

**(1984) 02 CAL CK 0017**

**Calcutta High Court**

**Case No:** S.A. No. 1470 of 1972

Pashupati Dholey and Others

APPELLANT

Vs

Subodh Chandraghosh and  
Others

RESPONDENT

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**Date of Decision:** Feb. 24, 1984

**Acts Referred:**

- Partition Act, 1893 - Section 4

**Citation:** 88 CWN 529

**Hon'ble Judges:** Sukumar Chakravarti, J

**Bench:** Single Bench

**Advocate:** Bidyut Kumar Banerjee, for the Appellant; M. Chowdhury and S.K. Chatterjee, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Sukumar Chakravarti, J.

This second appeal by the plaintiffs is against the judgment and decree passed by the Learned Additional District Judge, 3rd Court, Howrah in T.A. No. 340 of 1970 affirming the judgment and decree passed by the Learned Munsif, 2nd court, Howrah in T.S. No. 255 of 1968. Plaintiffs filed the suit for partition of the disputed property in respect of their alleged 1/3rd share in the same along with prayer for buying up the 1/3rd share of the defendant no. 1 u/s. 4 of the Partition Act. The case of the plaintiffs was that the suit property in plot no. 627 under khatian No. 323 of mouza Majukshetra belonged to Nagendra Nath Dholey and Pramatha Nath Dholey in 2/3rd and 1/3rd share respectively. The preformed defendant No. 4, the uncle of the plaintiffs purchased the 23rd share of Nagendra from his widow Sitalabala while he was in joint family with the father of the plaintiffs. The proforma defendant No. 4 sold 13rd share out of his 2/3rd share in the suit property to the plaintiffs who were co-sharers in the land of the khatian in suit. The suit property was the part of the ancestral bastu and the dwelling house of the plaintiffs and the proforma defendant

no.

2. The proforma defendant no. 4 expressed also that he would sell the remaining 1/3rd share to the plaintiffs in future but he sold the remaining 1/3rd share to the defendant no. 1 who was the stranger purchaser. Accordingly the suit was filed for the reliefs as sought for when the demand for partition was not complied with.

3. The defendant no. 1 contested the suit by filing the written statement. Proforma defendant no. 4 filed the written statement supporting the contention of the defendant no. 1. Defendants no. 2 and 3 who are the heirs of Prama the Nath Dholey did not enter appearance. The defence version was that the suit plot no. 627 was purchased by Sitalabala in execution of the decree in a rent suit and that she sold the entire plot to the proforma defendant no. 4. The proforma defendant no. 4 was not in joint family with the father of the plaintiffs and that they were not co sharers in the suit khatian. The plaintiffs obtained a kobala fraudulently in respect of 3 acres of land out of the suit plot containing 12 acres of land, from the proforma defendant no. 4. It was also contented that the stiff plot was not the joint dwelling house of the father of the plaintiffs and the proforma defendant no. 4. Other allegation of the plaintiffs were denied by the defendant no. 1.

4. The Learned Munsif on a consideration of the evidence came to the conclusion that the plaintiffs were entitled to the decree for partition in respect of their 03 acres of land in the suit plot but he rejected the plaintiffs' prayer for preemption u/s 4 of the Partition Act as the plaintiffs failed to prove that the suit property was the joint family dwelling house of the father of the plaintiffs and proforma defendant no. 4. On appeal by the plaintiffs, the Learned Additional District Judge confirmed the judgment and decree of the Learned Munsif and dismissed the appeal by not accepting the plaintiffs appellants' objection to the effect that the Learned Munsif committed mistake in law in rejecting the plaintiffs' prayer for pre-emption u/s 4 of the Partition Act before they filed a separate petition for the purpose after the preliminary decree.

5. Being aggrieved, plaintiffs have preferred this second appeal only on the point of law to the effect that the courts below committed mistake by rejecting the plaintiffs' prayer for pre-emption u/s 4 of the Partition Act before they filed a separate petition for the pinpose after the passing the preliminary decree as enjoined in law.

6. Mr. Bidyut Kumar Banerji, Learned Advocate for the plaintiffs appellants has made his submission in support of this second appeal and has drawn my attention to the decisions in [Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others](#), and [In Re: Kalipada Sadhukhan](#), to show that the proper stage for making the application u/s 4 of the Partition Act would be when application, for final decree of partition by appointing a commissioner to effect partition by metes and bounds has been made. Mr. Banerji accordingly nas submit tea that the courts blow committed mistake in law in rejecting the plaintiffs' prayer for pre-emption u/s 4 of

the partition Act when plaintiffs had no occasion to make such petition and when they actually did not file such application.

7. Mrs Manjuli Choudhury, Learned Advocate for the respondent defendant no. 1 has however submitted that the courts below did not commit any mistake in this respect and that the principles of law as enunciated in the decisions as referred to by Mr. Banerji and the decision in [Birendra Nath Banerjee Vs. Sm. Snehalata Devi and Another](#), protect the decision of the courts below.

8. The plaintiffs, in the present suit while praying for a decree of partition in respect of their alleged share, made a specific prayer also for buying up the share of the defendant no. 1 in the suit property u/s 4 of the Partition Act. The trial court was therefore invited by the plaintiffs to give a decision as to whether the plaintiffs were entitled to pre-empt the share of the defendant no. 1 u/s 4 of the Partition Act in the facts and circumstances of the case. The trial court did the same and found that the plaintiffs were not entitled to get such relief and accordingly rejected that prayer of the plaintiffs. The first appellate court upheld the decision of the Learned Munsif in this respect. If the trial court or the first appellate court would have found that the plaintiffs were entitled to preempt u/s 4 of the Partition Act, then the respective court would have given direction to the plaintiffs to make the necessary application in this respect when application for final decree or partition by appointing a commissioner to erect partition by metes and bounds would be made. The courts below did not get the scope to give such direction as the plaintiffs were found not entitled to pre-empt u/s 4 of the Partition Act.

9. The Single Bench decision in [In Re: Kalipada Sadhukhan](#), is based on the Division Bench decision in [Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others](#), . It is true that in paragraph 25 of the decision in [Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others](#), , it has been held that proper stage for making the application u/s 4 of the Partition Act would be when application for final decree of partition by appointing a commissioner to effect partition by metes and bounds has been made. But nowhere in the said decision it has been held that trial court in a suit for partition with a prayer for pre-emption u/s 4 of the Partition Act, shall be precluded from giving a decision as to the fact whether the plaintiffs are entitled to pre-empt or not u/s 4 of the Partition Act while dealing in the said partition suit with plaintiffs' prayer for pre-emption.

10. It appears from the decision in [Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others](#), that in a suit for partition by the plaintiffs, the defendants in their written statement expressed their desire to exercise their right u/s 4 of the Partition Act. The Learned Subordinate Judge while passing the preliminary decree in that suit gave inter alia the direction to the effect that the defendants would be entitled to preempt plaintiffs' share u/s 4 of the Partition Act. It has been held in the said decision that there is no defect in the direction given by the Learned Subordinate Judge in the ordering portion of the judgment so far as

those directions go. (vide first sentence of para-graph 22 of the decision in [Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others](#), ). In paragraph. 24 of that decision it has been held that "In this case all the defendants in their written statement have expressed their desire to exercise their right u/s 4 of the Partition Act. But for actual exercise of right Section 4 requires something more, that is, an undertaking to pre-empt the share sold to a stranger purchaser. That can be done only by a proper application in terms of that section. Up to the present stage the defendants have not made any such application, though in the preliminary decree it has been held that they are entitled to exercise the right u/s 4 of Partition Act."

11. In the aforesaid context, it has been held in paragraph 25 of [Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others](#), that the proper stage for making the application u/s 4 of Partition Act would be when application for final decree of partition by appointing a commissioner to effect partition by metes and bounds has been made. The direction given by the Learned Subordinate Judge while passing the preliminary decree in the suit referred to in [Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others](#), to the effect that the defendants are entitled to pre-empt plaintiff's share u/s 4 of Partition Act, was not found to be defective in any way by their Lordships in the decision in [Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others](#), . Considered in that light, the decision of the courts be that light, the decision of the courts beantifis prayer for pre-emption u/s 4 of the partition Act is not found to be defective in any way. The courts below did not commit any mistake in giving such decision.

12. The observation of their Lordships in the decision in [Birendra Nath Banerjee Vs. Sm. Snehalata Devi and Another](#), to the effect that the right of a cosharer to make an application for pre-emption u/s 4 of the Partition Act for starting a proceeding at any stage of the suit is valid and effective was made with reference to the context of the facts which are different from the facts of present case. There the question arose, whether the party concerned could file a petition for pre-emption u/s 4 of Partition Act when the appeal against the final decree in suit for partition was pending in the High Court. So I find that the decision in [Birendra Nath Banerjee Vs. Sm. Snehalata Devi and Another](#), is actually not relevant in this case although Learned Advocate for the respondent no. 1 has relied on that decision. I however find that the decision in [Sri Surendra Nath Achar and Another Vs. Sri Ram Chandra Hazra and Others](#), assists me to uphold the decision of the courts below on the point at issue as raised by the plaintiffs appellants. In the result, this appeal is dismissed on contest. The judgment and decree as passed by the Learned Additional District Judge are hereby confirmed. I make no order as to costs.