

(1979) 10 DEL CK 0024

Delhi High Court

Case No: Leave Application Appeal No. 796 of 1976 and 2743 of 1979

Haridev Shourie

APPELLANT

Vs

Madan Mohan

RESPONDENT

Date of Decision: Oct. 17, 1979**Citation:** AIR 1980 Delhi 59 : (1980) RLR 247**Hon'ble Judges:** N.N. Goswamy, J**Bench:** Single Bench**Advocate:** Rajiv Sawhney, Rajinder Dhawan and A.B. Saharia, for the Appellant;

Judgement

N.N. Goswamy, J.

(1) This application u/s 151 of the CPC has been filed by the defendant No. 4 for setting aside all proceedings held up to the auction of the property held on 25-3-1979. It is stated in the application that a preliminary decree dated 20th April, 1978 was passed by this Court and the partition of the properties was ordered by a further Preliminary decree dated 7th December, 1978. This court had passed an order for the sale of the property No. 2W/7, West Patel Nagar, New Delhi by public auction. The public auction was held on 25-3-1979. The said auction has not been confirmed by this Court. This application has been filed for permission to purchase the said property.

(2) The learned counsel for the applicant has referred to Section 2 and 3 of the Partition Act and according to the learned counsel it is open to the co-sharers to apply for purchasing the property at any time till the sale is actually confirmed by this Court. For this proposition, reliance is placed on a single Bench's Judgment of the Bombay High Court in [Taherbhai Abdulalli Vs. Nagindas Gokuldas Saraf and Others](#), . The authority, no doubt, supports the contention of the learned counsel for the applicant and it was held in that case that the last point of time before which the application u/s 3 of the Partition Act can be made is the date of the confirmation of the sale. With respect, I do not agree with the view taken by the Bombay High Court.

Section 3 of the Partition Act is as follows : "Section 3(1). If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other share-holder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf."

(3) As I look at this section, the point of time for making such application is when the Court is requested to direct the sale of property. In the present case, it is not disputed that the Court was requested by an application and notice of that application was served on the applicant and it is only after hearing the parties that this court had directed the sale of the property. The court auction can only be set aside under Order 21 Rule 90 of the CPC on the ground of material irregularities or fraud in publishing or conducting the sale. There is no such allegation in the present case. The court in its inherent powers cannot set aside the court auction when there is a specific provision in the Code itself. The Calutta High Court in the cases "Manik Lal Dutt v. Pulin Behari Pal" and [Nitish Chandra and Another Vs. Promode Kumar and Others](#), respectively has held that an application u/s 3 could be made at any time after a request is made for auction and before the auction has actually been held. The view was not accepted by the Bombay High Court in the judgment referred to above. I am in respectful agreement with the view taken by the Calutta High Court. Further, I find that in the Bombay case the application u/s 3 of the Partition Act was filed on 7-1-1977 and the sale took place on 30th March, 1977 i.e., after the application u/s 3 had been filed.

(4) For the reasons recorded above, I do not find any merits in the application which is accordingly dismissed with no order as to costs.