelling house by the remaining co-owners being members of the same family sharing a common hearth and or home. It is in the light of the aforesaid pre-existing statutory background encompassing the subject that we have to see what Section 4 of the Act purports to do. Section 4 of the Act provides as under :-

> "4. Partition suit by transferee of share in dwelling-house.-(1) Where a share or 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 last foregoing section."
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> A mere look at the aforesaid provision shows that for its applicability at any stage of the proceedings between the contesting parties, the following conditions must be satisfied:
>
> (1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein; (2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to he family;
>
> (3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the concerned co-owner; (4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and (5) While accepting such a claim for pre-emption by the existing co-

owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and

separate possession of his share in the dwelling house and acccordingly can be effectively denied entry in any part of such family dwelling house The aforesaid analysis of Section 4 of the Act makes it clear that there is no express provision indicating the stage at which such application can be moved against the stranger transferee of the share of an erstwhile co-owner of dwelling house of undivided family. Consequently, on the language of Section 4, it cannot be urged that it cannot be pressed in service after the final decree for partition is passed and before such. final decree is fully executed whereby the court becomes functus officio. It is trite to observe that in the present case out of the aforesaid conditions for applicability of Section 4, save and except the condition regarding the stranger transferee suing for partition which is the subject-matter of fierce controversy between the parties, all the remaining conditions are satisfied. In other words, there is well established on the record of the case that the suit house was a dwelling house belonging to undivided family of three erstwhile brothers and which later on came to belong to two undivided brothers along with the widow of their deceased brother and thus the suit house was a dwelling house belonging to undivided family. Dr. Ghosh, learned senior counsel for the appellant, faintly tried to submit that both the courts below were in error in holding that the suit property consisted of a dwelling house and not open land. As both the courts concurrently found it to be a dwelling house belonging to undivided family, this contention is no longer open for adjudication at this stage. We, therefore, proceed on the basis that the suit house is a dwelling house belonging to undivided family. It is also not in dispute between the parties that 1/3rd interest of one of the co-owners, namely, Smt. Radha Rani, who had got final decree for partition in her favour, was transferred by gift in favour of the appellant after the final decree and that such donee- tranferee was a stranger to the family as he was not a member of the said family. It is also not in dispute that Respondent No.1 by way of application under Section 4 of the Act undertook to buy out the share of the appellant stranger transferee being 1/3rd undivided share which belonged to his predecessor in title decree-holder Smt. Radha Rani. However, the real controversy between the parties is whether the appellant who is a stranger transferee of 1/3rd undivided interest cf Smt Radha Rani in the suit property ?can be said to have sued for partition so as to satisfy the remaining condition of the said provision.

In order to answer this moot question, it has to be kept in view what the legislature intended while enacting the Act and specially Section 4 thereof. The legislative intent as reflected by the Statement of Objects and Reasons, as noted earlier, makes it clear that the restriction imposed on a stranger transferee of a share-of one or more of the co-owners in a dwelling house by Section 44 of the T.P. Act is tried to be further extended by Section 4 of the Partition Act with a view to seeing that such transferee washes his hands off such a family dwelling house and gets satisfied with the proper valuation of his share which will be paid to him by the pre-empting co-sharer or co-sharers, as the case may be. This right cf pre-emption available to other co-owners under Section 4 is obviously in further fructification of the restriction on such a transferee as imposed by Section 44 of the T.P. Act. It is true that amongst other conditions, Section 4 requires for its applicability that such stranger transferee must sue for partition and only in that eventuality the right of pre- emption envisaged by Section 4 can be made available to the other contesting Co-owners. In this connection, great emphasis was placed by Dr. Ghosh on the words such transferee sues for partition as employed by Section 4. However, it has to be noted that this section does not provide as a condition for its applicability that such stranger transferee must file a suit for partition. The words transferee sues for partition are wider than the words transferee filing a suit for partition . The latter phraseology is

conspicuously absent in the section. The Partition Act does not define the words "suing for partition". The connotation of the term "sue" can be better appreciated by looking at certain standard works defining such a phrase. In Black's Law Dictionary, Sixth Edition, at page 1432 the meaning of the word "sue is mentioned as under

:-

"To commence or to continue legal proceedings for recovery of a right; to proceed with as an action, and follow it up to its proper termination; to gain by legal process".

In Collins English Dictionary, 1979 Edition, at page 1452, one of the meaning of the word "sue" has been shown as under:

"to institute legal proceedings against". In Aiyar's Judicial Dictionary, 10th Edition (1988), at page 980, the word 'sue" is said to have the following meaning :-

"To take only legal proceedings against one".

It is further observed that the word is used most exclusively to prosecute a civil action against one.

In Concise Oxford Dictionary, Seventh Edition, at page 1066, the following meanings are ascribed to the word "sue" :-

"1. institute legal proceedings against (person); make application to or to law court for redress;

make petition in law court for and obtain (writ pardon etc.);

2. entreat (person); make entreaty to (person) for a favour".

In Stroud's Judicial Dictionary, Fifth Edition, at page 2540, the words "to sue" is said to have the meaning generally speaking, or bringing action.

It is, therefore, well-established that the terminology "suing for partition" would not necessarily mean filing of a suit in the first instance by the transferee. If a transferee seeks to execute any final decree for partition in favour of his transferor co-owner, he can be said to have initiated a legal action for redressal of his decretal right as a stranger transferee. Any legal action taken by anyone for getting redressal from a law court and for vindicating his legal right on which such action is based can be said to have sued in a court of law. It cannot, therefore, be said that a purchaser of decretal rights flowing from a final decree for partition while initiating proceedings for execution of that decree against the judgment-debtors who are co-sharers in the property sought to be partitioned by metes and bounds, is not suing for partition by getting the said decree executed through a Court of law. If the words "transferee suing for partition are given a restrictive meaning, namely, that he can be said to be suing for partition only upto the stage of final decree in such a suit

for partition then the wide phraseology advisedly employed by the legislature in the section would be deprived of its real laudable object and content . It is trite to observe that till the final decree for partition of a co-ownership property culminates into its full discharge and satisfaction, the lis between the contesting parties cannot be said to have come to a final end. It is also axiomatic that once the partition decree becomes final, the court which passed the decree does not become functus officio for all purposes. On the contrary, its role remains effective till the decree passed by it gets fully executed and implemented. It is for this very purpose that the legislature has provided as per Section 38 of the Civil Procedure Code that a decree may be executed by the court which passed it, or by the court to which it is sent for execution. Therefore, it is the duty of the court which passes the decree to get it executed when called upon to do so with a view to seeing that the rights and obligations flowing from such decree get finally complied with and translated into reality. Till that stage is reached the court which passes the decree does not become totally functus officio and the litigation between parties cannot be said to have ended finally. Under these circumstances, it cannot be said that a decree-holder in a partition suit or his transferee who is armed with the plaintiff's rights pending such suit or even after the passing of the final decree as transferee of decretal rights when he seeks execution is not suing for partition or is not entreating the court for its assistance to get his right fully vindicated as per the claim in the suit and decree therein. In this connection, it is also profitable to keep in view the legislative intent underlying various provisions of the Code of Civil Procedure which shows that in given circumstances the proceedings in the suit can be treated to include even execution proceedings. Explanation VII to Section ll of the Civil Procedure Code dealing with res judicata lays down as under :-

> "Explanation VII.-The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree."

As per Order 22 Rule 10, in cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. As per Order 22 Rule 12, nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order meaning thereby that Order 22 Rule 10 will apply to execution proceedings whereby the same scheme regarding devolution of interest of either party in the suit is made applicable even to execution proceedings.

Section 52 of the Transfer of Property Act is another illustration on the point dealing with the principle of lis pendens. The explanation to the said section indicates that the pendency of a suit would encompass the stage after the final decree till complete satisfaction and discharge of such decree or order. It is, therefore, obvious that legislature for different contingencies has thought it fit to extend the scope and ambit of the terminology "suit" even for covering the execution proceedings in connection with decrees passed in such suits. As we have seen earlier, Section 4 of the Act has also advisedly used the terminology "sues for partition" and has not confined it only to suits filed by stranger transferee for applicability of Section 4 of the Act.

We have also to keep in view the avowed beneficial object underlying the said provision. Section 4 of the Partition Act read with Section 44 of the T.P. Act represents a well knit legislative scheme for insulating the domestic peace of members of undivided family occupying a common dwelling house from the encroachment of a stranger transferee of the share of one undivided co-owner as the remaining co-owners are presumed to follow similar traditions and mode of life and to be accustomed to identical likes and dislikes and identical family traditions. This legislative scheme seeks to protect them from the onslaught on their peaceful joint family life by stranger-outsider to the family who may obviously be having different outlook and mode of life including food habits and other social and religious customs. Entry of such outsider in the joint family dwelling house is likely to create unnecessary disturbances not germane to the peace and tranquility not only of the occupants of the dwelling house but also of neighbours residing in the locality and in the near vicinity. With a view to seeing that such homogenious life of co-owners belonging to the same joint family and residing in the joint family dwelling house is not adversely affected by the entry of a stranger to the family, this statutory right of pre-emption is made available to the co- owners who undertake to buy out such undivided share of the stranger co-owner. If such a right flowing from Section 4 of the Act is restricted in its operation only upto the final decree for partition, the very benevolent object of the section would get frustrated as upto final decree stage, the court would only crystalise the shares of the contesting co- owners but the separation and partition of the shares of respective parties get really affected on spot only by actual division by metes and bounds and delivery of Possession of respective shares to respective share-holders. This can be achieved only at the stage when the execution of the final decree takes place and the litigation reaches its terminus for the contesting parties and the curtain drops on the litigation. Only then the court which passed the decree becomes finally functus officio. It is also well-settled rule of interpretation of statute that the court should lean in favour of that interpretation which fructifies the beneficial purpose for which the provision is enacted by the legislature and should not adopt an interpretation which frustrates or unnecessarily truncates it. Maxwell on The Interoretation of statutes, Twelfth Edition, has observed in Chapter 4 pertaining to beneficial construction as under :-

> "The fact that a section is clearly designed to afford relief may incline the court to construe it more benevolently than it might a less obviously remedial enactment..."

Similarly it has been observed at page 96 as under :-

> "It is said to he the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy. To this end, a certain extension of the letter is not unknown, even in criminal statutes".

Consequently, on the express language of Section 4 of the Partition Act which is a benevolent provision enacted by the legislature for the welfare and tranquility of the members of a joint family occupying s e dwelling House, we must so construe the provision as to make it available at all the relevant stages of the litigation between the contesting co-owners till the litigation reaches its terminus by way of full and final discharge and satisfaction of the final decree for partition. If a stranger transferee enters the arena of contest at any stage and seeks to get his share separated as far as the subject-matter of the litigation, namely, the dwelling house, is concerned, he can be said to

be suing for partition and separate possession of his undivided share to which he has become entitled because of transfer by one of the co-owners. Such a transferee might come on the scene prior to the final decree via Order 22 Rule 10 or he may come on the arena of contest seeking redressal of his right of partition and separation of his undivided share even tn execution proceedings as a transferee of the decree right of erstwhile plaintiff under the final decree either by himself filing the execution proceedings as per Order 21 Rule 16 or may subsequently step in the shoes of the decree-holder who has already filed the execution proceedings via Order 22 Rule 10 read with Order 22 Rule 12. In either eventuality, such a stranger transferee who emerges on the scene of litigation between the contesting co-owners which has not stilt reached its terminus and who seeks vindication of his transferee-rights in the dwelling house can certainly be said to be suing for partition even at the stage of execution of such final decree for partition.

In our view, therefore, on the express language of Section 4 of the Partition Act, the Division Bench of the High Court reached a correct conclusion in the impugned judgment.

Now is time for us to have a quick look at the different decisions of the High Courts on this question. Dr. Ghosh, learned senior counsel for the appellant, heavily relied upon some of the decisions of the Patna and the Calcutta High Courts as well as the decision of the Madras High Court in support of his contention that Section 4 cannot be applied at the stage of execution of a final decree for partition. On the other hand, learned counsel for the respondents, relied upon the latter decisions of the Patna High Court as well as the Calcutta High Court in support of his rival contention seeking application of Section 4 of the Act even during execution proceedings and which contention, as we have seen above, meets our approval. We shall first deal with the decisions relied upon by Dr. Ghosh in support of his contention. In Sheodhar Prasad Singh & Ors. vs Kishun Prasad Singh & Ors. (A.I.R. 1941 Patna 4)), Dhavle, J. took the view that an application under Section 4 could be made in appeal against final decree. Now it must be kept in view that the learned Judge was not directly concerned with a situation which arises in the present case. In the case before the learned Judge of the Patna High Court, the question of applicability of Section 4 of the Act fell for consideration at the stage when the final decree reached the second appellate stage before the High Court. According to the learned Single Judge, Section 4 could apply even at that stage. The learned Single Judge, therefore, had no occasion to consider the further question with which we are concerned. The view propounded by him cannot be said to have ruled out the applicability of Section 4 beyond the stage of final decree in a suit for partition. Dr. Ghosh invited our attention to a decision in Birendra Nath Banerjee vs. Smt. snehalata Devi Anr. (A.I.R. 1968 Calcutta

380). Even in that case the Division Bench of the High Court was concerned with the applicability of Section 4 pending appeal against the final decree for partition. The Division Bench observed therein as under :-

> "The right of pre-emption under Section 4 of the Partition Act is a right given by the statute and on its wording, it subsists so long as the suit remains pending, or, in other words, so long as the suit has not been concluded or terminated by an effective final decree for partition. Therefore, an application claiming, pre-emption at a time when the appeal against final partition decree is pending cannot be held barred by

> limitation on the ground that it has been filed beyond three years of the passing of the preliminary partition decree."

The aforesaid observation makes it clear that the court was concerned with the question of limitation in connection with application under Section 4 of the Act pending the appeal against the final decree and whether it should be treated as time barred considering the starting point of preliminary decree. It is true that the Division Bench, in this connection, observed that the right of pre-emption under Section 4 subsists so long as the suit is pending or has not been concluded or terminated by the final decree for partition. But the said observation cannot be construed to have excluded the possibility of applicability of Section 4 to a post final decree stage as such a situation had not arisen for consideration of the court. However the decision of the Madras High Court is on the point. Strong reliance was placed by Dr. Ghosh on the judgment of the Madras High Court in Abdul Sathar vs. AL Nawab (A.I.R. 1980 Madras 225), In that case a learned Single Judge, Ratnam, J., took the view dissenting from the decisions of the Patna and the Calcutta High Courts to which we shall make a reference presently that Section 4 of the Act cannot be pressed in service after the final decree for partition is passed. In other words, in execution proceedings Section 4 of the Act cannot apply. As already discussed by us earlier Section 4 on its express language cannot be read in such a truncated fashion. Therefore, the decision of the learned Single Judge Cannot be Considered to ba laying down good law. On the other hand, the decisions of the Patna and the Calcutta High Courts to which we shall now make a reference.

In Satya Narayan Chakravarty vs. Biswanath Paul & Ors. (1974 Calcutta Weekly Notes 871), a Division Bench of the Calcutta High Court observed that so long as the stranger purchaser of decretal rights of one of the co-owners has not taken possession of his allotted share by execution of the said decree, application under Section 4 of the partition Act is maintainable In this connection, it was observed by the Division Bench, speaking through Laik, J., as under :-

> "Having considered the scheme of the Partition Act including its object which is to prevent the introduction of any foreign element into the group of family members and its aim which is to maintain homogeneity in respect of the entire family and particularly the provisions of section 4 thereof, which does not indicate a contrary intention and after giving anxious consideration to the principles laid down but following the principle that the residence in a dwelling house of an undivided family should not, if possible (but not contrary to law), be thrown open to a stranger to the family and remembering that the terms of section 4 of the Act are quite general and distinct from a decree passed in a partition suit and holding further the rule that the executing court should not go behind the decree, is inapplicable in an application under section 4 of the Partition Act and not ignoring the provisions of section 44 of the Transfer of Property Act and the rules of pre- emption governing the Muhammandans, Buddhists, Jews, Romans and others and agreeing with respect to the dictum of the judicial committee in 42 IA 10-ILR 37 AM 129 (141) R.C. that the right of pre-emption is a "valuable right" - the object of such a right being the avoidance of a disagreeable stranger (though some may think it an archaism and a clog on freedom of contract) the court held that an application under Section 4 of the

Partition Act is maintainable even after the final decree is passed...."

In Boto Krishna Ghose vs. Akhoy Kumar Ghose & Ors. (A.I.R. (37) 1950 Calcutta 111), it was held by another Division Bench of the Calcutta High Court that a dwelling house of an undivided family has a linkage with the dwelling house which belongs to the family and which is not divided and that such dwelling house may be owned by members of such family who need not be joint in mess and that house itself should be undivided amongst the members of the family who are its owners. The emphasis is really on the undivided character of the house, and it is this attribute of the house which imparts to the family its character of an undivided family. For the members of the family may have partitioned all their other joint properties and may have separated in mess and worship, but they would still be an undivided family in relation to the dwelling house so long as they have not divided it amongst themselves. In this connection, it has been further observed as follows :-

> "If in this state of things a member of the family transfers his share in the dwelling house to a stranger, the position that arises that para 2 of section 44, T.P. Act comes into operation and the transferee does not become entitled to joint possession or other common or part enjoyment of the house, although he would have the right to enforce a partition of his share. The object of this provision is to prevent the intrusion of strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share to a stranger . The factual position then is that it is still an undivided dwelling house, the possession and enjoyment of which are confined to the members of the family, the stranger transferee being debarred by law from exercising his right to joint possession which is one of the main incidents of co-ownership of property. Such a dwelling house can in our opinion still be looked upon as a dwelling house belonging to an undivided family, because the members of the family have not divided it amongst themselves and are in sole enjoyment and possession of it to the exclusion of the stranger transferee who has only a right to partition. And so long as the dwelling house has not been completely alienated to strangers as was the case in Vaman Vishnu vs. Vasudeo Norbhat, 23 Bom. 73, successive transfers by other co-sharer members of the family do not alter the factual position in this respect, because the remaining member or members of the family have the right to hold exclusive possession to the exclusion of the stranger alienees. So long as that situation lasts, the dwelling house, in our opinion, continues to be a dwelling house belonging to an undivided family."

The aforesaid decision also shows that so long as decree for partition of a family dwelling house does not get fully executed and the shares of co-owners do not get separated by metes and bounds and the co-owners are not put in actual possession of their respective shares, the dwelling house remains to be common dwelling house of joint family and so long as that attribute remains, section 4 would continue to ba attracted. We may now deal with the decision of the Division Bench of the Patna High Court which has also directly spoken on the point. In Harendra Nath Mukharjee vs. Shyam Sunder Kuer & Ors. (Supra) Mukharji, J., speaking for the court had to consider this very question in the light of the scheme of Section 4 of the Partition Act. It was held that application under Section 4 could be made at any stage of the suit. Simply because an application had been filed after the

passing of the final decree, it could not be said that it was not maintainable on the ground that the executing court could not go behind the decree. It was not a case of going behind the decree. It was further observed that family continued to be undivided qua dwelling house till possession was delivered to the members of the family in execution of the final decree for partition and as such, the application under Section 4 was maintainable after passing of the final decree and before the possession of the dwelling house in question was delivered to the stranger transferee. The aforesaid decisions of the Calcutta High Court in the cases of Satya Narayan Chakravarty (supra) and Boto Krishna Ghose (supra) as well as the decision of the Division Bench of the Patna High Court in the case of Harendra Nath Mukharjee (supra) lay down the correct legal position.

At this stage, we may note one apprehension voiced by Dr. Ghosh. It was submitted that if this view regarding applicability of Section 4 is upheld, then it may very well happen that even after the decree for partition is executed by one of the erstwhile co-owners and his transferee and the stranger transferee is actually put in possession of his share by division on spot by metes and bounds, and thereafter if such a transferee transfers his separate share in the dwelling house which has been actually handed over to him, the co-owner may still file an application under Section 4 of the Act. This apprehension is totally misconceived. Section 4 in its applicability, as discussed above, will cover all stages of litigation in a partition suit from its inception till its termination not only by the final decree for partition but also by its complete satisfaction and discharge through the assistance of the executing court; once that happens the court itself becomes functus officio and the litigation will come to an end and the concerned parties thereafter will occupy the respective portions of the erstwhile dwelling house as full owners of their portions. The separated part of the dwelling house in possession of such stranger transferee cannot then be treated as a part and parcel of the dwelling house belonging to an undivided family and at that stage the dwelling house qua such a stranger would cease to belong to any joint family and it would belong to different owners occupying their respective portions in a composite building. Momemt the integrity of common dwelling house belonging to undivided family is broken by the execution of the final partition decree through the intervention of the court and the proceedings are ended, there would remain no scope for play of Section 4 of the Act as there would be no subject- matter of a common dwelling house belonging to an undivided family on which it could operate.

As a result of the aforesaid discussion, it must be held that Section 4 of the Act can validly be pressed in service by any of the co-owners of the dwelling house belonging to undivided family pending the suit for partition till final decree is passed and thereafter even at the stage of execution of the final decree for partition so long as the execution proceedings have not effectively ended and the decree for partition has not been fully executed and satisfied by putting the share-holders in actual possession of their respective shares. Beyond that stage, however, Section 4 will go out of commission.

That leaves out the question as to what final order should be passed in these proceedings. As we have upheld the applicability of Section 4 to the present proceedings the application filed by Respondent No.1 is held maintainable and is required to be processed further. At this stage, on the aforesaid conclusion to which we have reached, it would be necessary, as directed by the High Court, to remand the proceedings under Section 4 of the Act for being processed further. However, as the

proceedings are very old and are lingering on since so many years in the court, learned counsel for the respondents fairly suggested with a view to putting an end to this litigation that Respondent No.1 who had moved the application under Section 4 of the Act in 1986, is prepared to pay Rs. four lakhs to the appellant in full and final satisfaction of his Claim as a donee of the share belonging to Smt. Radha Rani. This amount was offered in the light of the valuation of the share of the appellant in the dwelling house as on 12.12.1985 when that application was moved.

This offer was made by learned counsel for the respondents in consultation with Respondent No 1 who was present in the Court. Dr. Ghosh, learned senior counsel for the appellant, was also agreeable to the said course being adopted. In our view this is a fair stand taken by both the parties to put an end to this litigation which was triggered off as early as on 5.9.1960. It is high time that it reaches its final terminus at least after 36 years. We, therefore, grant application of Respondent No.1 under Section 4 of the Partition Act and direct him to pay Rs.four lakhs to the appellant in full and final satisfaction of his claim and on payment of Rs.four lakhs by Respondent No.1 to the appellant, the appellant shall convey his right, title and interest in the suit house to Respondent No.1 as per Section 4 of the Partition Act. Rupees four lakhs shall be paid by Respondent. No.1 to the appellant by instalments as under :-

1. Rupees two lakhs will be paid by Respondent No.1 to the appellant on or before 31 .12.1996.

2. The balance of Rupees two lakhs shall be paid by Respondent No.1 to the appellant on or before 31.3.1997.

It is further directed that in case of default of any of these instalments, the amount remaining due on such default shall become payable by Respondent No.1 to the appellant with 18% interest thereon from the date cf this judgment till the payment of such default amount. On payment of the aforesaid amount of Rs.four lakhs and also subject to payment of interest on the requisite amount, in case of default, if any, as eforesaid, the right, title and interest of the appellant in the suit dwelling house shall stand transferred in full ownership Of Respondent No.1, the applicant of Section 4 of the Act and such share shall be treated to have been sold by the appellant to Respondent No.1. On receipt of the aforesaid sale consideration, the appellant shall also execute necessary sale document in favour of Respondent No.1. The cost of registration of such sale document shall be borne by Respondent No.1. Thereupon, the application for execution moved by the appellant shall be treated as closed and the decratal claim of the appellant qua the judgment-debtors will be treated as fully satisfied. It is further directed that the concerned parties shall not alienate or encumber in any manner their respective shares in the joint family dwelling house till the present order is fully complied with. The concerned parties are directed to carry out the aforesaid directions punctually. The appeal is accordingly disposed of with no order as to costs in the facts and circumstances of the case.