

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Krishnan.*

1925,
March 23.

ANGAMUTHU MUDALIAR (PLAINTIFF) APPELLANT

v.

RATNA MUDALIAR AND OTHERS (DEFENDANTS)

RESPONDENTS.

Partition Act (IV of 1893), ss. 2 and 3—Party by whom an application for sale at a valuation can be made—Time when an application under sec. 3 can be made—Order for sale by consent of both parties passed—Competency of an application under sec. 3 by either party—Sale under sec. 2, nature of.

In a partition suit, a consent decree was passed embodying a direction by consent of parties that the Official Referee should divide the property by metes and bounds and that, if it could not be so divided, he should sell the property under the Partition Act (IV of 1893); on the Official Referee deciding to sell the property, the plaintiff applied under section 3 of the Act for leave to purchase it at a valuation to be fixed by the Referee; the defendants also applied later on to buy at the valuation or else that the house should be sold to the shareholder who offered the highest price above the valuation :

Held, that, under the Partition Act (IV of 1893), an application under section 3 for a sale at a valuation to be fixed by the Court, can be made only by a shareholder other than the shareholder who had applied for sale under section 2 ;

that the proper time to apply under section 3 is after the request had been made by one of the parties that the property should be sold under section 2 and before the Court makes an order under that section ;

that, in this case, as the Court had already ordered the sale, by consent of both parties, an application under section 3 could not be made ;

that only the shareholder, who applied to buy at a valuation and at whose instance the valuation was made by the Court, is he person who is entitled to buy at the valuation ;

that the original order for sale in this case, by consent of parties, should be deemed to be one under section 2, and as that order was not set aside, the sale should be held by public auction in which the parties as well as the public could bid.

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APPEAL from the judgment of COURTS TROTTER, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 750 of 1919.

The plaintiff sued for partition of a house and ground against defendants 1 to 3 who were his co-sharers, and a decree dated 1st April 1921 was passed by consent declaring that plaintiff was entitled to a half share, and the decree embodied an order that the Official Referee should effect a division by metes and bounds and, if division was found impossible, that the Official Referee should sell the property under the Partition Act (IV of 1893). The plaintiff made an application to the Court on the 29th April 1921, praying for an order to fix the price of the shares of the defendants and to allow the plaintiff to buy their shares at that valuation. The learned Judge (COURTS TROTTER, J.), dismissed the petition. On appeal this order was reversed on 24th July 1922 by SCHWABE, C.J., and WALLACE, J., who held that the original order did not specify whether the sale directed was to be held under section 2 or 3, and that the parties were not deprived of the right to proceed under section 3, and their Lordships referred the case back to the Official Referee for disposal according to law. Subsequently the defendants applied under section 3 of the Act, that they should be allowed to purchase the house at the valuation fixed by the Official Referee or that the house should be sold to the shareholders who offered the highest price and that, for that purpose, the sale should be held by the Official Referee as between the shareholders. This petition came on for disposal before COURTS TROTTER, J.,

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who held that the defendants were competent as shareholders within the meaning of section 3 (2) to make this application, and directed "that the defendants shall have the liberty of offering a price in competition with the plaintiff over and above the valuation made by the Court". Against this order the plaintiff preferred this appeal.

Section 3 of the Partition Act is quoted in the judgment at page 923.

K. Jagannadha Ayyar for appellant.

V. S. Govinda Achariyar for respondents.

The JUDGMENT of the Court was delivered by

KRISHNAN, J.

KRISHNAN, J.—This is an appeal against an order passed under the Partition Act (IV of 1893). The plaintiff, who is the appellant before us, was one of the coparceners of a family consisting of three coparceners, brought a partition suit for his share. When the decree was passed in that suit, we find an order passed by the learned trial judge, by consent of parties, that the property in suit, a house, should be sold under the Partition Act unless the Official Referee found it convenient to divide it by metes and bounds. This was a consent order. The Official Referee afterwards found that it was not convenient to divide the house into two halves and give one half share to the plaintiff and the other half to the defendants. It was therefore decided to sell the property under the Partition Act, but in the order made for this purpose, the learned Judge, *COUTTS TROTTER, J.*, did not make it clear under what section of the Partition Act the sale was to take place. An application was subsequently made by the plaintiff under section 3 of the Partition Act claiming to buy the property at a valuation fixed by the Court. This was disallowed by *COUTTS TROTTER, J.*, but on appeal to the Appellate Court, the late learned Chief Justice, Sir

WALTER SCHWABE, and WALLACE J., reversed that order and sent the case back to be disposed of according to law. In remanding the case they did not order that action should be taken under section 3 of the Partition Act but simply directed that the case must be disposed of according to law.

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It is clear to our minds that section 3 of the Partition Act cannot be applied after the Court had already directed a sale and in this case the sale was with the consent of all parties. The sale which was directed was a sale under section 2 of the Partition Act. Section 3 begins by saying, "If, in any case where the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or the shares of the party asking for a sale, the Court shall order a valuation". It seems to us therefore that the proper time to apply under section 3 is before a Court makes an order under section 2, and after the request had been made by one of the parties that the property should be sold. Unless we construe the two sections in this manner there will be much difficulty in applying them. Once a final order is made as between the parties that the property should be sold under section 2, and that means a sale open to the public when anybody might bid for the property unless it is expressly restricted to be between the parties only, no order can be made under section 3, as it is too late then to apply under that section. Section 3 contemplates that, when the application is made by one of the parties to direct a sale of the property and before the Court makes the order, any other party who is entitled to a share in the property may at once apply for leave to buy at a valuation and when such an application is made, the Court is bound under the section to direct a valuation of the shares of the party asking for sale to find out what

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its proper value is, and the party who has offered to buy is entitled to buy that share at that valuation. If he fails to do so, his application would be dismissed and he will be made responsible for costs under clause (3) of section 3. Clause (2) provides for more than one party applying at the same time for leave to buy as provided in sub-section (1) of clause (3). There is no difficulty in construing the section in this manner. We are not able to agree with the construction put on section 3 by COURTS TROTTER, J., where he says that when an application is made for buying by one of the shareholders, any shareholder can ask that the property should be sold to him at the valuation arrived at; if that view is taken, there will be no end of trouble between competing shareholders. It is clear that the shareholder who offers to buy and at whose instance the valuation is made by the Court is the person who is entitled to buy. The words "such shareholder" occurring in the latter part of clause (1) of the section must necessarily mean the shareholder who applied for leave to buy. In this case section 3 does not apply. The parties have already agreed that the properties should be sold under section 2 and that consent has not been set aside by any order and is still in force.

One further difficulty in applying section 3 in this case is that it is not shown that the defendant applied for the sale, for it is only then that his share can be valued and dealt with under section 3. The fact seems to be that both parties were present at the time when the decree was passed and agreed to the sale being ordered and neither party actually made the application for sale. In these circumstances, we direct that the property be sold by public auction under section 2 of the Partition Act. Both parties will be at liberty to bid and set off

their respective shares if they become purchasers. The public will also have a right to bid at the auction.

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It was argued that the plaintiff should be compelled to adhere to the bid that he made once before to the Official Referee of Rs. 10,000 for this property; but we think that that cannot be insisted upon, because the bid was made when it was not clear as to what the rights of the parties were.

The decree will be modified as above stated and the case will go back to the Official Referee for disposal in the light of the above observations. The appellant will pay to the respondent half of the taxed costs.

K.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Krishnan.*

P. RAMIAH & CO. (DEFENDANTS), APPELLANTS

1925.
January 19.

v.

T. R. SADASIVA MUDALIAR & BROTHERS (PLAINTIFFS),
RESPONDENTS.*

Contract—Sale of goods—Shortage in delivery—Suit by vendee for damages—Plea that defendant had fully paid his vendor who had become insolvent before plaintiff made his claim for shortage—Plea, whether sustainable—Bar of limitation—Limitation Act (IX of 1908), art. 62 or 96—Mistake—Knowledge of plaintiff as to shortage—Money had and received.

The defendants, who had purchased eight bales of grey shirtings from a person, sold them to the plaintiff in August 1918, representing that each bale contained sixty pieces. The latter sold the bales to others who found that each bale contained only fifty pieces; the plaintiff became aware of the shortage in April 1919, and, after sending a notice of demand to the defendants, sued them in February 1922 for

* Original Side Appeal No. 118 of 1923.