

(1984) 12 CAL CK 0003

Calcutta High Court

Case No: Appeal No. 1666 of 1981

Sm. Nirupoma Basak and Others

APPELLANT

Vs

Baidyanath Pramanick

RESPONDENT

Date of Decision: Dec. 21, 1984

Acts Referred:

- Evidence Act, 1872 - Section 115
- Partition Act, 1893 - Section 4
- Transfer of Property Act, 1882 - Section 105, 44

Citation: AIR 1985 Cal 406

Hon'ble Judges: R.N. Pyne, J; Prabir Kumar Majumdar, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Pyne, J.

This appeal is directed against the judgment and order dated May 18, 1981 passed by S. C. Deb, J. dismissing the appellants' application u/s 4 of the Partition Act, 1893 for purchase of the undivided 5/6th share from the respondent who purchased the same in the dwelling house of the appellants from other co-sharers. To understand the points in issue brief facts of the case may be stated.

2. Premises No. 45, Nanda Ram Sen Street (hereinafter referred to as "the said premises") was the ancestral dwelling house of the appellants and their other co-sharers. One Gopi Ballav Pramanick alias Basak had undivided 1/2 share of the said premises. On or about 11th July, 1975 Gopi Ballav Basak sold his undivided 1/2 share in the said premises to the respondent. It is alleged by the respondent that when Gopi Ballav Basak offered his undivided 1/2 share of the said premises for sale to the respondent the respondent stated to Gopi Ballav Basak that the said share should be offered first to the other co-sharers and accordingly Gopi Ballav Basak in the presence of the respondent offered to sell his undivided 1/2 share to all

co-sharers, namely, Nadia Behari Basak, Brindaban Basak, Santosh. Basak, Bimal Basak and Nirmal Kumar Basak. The other co-sharers declined to purchase Gopi Ballav's undivided 1/2 share and represented to the respondent that they had no objection if the said share was sold to the respondent. Thereafter, at the respondent's request the respondent Nos. 2, 3, 4 and 5 on behalf of themselves and other co-sharers and Nadia Behari Basak gave declarations in writing dated 22nd June, 1975 stating that they declined to purchase the said 1/2 share of Gopi Ballav Basak. It is stated by the respondent that similar letter and/or declaration in writing dated 5th July, 1975 was given by Brindaban Basak to the respondent. The said writings contain as follows :

"I decline to purchase the half share of my elder cousin brother Sri Gopi Ballav Basak in premises No. 45, Nanda Ram Sen Street, Calcutta-5 as offered to me.

Nadia Behari Basak.

22-6-75".

"We decline to purchase the half share of our uncle Sri Gopi Ballav Basak in premises No. 45, Nanda Ram Sen Street, Calcutta-5 as offered to us.

1. Santosh Basak.

2. Bimal Basak.

3. Nirmal Kumar Basak

23-6-75".

"I decline to purchase the half share of my elder cousin brother Sri Gopi Ballav Basak in premises No. 45, Nanda Ram Sen Street, Calcutta-5 as offered to me.

Brindaban Chandra Basak.

15-7-75."

3. It is further stated by the respondent that immediately after the sale of his undivided share Gopi Ballav Basak delivered vacant possession of three rooms and attached kitchen and privy in the first floor and one room on the ground floor of the said premises to the respondent which were in the occupation of the said Gopi Ballav Basak. Simultaneously with the sale of the said 1/2 share by Gopi Ballav Basak to the respondent, Gopi Ballav Basak issued necessary letters of attornment to the tenants of the said premises and since the date of purchase the respondent with the knowledge and consent of the other co-sharers was collecting his 1/2 share of total rent from the tenant of the said premises. It is also stated by the respondent that after such sale he had his name mutated as one of the co-owners of the said premises in the records of the Calcutta Corporation and has been paying his half share of the Corporation's rates and taxes in respect of the said premises.

4. On or about 12th July, 1978 one Bimal Chandra Das, Solicitor for the respondent addressed a letter to the appellants including the other co-sharers for amicable partition of the said premises. In spite of such letter it is alleged that no steps were taken by the other co-sharers b including the appellants. It is stated by the respondent that he purchased 1/2 share of the said premises with the consent of the other co-sharers including the appellants and they acquiesced to the purchase made by the respondent.

5. It is further stated by the respondent that in the first week of Feb. 1979 Nadia Behari Basak, Brindaban Basak, Smt. Hemangini Basak, Tarangini Basak and Sabitri Basak -having 5/8th share in the said premises approached the respondent for the sale thereof to them. According to the direction of the respondent on 5th June, 1979 the said co-sharers in the presence of the respondent offered for sale of their 5/8th share to the other co-sharers including the appellants but they declined to purchase the same and also represented to the respondent that they would not object to such sale to the respondent. Thereafter, on the 16th Feb. 1979 the respondent purchased 5/8th share of the said premises from the said co-sharers and immediately thereafter the respondent was put into physical possession of the portion of the said premises occupied by the said transferors of 5/8th share of the said premises namely, five rooms in the back portion of the first floor and one room in the middle portion of the ground floor of the said premises to the respondent and the respondent since the said date has been in actual occupation thereof. On the 27th Feb. 1979 the transferors of 5/8th share issued letters of attornment to the tenants to pay the rent of the said share to the respondent.

6. The respondent has further stated that in the second week of June, 1979 Smt. Kadambini Basak, owner of undivided 1/18th share of the said premises offered for sale of her said share to the respondent. As instructed by the respondent, the said Kadambini Basak towards the end of second week of June 1979 in the presence of the respondent offered for sale of her undivided 1/18th share to the said co-owners including the appellants but they declined to purchase the same on the ground that they were not interested in the purchase of the said share. It is further stated that the other co-sharers including the appellants assured and represented to the respondent that they had no objection to the purchase of the said share by the respondent. On 22nd June, 1979 the said Kadambini Basak sold her undivided 1/18th share in the said premises to the respondent. On 22nd June, 1979 and 24th June, 1979 Kadambini Basak issued letters of attornment to the tenants of the said premises requesting them to attorn the tenancy and pay 1/18th share of the total monthly rent payable by the tenants in respect of their tenancies to the respondent from the said date.

7. It is alleged by the respondent that in all he purchased 5/6th share in the said premises. Such purchase was made with the full knowledge and consent of the other co-sharers including the appellants and the appellants assured and

represented to the respondent that they would never raise any objection to the sale of the said 5/6th share to the respondent.

8. Thereafter on Aug. 12, 1980 the respondent as plaintiff filed a suit, being suit No. 706 of 1980 for partition of the said premises and for other reliefs as will fully appear from the plaint.

9. During the pendency of the suit on or about 2nd Mar., 1981 the appellants as the co-sharers of the said premises having 1/6th share therein made an application u/s 4 of the Partition Act for purchase of the respondent's undivided 5/6th share in the said premises at a price of Rs. 41,670/- or at such other price-which would be fixed by this Hon"ble Court.

10. By the judgment and order dated 18th May, 1981 Deb, J. dismissed the appellants' said application made u/s 4 of the Partition Act. Relying on the decision in the cases of [Commissioner of Wealth Tax, West Bengal Vs. Gauri Shankar Bhar,](#) and [Commissioner of Wealth Tax, W. Bengal Vs. Bishwanath Chatterjee and Others,](#) . His Lordship held that Section 4 has no application in the instant case because the defendants are governed by Dayabhaga School of Hindu Law and after the death of Gopal Chandra Basak the appellants ceased to belong to an undivided family.

11. In the instant appeal the parties have not relied on the reasons given by the learned Judge of the Court of the first instance in dismissing the application. Parties, however, argued on various other points as will appear hereinafter.

12. The cases relied on by Deb, J. were cases under Wealth-tax Act. Those cases are distinguishable. In those cases it was decided that under Dayabhaga School of Hindu Law after the death of the father his heirs become entitled to inherit the properties in defined shares and therefore they should not be assessed to tax as a Hindu undivided family but on the basis of individual capacity. The above principle does not apply to cases of application made u/s 4 of the Partition Act. u/s 4 of the Partition Act dwelling house belonging to an undivided family means family not divided qua dwelling house. The essence of the matter 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 Partn. Act. In our view, the decisions relied upon by Deb, J. have no application in the instant case.

13. The first point that arises for consideration is whether the appellant's application made u/s 4 of the Partition Act is maintainable. It has been submitted on behalf of the respondent that there is no proper averment in terms of the provisions of the said section in the application. It has not been alleged in the petition that the property is a dwelling house belonging to an undivided family, nor has it been alleged that the respondent is a stranger transferee. Further, there is no undertaking in the petition by and on behalf of the appellants to purchase the said

5/6th share of the respondent at a valuation to be made by the Court. It has been further alleged by the respondent that since there was no proper pleading in the instant case application was properly dismissed. Reliance was placed on the case of [Zila Singh and Others Vs. Hazari and Others](#), .

14. We have gone through the appellants petition or the application made u/s 4 of the Partition Act. In our view the petition does contain the relevant averments. The petition should not be read with microscopic scrutiny but in a broader manner. If so read it will appear that there are averments in the petition to satisfy the requirements of Section 4 of the Partition Act. The decision relied on by the respondent, in our view, has no application in the matter of construction of the petition or the application made u/s 4 of the Partition-Act.

15. Next question that arises for consideration is the ambit, scope and applicability of Section 4(1) of the Partition Act and whether the said premises is a dwelling house belonging to an undivided family as envisaged by Section 4(1) of the Partition Act. On this point it was submitted on behalf of the respondent that before Section 4 of the Partition Act, 1893 is said to be applicable in the facts and circumstances of a case the Court will have to come to a finding that the property which is the subject matter of the application is a dwelling house belonging to an undivided family. According to the respondent, the basic pre-requisite for an application u/s 4 of the Partition Act for exercise of the right of pre-emption is that the property which is the subject matter of the application must be a dwelling house of an undivided family. If on examination of the facts of a particular case it is found that by reason of the co-sharers' dealings with property it has lost its character as dwelling house then in such an event naturally the provision of Section 4 of the Partition Act, 1893 will not apply. It is further submitted that by reason of sale of 5/6th share of the property and delivery of possession of number of the rooms to the purchaser the suit property has lost its character as a dwelling house belonging to an undivided family which is the basic condition for applicability of Section 4 of the Partition Act. It is also submitted that what is important u/s 4 of the Act is that the house has either been put actually in use, though not constant occupation by the owners of the residential house or that condition should be such that it is still possible for them to return to the occupation of the house at some future date. It is also submitted that when some co-sharers have alienated a substantial part of the suit property in favour of the strangers by way of permanent settlement or sale and a portion of the said property has been in possession of the stranger-purchaser for a long time to the knowledge and/or with the consent or approval of the co-sharers then it will no longer be open for the co-sharers residing in a fractional portion of the suit property to contend that it retains the character of the dwelling house belonging to the undivided family. Reliance was placed on the cases of [Dulal Chandra Chatterjee Vs. Gostabehari Mitra](#), , and [Kalipada Ghosh Vs. Tulsidas Dutt and Others](#), .

16. It has been further submitted that Section 44 of the Transfer of Property Act gives right to the co-owner to resist possession of family dwelling house belonging to the undivided family by a stranger purchaser. If the co-owner objects then naturally the possession of the stranger-purchaser will be wrongful. Further, the right to object to joint possession by a stranger of a family dwelling house belonging to undivided family has been granted statutorily to a co-sharer. This right he may not insist upon or he may waive. It is submitted that in the instant case the respondent for a long time without any objection from the appellants has been in possession of a part of the property in question. Hence the possession of the respondent cannot be said to be illegal or wrongful. Reliance was placed on the cases of *Surendra Nath Achar v. Ram Chandra Hazra*, (1971) 75 C WN 195; [Pannalal Mukherjee Vs. Union of India \(UOI\)](#), ; [Bhuban Mohan Guha and Another Vs. Brojendra Chandra Ghose and Others](#), and [Haradhone Haldar Vs. Usha Charan Karmakar and Others](#), .

17. It is submitted that the above decisions indicate that a stranger-purchaser becomes a trespasser of a family dwelling house if a co-owner objects to his entry therein; but if he is accepted without any complaint by the co-owner he cannot be said to be a trespasser in a family dwelling house of undivided family.

18. It has been further submitted that in an application u/s 4 of the Partition Act, the Court should take into account the nature and the extent of the alienation of the property in question. If it is found that co-sharers themselves have alienated a substantial portion of the dwelling house permanently in favour of outsiders and this state of affairs had been going on for a long time the Court would not be justified in coming to the conclusion that owners or co-sharers have not given up their intention of treating the property as dwelling house. It is further submitted that the purpose of the provision of the law is to maintain integrity of the family dwelling house, but if it is found that the co-sharers themselves are not interested to maintain the integrity of the dwelling house and such intention is evidenced by their acts of disposing of different parts of the property at different points of time by sale or permanent lease then in such event the Court should not permit a co-sharer to exercise his right u/s 4 of the Partition Act for preservation of the alleged sanctity of the house which has lost its character as a family dwelling house. Its integrity as such having been broken up by the acts of the co-owners, they are not entitled to any protection. Reference was made to the case of [Santosh Kr. Mitra Vs. Kalipada Das and Others](#), .

19. On the question whether the house in question ceased to be a dwelling house belonging to an undivided family after purchase of undivided shares therein by the respondent and whether it still remains the dwelling house belonging to an undivided family, it was submitted on behalf of the appellants that the respondent never came into physical possession of the property in question or any portion thereof; the respondent never took up his residence in the said premises as would

appear from the cause title of the plaint in the suit. It was submitted that mere collection of rent from some of the tenants of the dwelling house from whom co-sharers, (vendors) were making collection as claimed by the respondent is of no material consequence. Whether or not the house is a dwelling house has to be considered by reference not to the date of suit or the application u/s 4 of the Partition Act but by reference to the date of the sale to the stranger-purchaser. Reliance was placed to the case of [Manick Lal Singh Vs. Gouri Shankar Shah](#), .

20. It has been further submitted on behalf of the appellants that the respondent wants to equate irrevocable sale to permanent settlement. It is submitted that the said two concepts are totally different and distinguishable from each other and the same could never be equated. A permanent settlement has a definite correlation with the corpus of the property and/or a defined portion thereof whereas a sale may be of undivided share in the property which may only crystallise in defined portions on partition. Further, one is the right of co-ownership whereas the other is the right of tenancy. The position of a tenant coming into effective possession of a property under a permanent lease implying abandonment of animus on the part of the owners to use the property as their dwelling house cannot be considered on the same footing as that of the stranger trespasser of an undivided share in the dwelling house and more so when some of the continuing co-sharers continue to use the same as family dwelling house as before. In respect of the question now under consideration on behalf of the appellants various decisions were cited. They are : [Abu Isa Thakur and Another Vs. Dinabandhu Banik and Another](#), ; [Boto Krishna Ghose Vs. Akhoy Kumar Ghose and Others](#), ; [Dulal Chandra Chatterjee Vs. Gosthabehari Mitra](#), ; [Satyendu Kundu Vs. Amar Nath Ghosh and Others](#), ; [Manick Lal Singh Vs. Gouri Shankar Shah](#), ; [Sunil Kumar Mukhopadhyaya and Another Vs. Provash Chandra Majumdar and Others](#), ; *Surendranath Achar v. Ram Chandra Hazra*, (1971) 75 C WN 195; [Santosh Kr. Mitra Vs. Kalipada Das and Others](#), ; [Bholanath Karmakar Vs. Sailendra Nath Pramanik](#), , [Bharat Singh Vs. Rishi Kumar and Others](#), ; [Birendra Nath Banerjee Vs. Sm. Snehalata Devi and Another](#), ; [Chaudhri Mohammad Sulaiman Khan Vs. Mt. Amir Jan](#), and unreported decision dated 16th Sept. 1982 in Suit No. 185/79 (*Gobind Ram Goenka v. Smt. Mahamaya Dey*).

21. We shall now deal with the cases cited at the Bar which are relevant to the question under consideration.

22. In the case of [Abu Isa Thakur and Another Vs. Dinabandhu Banik and Another](#), it was held that Section 4 of the Partition Act should be liberally construed. The object of section is to prevent the intrusion of the strangers into a dwelling house of an undivided family.

23. In the case of [Boto Krishna Ghose Vs. Akhoy Kumar Ghose and Others](#), it was observed that "undivided family" means simply a family not divided qua, the dwelling house. In other words, a family which owns a dwelling house and has not

divided it. It does not mean a Hindu joint family or even a joint family. The members need not be joint in mess. The essence of the matter is that the house itself should be undivided among 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.

24. In the above case it was further observed that so long as the dwelling house has not been completely alienated to stranger-, 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 a right to hold exclusive possession to the exclusion of the strangers alienees. So long as that situation lasts, the dwelling house continues to be a dwelling house belonging to an undivided family.

25. In the case of [Dulal Chandra Chatterjee Vs. Gosthabehari Mitra](#), it was observed that as is well known, that the object of both Section 4(1) of Partition Act and Section 44 of T.P. Act is to keep off the strangers who may purchase the undivided share of the co-owner of an immovable property and so far as the dwelling houses are concerned to make it possible for the co-sharer, who has not sold his share, to buy off the stranger-purchaser. The whole object is, therefore, to provide for peaceable enjoyment of the property and to secure privacy. The creation of tenancy does not terminate the possibility of the owners of the house retaining its occupation. In this respect the respondent has relied upon the following observation of Chakravartti, C.J.

"It may be that if a permanent and irrevocable lease is granted to a third party, the question may arise as to whether the character of the house as a dwelling house in so far as the owners are concerned still survives. No such question, in my view, can possibly arise where what has been created is nothing more than a tenancy of an ordinary kind." .

26. In the case of [Satyendu Kundu Vs. Amar Nath Ghosh and Others](#), it was observed that the provisions contained in Section 4(1) of the Partition Act have been introduced in order to maintain customary privacy and to prevent intrusion of stranger into the dwelling house belonging to an undivided family. As long as there is a dwelling house which has not been divided qua family it might be said to be a dwelling house belonging to an undivided-family for the purpose of Section 4(1). It was also observed that if some of the members of the family have transferred their interest to strangers that will not by itself take the case out of operation of Section 4. Until the dwelling house is completely alienated to strangers, it is still undivided dwelling house within the meaning of Section 4.

27. In the case of [Manick Lal Singh Vs. Gouri Shankar Shah](#), it was observed as follows (at p. 249) :

"The next question is whether brothers were the members of a family. In view of the large number of decisions of this Court we must hold that the property belonged to an undivided family. It does not mean that the property at the date of the suit belonged to undivided family. It means that the property belonged to an undivided family before a member transferred his share. We must find that it belonged to the members of a family who were undivided on that date. Mere separation in mess will not make the family divided if they had joint property and there is no doubt that the two brothers were the members of a family the property of which was not partitioned."

28. In the case of [Sunil Kumar Mukhopadhaya and Another Vs. Provash Chandra Majumdar and Others](#), it was observed that Section 4 of the Partition Act should be liberally construed in favour of the member of the family and strictly against the stranger.

29. In the case of Sri Surendranath Achar v. Ram Chandra Hazra, (1971) 75 C WN 195 it was observed that in a suit for partition instituted by a stranger-purchaser a right is given by Section 4 of the Partition Act to member co-sharer which is directly enforceable even though the plaintiff is already in possession of a portion of the joint property. The factum of his illegal possession cannot be used either as a shield or as a sword to defeat the right given by Section 4 of the Act. It was further observed that the possession of a portion of the dwelling house by a stranger purchaser without partition is illegal in view of the embargo put by the second limb of Section 44 of the T. P. Act.

30. In the case of [Santosh Kr. Mitra Vs. Kalipada Das and Others](#), it was observed that a tenant purchasing the family dwelling house nevertheless remains a stranger to the family and hence the stranger purchaser. The house does not cease to be a family dwelling house because a part of it has been let out to tenants. The position as to the character of dwelling house has been considered by reference to the date of purchase by the stranger purchaser.

31. In the case of [Bholanath Karmakar Vs. Sailendra Nath Pramanik](#), it was observed that so long as the family remains undivided qua dwelling house, every co-sharer has a right to pre-empt the shares sold to stranger by any other co-sharer.

32. In the case of [Bharat Singh Vs. Rishi Kumar and Others](#), it was observed that the expression "undivided family" as used in Section 4 of the Act means not divided qua dwelling house. The essence of the matter is that the house itself should be undivided amongst the members of the family who are its owners. The emphasis being on the undivided character of the house the expression merely means a family the members of which have not effected the partition of the dwelling house belonging to it. It was further observed from the language of Section 4 it is clear that the right to members of the family, who are share-holders accrues under the said section as soon as the suit for partition is filed by a stranger to the family and

subsists during the pendency of the suit until it is terminated by an effective final decree. Those rights can be exercised at any time before final decree for partition is passed.

33. In the case of [Birendra Nath Banerjee Vs. Sm. Snehalata Devi and Another](#), it was observed that a right to apply u/s 4 of the Partition Act subsists throughout the pendency of the suit for partition and that such application for pre-emption can be made at any stage of the suit so long as the suit has not been concluded by an effective final decree for partition which would also include appellate decree.

34. In the unreported decision dated 16th Sept., 1982 in Appeal No. 203 of 1979 (Gobinda Ram Goenka v. Smt. Mahamaya Dey and Ors..) it was held that the possession of the stranger purchaser was illegal in view of Section 44 of T. P. Act.

35. In the case of [Kalipada Ghosh Vs. Tulsidas Dutt and Others](#), it was observed that a permanent settlement of the plot in favour of a third party would be a material fact to be taken into consideration in coming to the conclusion as to whether it was still then the intention of the owners to utilise the plot, so settled, for the future purposes of their dwelling house. It would depend upon the terms of the settlement as to whether it would be at all possible to get back the land in the event of a partition. Further complications would arise if such a permanent settlement was granted by only one of the co-sharers but was acquiesced in by the others. In such an event it would have, to be seen whether the acquiescence was of such a nature as to operate as an estoppel against the other co-sharers, who were no parties to the permanent settlement.

36. In the case of [Bhuban Mohan Guha and Another Vs. Brojendra Chandra Ghose and Others](#), it was observed that in order to invoke the provisions of Section 4 it is necessary to show first that the property consisted of a dwelling house belonging to an undivided family, and secondly that a share of that property was transferred to a person who was not a member of the undivided family, unless it can be shown that the member exercising his right u/s 4 had lost it after the date of purchase. The mere fact that the purchaser has obtained possession is not sufficient to defeat the claim of a member of a family u/s 4 unless it can be shown that the purchaser's possession was such that he could be regarded as having become a member of the family. In order to defeat a claim u/s 4 the purchaser however must be shown to be a member of the undivided family at the date of the sale. The fact that the purchaser was a member of the family to which the property originally belonged is quite irrelevant.

37. In the case of [Haradhone Haldar Vs. Usha Charan Karmakar and Others](#), it was observed that the obtaining of joint possession by the stranger purchaser will be unavailing against a claim u/s 4, Partition Act. Joint possession is no bar to a claim for partition. On the other hand, it is really the foundation for such a claim and the aim of partition is to break up this joint possession and convert it into separate

possession. The utmost that can be claimed is that, if this joint possession of the stranger purchaser has assumed such a character that he may be regarded as a member of the family, referred to in Section 4, Partition Act, he will, place himself outside the mischief of that section and will not be bound to submit to pre-emption thereunder.

38. In the case of [Pannalal Mukherjee Vs. Union of India \(UOI\)](#), it was observed that a party may expressly agree to forego its right under a contract or under the provisions of a statute. It is also open to a party by his conduct to release his right by implication.

39. In the light of the above decisions and in the facts and circumstances of this case it has to be considered whether after the respondent's purchase of a portion of the property in question there has been any change in nature and character of the property and the appellants are entitled to exercise their right of pre-emption u/s 4 of the Partition Act. It is an admitted fact that before the respondent's purchase of a portion of the said premises it was a dwelling house belonging to an undivided family. Until a dwelling house is completely alienated to strangers it remains to be the undivided dwelling house within the meaning of Section 4 of Partition Act. The respondent's contention is that upon his purchase of 5/6 share in the property and his possession of a portion thereof and collection of rent in respect of the portion of the property purchased by him from the tenants without any objection of the other co-owners the nature and condition of the property has changed i.e., it ceased to be a dwelling house belonging to an undivided family. The above facts may justify the respondent's possession as not being wrongful u/s 44 of the T. P. Act but in our view they have not changed the nature and character of the property. The position as to the character of dwelling house is to be considered by reference to the date of purchase by the stranger purchaser. At the time of purchase by the stranger it is to be seen whether the property is the dwelling house of an undivided family. In the instant case there is no dispute that at the time of purchase by the respondent, a stranger purchaser, the property was the dwelling house belonging to an undivided family. Only because of the respondent's possession of a portion of the property without the objection of the other co-sharers in the facts and circumstances of the case the property does not cease to be the dwelling house belonging to an undivided family. Merely because of the respondent's possession of a portion by reason of his purchase of a portion of the dwelling house belonging to an undivided family the nature and character of the property is not changed. As long as there is a dwelling house which has not been divided qua family it might be said to be a dwelling house belonging to an undivided family for the purpose of Section 4(1) of the Partition Act. If some of the members of the family have transferred their interest to strangers that will not by itself take the case out of operation of Section 4 and until the dwelling house is completely alienated to strangers, it will still be an undivided dwelling house within the meaning of Section 4. Further, it does not mean that the property at the date of the suit would belong to an undivided family. It

means that the property belonged to an undivided family before a member transferred his share. The mere fact that the purchaser has obtained possession is not sufficient to defeat the claim of a member of a family unless it can be shown that the purchaser's possession was such that he could be regarded as having become a member of the family. In order to defeat a claim u/s 4 the purchaser however must have to be a member of the undivided family at the date of sale. In the instant case the respondent was not a member of the undivided family at the date of sale. Further, the mere symbolic possession of the respondent of a portion of the property and his collection of a share of rent do not in our view make him a member of the family nor do they demolish the right of the appellants as co-owners u/s 4 of the Act.

40. In support of the contention that after the respondent's purchase of a portion of the property there is change in the nature and character of the property reliance was placed on behalf of the respondent mainly on two decisions of this Court viz., [Dulal Chandra Chatterjee Vs. Gosthabehari Mitra](#), and [Kalipada Ghosh Vs. Tulsidas Dutt and Others](#), . These two cases are distinguishable on fact. In those cases a permanent irrevocable lease was granted to a third party in respect of the property in question. In view of such a case it was observed by court that in such a case a question may arise as to whether the character of the house as a dwelling house in so far as the owners are concerned still survives. It was further observed that a permanent settlement of the plot in favour of a third party would be a material fact to be taken into consideration in coming to the conclusion as to whether it was still then the intention of the owners to utilise the plot, so settled, for the future purposes of their dwelling house. It would depend upon the terms of the settlement as to whether it would be at all possible to get back the land in the event of partition. In the instant case there is no question of any permanent settlement of any part of the property in question. The respondent wants to equate the sale with the permanent settlement which in our view cannot be done. In case of permanent settlement the part of the property so settled cannot be made subject-matter of partition whereas in case of sale of a portion of the property to a stranger purchaser the share so purchased can be made a subject-matter of partition. A permanent settlement has a definite correlation with the corpus of a property and/or a defined portion thereof whereas a sale may be of an undivided share in the property which may only crystallise in defined portion on partition. Further, one is a right of ownership whereas the other is the right of tenancy. The position of a tenant coming into effective possession of a property under a permanent settlement implying abandonment of animus on the part of the owners to use the property as their dwelling house cannot be considered on the same footing as that of a stranger purchaser of an undivided share in the dwelling house and more so when some of the continuing co-sharers continue to use the same as their dwelling house as before. If the case of permanent settlement of a portion of dwelling house is equated to the sale of a portion thereof then the portion so sold will have to be left

out of partition and in that event Section 4 of the Partition Act will become ineffective. Further, if the sale of portion of the property is equated to the permanent settlement then in no case a sale of a portion of the property would give rise to a right of pre-emption u/s 4 so far as the co-owners of the other portion when a suit for partition is filed by the stranger purchaser. We are therefore of the opinion that in the facts and circumstances of this case the purchase of a portion of the dwelling house belonging to an undivided family has not changed the nature and character of the property.

41. As in our view the nature and character of the property have not changed. Section 4 of the Partition Act is applicable to this case. It is settled law that Section 4 of the Act should be liberally construed in favour of the member of the family and strictly against the stranger. The right of the members of the family, who are shareholders accrues u/s 4 as soon as the suit for partition is filed by a stranger to the family and subsists during the pendency of the suit until it is terminated by an effective final decree. The mere fact that the purchaser has obtained possession is not sufficient to defeat the claim of a member of a family u/s 4 unless it can be shown that the purchaser's possession was such that he would be regarded as having become a member of the family. Right given to a co-sharer u/s 4 is directly enforceable against a stranger purchaser even though he is already in possession of a portion of the joint property. Further, from the language of Section 4 it is clear that the right to the members of the family, who are shareholders, accrues u/s 4 as soon as the suit for partition is filed by a stranger to the family and subsists during the pendency of the suit until it is terminated by an effective final decree. The mere fact that the purchaser has obtained possession is not sufficient to defeat the claim of a member of a family u/s 4 unless it can be shown that the purchaser's possession was such that he could be regarded as having become a member of the family. In order to defeat a claim u/s 4 the purchaser however must be shown to be a member of the undivided family at the date of sale.

42. Next question for consideration is whether in view of the facts and circumstances of the case and the conduct of the appellants they are estopped from exercising their right u/s 4 of the Partition Act for purchasing the respondent's share in the property.

43. On the basis of the facts as stated in the affidavit and which have been set out earlier in detail on behalf of the respondent it is contended that in view of the said facts the appellants are estopped from exercising their right of purchasing the respondent's share in the said premises u/s 4(1) of the Partition Act. The material facts upon which the respondent has relied upon are that Gopi Ballav Basak offered to sell his undivided 1/2 share in June, 1965 to Nadia Behari, Brindaban, Santosh and Nirmal and other defendants but all the co-sharers declined to purchase the said share and represented that they had no objection if the said 1/2 share was sold to the respondent. Reliance was placed on three declarations which have been set out

earlier. It has been further stated that similarly in case of sale of 5/18th share co-sharers offered the said share for sale to the appellants and other co-sharers but they declined to purchase the same. It is submitted that on the basis of the said facts and also the facts stated in the affidavit-in-opposition which have been set out in detail earlier the respondent who is now the owner of undivided 5/6th share of the said premises contends that the appellants acquiesced to the purchase of the said undivided share of the property by the respondent. In view of the said representation made by the appellants they are estopped from exercising their right u/s 4 of the Act. It is, further, submitted that in view of the doctrine of promissory estoppel which arose in this case due to the facts stated hereinbefore the appellants cannot exercise their right u/s 4(1) of the Act. It is further submitted that the conduct of the appellants prior to the institution of the suit is a very material fact for determination of the question of exercising the appellants' right u/s 4 of the Act. It has been also submitted on behalf of the respondent that principle of estoppel can apply even in respect of rights which may arise in future. Further submission made on behalf of the respondent is that in the facts of this case by express promise and/or assurance made by the appellants as stated in the affidavit of the respondent he was persuaded to purchase 5/6th undivided share in the said property. The appellants should not be allowed now to go back on their promise to the detriment of the respondent. In respect of the above submissions reliance was placed on the cases of [Gulam Abbas Vs. Haji Kayyum Ali and Others,](#) and [Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others,](#) .

44. On behalf of the appellants it has been submitted that in the instant case the plea of promissory estoppel would be of no avail to the respondent and the same has no manner of application in the instant case. It has been submitted that there has been no promise of any kind by or on behalf of the appellants to the respondent and no privity of contract between them. The promissory estoppel may in given condition be available to the party to a contract and not to a stranger thereto. It has been further submitted that the document dated 23rd June, 1975 (page 24 of the paper book) bears the signature of only three male appellants Nos. 2, 3 and 4. The said documents have not been signed by or on behalf of the lady appellants, being appellants Nos. 1, 5, 6 and 7. The document relates to undivided share only of Gopi Ballav Basak, a co-sharer in the said dwelling house. It is further submitted that the said document, at best, was a communication of disinclination on the part of the signatories thereof to purchase 1/2 share in the dwelling house from another co-sharer, Gopi Ballav Basak and the same does not purport to and cannot be said to have constituted any representation to the stranger purchaser not to purchase his undivided share in the property in exercise of the statutory right u/s 4 of the Partition Act. It has been further submitted that in respect of other undivided shares in the property purchased by the stranger purchaser he has not produced any document of the nature of the documents mentioned above. It has been further submitted that the alleged representation pleaded in the affidavit-in-opposition is

not supported by any consideration.

45. It is also submitted that estoppel is necessarily based on a representation of fact and there has been no representation whatsoever by and on behalf of the appellants that they would never purchase any undivided share in the dwelling house even when a statutory right of pre-emption may accrue to them. Further, it is well settled that where one person makes a representation to the other about the fact he would not be shut out by the rule of estoppel if other persons knew the true state of facts and consequently have not been misled by the representation. In the instant case from the respondent's own averments and conduct it is apparent that he was fully aware and conscious of the right of pre-emption that the continuing co-sharer may acquire when a partition suit would be filed. The respondent has not been misled regarding the said fact.

46. It has been further submitted that the co-sharers enjoying the dwelling house continue to do so as before until the partition suit is instituted and the partition is effected affecting their manner of enjoyment of the dwelling house. That is the relevant time when the option is given to the continuing co-sharer whether to pre-empt the stranger purchaser or not. This right does not accrue to them at any point of time prior to the institution of the partition suit. It is further submitted that it is well settled that there cannot be any estoppel against the statute having the effect of arresting operation thereof in favour of the party.

47. In the case of [Gulam Abbas Vs. Haji Kayyum Ali and Others](#), the facts were that the defendant-appellant and the plaintiff respondent were both sons of one Kabir Ali Bohra who died on 5-4-52 leaving behind five sons and a daughter and his widow as his heirs. It appears that Kabir Ali Bohra had incurred debt so heavily that all his properties could have been swallowed up to liquidate the same. Three of his sons, namely, the defendant No. 1, defendant No. 2 and defendant No. 3. who had prospered, came to his rescue so that the property might be saved. But, apparently, they paid up the debts only in order to get the properties for themselves to the exclusion of the other two sons, namely, the plaintiff-respondent and the defendant No. 4, who executed, on 10-10-1942, deeds acknowledging receipt of some cash and moveable properties as consideration for not claiming any right in future in the properties mentioned in the deeds in which they gave up their possible rights in future. The question arose whether such declaration was binding on the declarants after the death of Kabir Ali Bohra when the succession opened. The question before the Court was whether the plaintiff and the defendant-respondent were estopped by declarations and conduct and silence from claiming their shares in the properties covered by these deeds. The first appellate Court, the final Court on questions of fact, recorded its findings of fact after examining the whole set of facts before it to conclude that the plaintiff and the defendant No. 4 were estopped from claiming their shares in the inheritance. The High Court held that the Court below was correct in finding that consideration had passed to the plaintiff and the defendant No. 4 for

relinquishment of their future possible rights of inheritance. It proceeded on the assumption that, if the law had not prohibited the transfer of the right of inheritance by a Muslim heir, an estoppel would have operated against the plaintiff and the defendant No. 4 on the findings given. It held that the Muslim personal law on the subject has the same effect as, Section 6(a) of the T. P. Act. The appeal preferred against the said order was dismissed by the Supreme Court and it held that the plaintiff and the defendant No. 4 were estopped by their conduct, on an application of Section 115 of the Evidence Act from claiming any right of inheritance which accrued to them on their father's death covered by relinquishment for consideration irrespective of the question whether these would operate as really valid or effective surrender of their spes successionis.

48. In the above case referring to a passage in Sir Roland Wilson's Anglo Mohammeden Law at page 260, para 208 it was observed as follows :

"This is a correct statement, so far as it goes, of the law, because a bare renunciation of an expectation to inherit cannot bind the expectant heir's conduct in future. But, if the expectant heir goes further and receives consideration and so conducts himself as to mislead an owner into not making dispositions of his property inter vivos the expectant heir could be debarred from setting up his right when it does unquestionably vest in him. In other words, the principle of estoppel remains untouched by this statement."

49. It was further observed as follows :

"The binding force in future of such a renunciation would even according to strict Muslim Jurisprudence, depend upon the attendant circumstances and the whole course of conduct of which it forms a part. In other words, the principle of an equitable estoppel, far from being opposed to any principle of Muslim law will be found, on investigation, to be completely in consonance with it."

50. In the case of [Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others](#), it was observed that the true principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.

51. In the facts and circumstances of the instant case the respondent is not entitled to the benefit of promissory estoppel According to the respondent, before his purchase of the share of the premises in question the other co-sharers including the

appellants declined to purchase the said share. Further, some of co-sharers including the male appellants gave writings to the respondent stating that they declined to purchase the half share of Gopi Ballav Basak. It is to be noted that the lady appellants did not give any such writing to the respondent. Further, in respect of purchase of 5/8th and 1/18th share of the said property no such written declaration was given to the respondent. The other co-sharers including the appellants only declined to purchase the shares of the said premises before the respondent purchased the said shares. It is submitted by the respondent that before his purchase of the share in the suit property other co-sharers including the appellants represented to him that they would not oppose the purchase made by the respondent. These allegations of the respondent have been denied by the appellants. In the facts and circumstances of this case we are unable to accept the above contention of the respondent. In our view, the appellants, particularly the female appellants did not make any representation that they would not exercise their right of pre-emption under the statute when such right would accrue to them. The right of pre-emption u/s 4 of the Partition Act arises in favour of the co-owners of a family dwelling house belonging to an undivided family when stranger purchaser of a share of such property files a partition suit. In the instant case it is alleged that the appellants declined to purchase the share of the property before the same was purchased by the respondent but they did not make any representation not to exercise their right of pre-emption u/s 4 when such right would accrue. According to us, in the facts and circumstances of this case no such promise was made by the appellants particularly, the female appellants. The appellants merely declined to purchase the shares offered to them before purchase of the suit property-Expression of such disinclination cannot be said to constitute their giving up of the right of pre-emption u/s 4 of the Partition Act which arose upon filing of the suit by the respondent in 1980. The facts and circumstances of this case do not show that the appellants, particularly, the female appellants made any promise not to exercise their right of pre-emption arising u/s 4(1) of the Partition Act upon filing of the suit by respondent a stranger purchaser on the basis of which the respondent purchased the share in the said property.

52. The case of [Gulam Abbas Vs. Haji Kayyum Ali and Others](#), is distinguishable on facts. There in view of the written declaration made upon payment of compensation the defendant-appellant and the plaintiff-respondent promised that they would not claim any, interest in their father's property. According to Supreme Court in view of such promise estoppel u/s 115 of the Evidence Act arose against the said parties. This case also confirms the legal position that a promissory estoppel may be available to the immediate parties to a contract, supported by consideration.

53. On behalf of the respondent it was submitted that by their conduct in making representation set out hereinbefore, as also by their silence for more than five years after undivided 1/2 share was sold to the respondent the appellants did not protest or object but on the contrary stood by and allowed the respondent to take

possession of different rooms in the said property and otherwise to assert and enjoy all his right as owner thereof. In the circumstances it will be deemed that the appellants have waived their right u/s 4 of the Partition Act.

54. It was further submitted on behalf of the appellants that the right of the appellants to apply u/s 4 arose only upon institution of the suit by the respondent in Aug. 1980. In the circumstances the conduct of the appellants prior to 1980 is immaterial. Further, according to the appellants waiver being intentional relinquishment of a known right, the right of pre-emption of the appellants did not accrue prior to Aug. 1980 and there could be no waiver of such right. It has been submitted on behalf of the respondent that the right of preemption is a pre-existing right, which becomes enforceable only when the suit is filed. It is submitted that the right of pre-emption exists antecedently to the sale, and therefore antecedently to the filing of the suit, the foundation of the right being the avoidance of the inconvenience and disturbances which would arise from the introduction of a stranger into the land, though such right of pre-emption becomes enforceable only upon the institution of the suit.

55. In support of the above submissions reliance was placed on [Hazari and Others Vs. Neki and Others](#), and [Zila Singh and Others Vs. Hazari and Others](#). It was submitted that in the case of Hazari v. Neki (supra) the right of preemption was vested u/s 15(1)(a) of the Punjab Pre-emption Act, 1913 only upon sale by the sole owner. The question was whether right of pre-emption existed antecedently to the sale. The Supreme Court held that though the right of pre-emption, by reason of the said Punjab Act, became enforceable only when there was sale, such right existed antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from introduction of a stranger into the land.

56. On the basis of the above decisions it was submitted on behalf of the respondent that there could be waiver of a right of preemption by co-owners even before institution of the suit for partition, such right of preemption being pre-existing right, existing antecedently to the sale, and as such before the institution of the suit for partition. According to the respondent in the facts of this case the appellants by their act and conduct waived such right, and as such they would no longer be entitled to exercise the right of preemption u/s 4 of the Partition Act.

57. On behalf of the appellants it has been submitted that waiver being "the intentional relinquishment of a known right" and the right u/s 4 of the Partition Act having had arisen only subsequently on the institution of the suit for partition by the stranger purchaser, the question of waiver would be of no avail to the respondent. It has been further submitted that a right which may or may not accrue to a person in future depending upon the occurrence or absence of given conditions cannot be waived. In other words a future right cannot be waived. In the instant case the

appellants had no right of pre-emption against a co-sharer. Their right of pre-emption arose u/s 4 of the Partition Act only after a suit for partition having been instituted by a stranger purchaser. A stranger purchaser cannot be compelled by a continuing co-sharer to sell his undivided share in the dwelling house at any stage prior to the institution of the suit. A right which cannot be enforced cannot be said to be a known right, and hence the same cannot be waived. There is no knowing whether a suit for partition would at all be instituted during the lifetime of a co-sharer. It was also submitted that Section 4 of the Partition Act deals with transfer of title and not of possession. Nature of possession of the property by the stranger purchaser is, therefore, not of much consequence in dealing with an application u/s 4 of the Partition Act. Possession would merely follow the title.

58. Further submission on behalf of the appellants is that possession of a dwelling house or any part of common enjoyment thereof by a stranger purchaser prior to partition has been held to be an illegal possession of trespasser. Further, an illegality as opposed to mere irregularity cannot be rendered legal or valid by any amount of waiver, acquiescence or estoppel.

59. The right of pre-emption which arose in the two cases cited on behalf of the respondent, i.e. [Hazari and Others Vs. Neki and Others](#), and [Zila Singh and Others Vs. Hazari and Others](#), was u/s 15(1) of the Punjab Act (1913). The case of Zila Singh v. Hazari is an appeal against the decision of the case of Hazari v. Neki. In the case of Hazari v. Neki Supreme Court made the following observation which was quoted in the decision of Zila Singh v. Hazari.

"In support of these appeals, learned counsel put forward the argument that the right of pre-emption claimed by Neki deceased plaintiff was a personal right which died with him upon his death and the legal representatives of Neki were not entitled to be granted a decree for pre-emption. The argument was that the statutory right of pre-emption under the Punjab Act was not a heritable right and no decree for pre-emption should have been passed by the lower Court in favour of the legal representatives as representing the estate of Neki. We are unable to accept the argument put forward by the appellants. It is not correct to say that the right of pre-emption is a personal right on the part of the pre-emptor to get the re-transfer of the property from the vendee who has already become the owner of the same. It is true that the right of pre-emption becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconvenience and disturbances which would arise from the introduction of a stranger into the land. The correct legal position is that the statutory law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's right of sale and compels him to sell the property to the person entitled to preemption under the statute. In other words, the statutory right of pre-emption though not amounting to an interest in the land is a right which attaches to the land and which can be enforced against a

purchaser by the person entitled to pre-empt".

60. The two decisions relied upon by the respondent mentioned above are distinguishable. The observation made by the Court quoted above was in respect of right of pre-emption conferred by Section 15(1)(a) of the Punjab Act. Section 15(1)(a) reads as follows :

"The right of pre-emption in respect of agricultural land and village immovable property shall vest -

(a) where the sale is by a sole owner : FIRST, in the son or daughter or son's son or daughter's son of the vendor : SECONDLY, in the brother or brother's son of the vendor :

THIRDLY, in the father's brother or father's brother's son of the vendor : FOURTHLY, in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof.

61. There is a difference in the language of Section 15(1)(a) of the Punjab Act and Section 4(1) of the Partition Act. Section 15(1)(a) provides that "The right of pre-emption in respect of agricultural land and village immovable property shall vest". Section 4(1) of the Partition Act provides that "where a share of a dwelling house..... the Court shall, if any member of the family being a share-holder 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 directions in that behalf. The difference in the language used in the two statutes should be noted. The language of the Punjab Act that the right which was attached to the land would vest upon a person under certain circumstances. But under the Partition Act the right accrues to a shareholder when the conditions laid down in Section 4(1) are fulfilled. Hence the right of pre-emption accrues to a shareholder after a partition suit is filed by the stranger purchaser. In this connection see [Bharat Singh Vs. Rishi Kumar and Others](#), .

62. Waiver means an intentional relinquishment of a known right. If the right of pre-emption under Partition Act arises only after a suit for partition is filed by the stranger purchaser it cannot be said to have been waived after the sale of a share to a purchaser who is a stranger to the undivided family. Further, mere facts of disinclination to purchase the share of a co-sharer or non-objection to the possession of a part of the property, which are being earlier to the filing of the partition suit by the stranger purchaser, in the facts and circumstances of the instant case, do not in our view amount to a waiver of the right of pre-emption by the appellants. Non-objection to the holding of possession of the stranger purchaser may have a bearing on question of the appellants' right u/s 44 of the T. P. Act, but we are not concerned with that question in this appeal. In the above view of the matter we are unable to accept the respondent's contention on the question under consideration.

63. For the reasons aforesaid the appeal is allowed. The matter is sent back to the trial Court which will dispose of the matter in the light of this judgment and in accordance with Section 4 of the Partition Act. In the facts and circumstances of this case there will be no order as to cost.

Majumdar, J.

64. I agree.