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have any influence over them. This confession certainly affords corroboration to the other evidence against Jagan and Bissu.

* * * * *

The final argument addressed to me by the appellants was that there was no particular reason why any of these people should have attacked Ramji. Barku certainly had motive because Ramji had taken steps to get his brother arrested and Ram Naresh was employed by an enemy of Ramji's. The suggestion is that the other appellants were friends of these people. There is evidence that they were seen consorting with the other appellants. The point however is of no importance. We cannot know what motives actuated the appellants. We do know that there is conclusive evidence that they did take part in this offence.

There is no force in the appeal and I dismiss it.

APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Verma

DWARKA DAS (PLAINTIFF) v. GODHANA AND OTHERS
(DEFENDANTS)*

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December, 16

Partition Act (IV of 1893), section 4—Partition suit by transferee of a share in a house—Application by shareholders to buy the plaintiff's share—Time when the application should be made—Application lies at any stage of the suit, even after decree.

Section 4 of the Partition Act fixes no stage up to which alone an application under the section can be made; on the contrary, the language of the section shows that the application can be made at any stage of the suit.

So where such an application was made after the preliminary decree for partition was passed by the trial court and modified by the appellate court, and in the course of preparation of the final decree the amin had made valuations and prepared the lots, it was *held* that the application could not be treated as being too late and must be entertained.

*Second Appeal No. 159 of 1936, from a decree of Z. Islam Khan, Civil Judge of Agra, dated the 30th of May, 1935, confirming a decree of S. M. Ahsan Kazmi, Additional Munsif of Agra, dated the 19th of March, 1934.

Mr. *B. Malik*, for the appellant.

The respondents were not represented.

BENNET and VERMA, JJ.:—The appellant before us was the plaintiff in the suit which was for partition of his share in certain buildings. The plaintiff has purchased the share of one of the members of the family which owned this house. A preliminary decree for partition was passed on the 30th of January, 1933. There was an appeal against that decree by the plaintiff and the appellate court made certain modifications in the preliminary decree. On the record going back to the trial court for the preparation of a final decree, the amin was appointed as a commissioner for partition and he submitted a report on the 14th of February, 1934. In this report he valued the entire property at a certain figure and made suggestions as to the manner in which the partition should be carried out. The plaintiff objected to this report. The defendants, however, put in an application at this stage under section 4 of the Partition Act (IV of 1893) undertaking to buy the share of the plaintiff. The defendants accepted the valuation made by the amin and submitted that they were prepared to buy the plaintiff's share in accordance with that valuation. The trial court, holding that the valuation made by the amin was correct, granted this application and passed a decree in favour of the plaintiff for the recovery of the amount fixed as the price of his share and fixed a date by which the payment had to be made by the defendants. It further directed that if the defendants failed to make the payment within the time fixed, the plaintiff would be entitled to recover possession of the share allotted to him by the amin and subject to the conditions laid down in the report of the amin. The plaintiff appealed against this decree and raised two points, (1) that the application of the defendants under section 4 of the Partition Act should not have been entertained at the late stage at which it was made, and (2) that, in any case, the price fixed by the

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trial court was inadequate. The lower appellate court has repelled both these contentions and has dismissed the appeal.

So far as the price of the plaintiff's share fixed by the courts below is concerned, the finding is one of fact and cannot be challenged in second appeal. The learned counsel appearing for the plaintiff appellant has, however, urged that an application under section 4 of the Partition Act can be made only before a decree in a suit has been passed, and not later. He contends that in this case a preliminary decree having been passed, not only by the trial court but also in appeal, the defendants were no longer entitled to make an application under section 4. Having heard learned counsel at length, we have come to the conclusion that this contention is not well founded. The section itself fixes no stage up to which alone the application can be made. On the contrary, the language of the section shows that it can be made at any stage. Bearing in mind the principle underlying the provisions of section 4, namely that the members of the family to which the house belonged should have an opportunity of buying out the stranger who has become a co-sharer in the house, there seems no valid reason for putting the limitation contended for by the learned counsel on the right of the defendants as to the time when they should make the application. There is no case of this Court on the point. The High Court of Calcutta has, however, consistently held that the application can be made at any stage, even after a decree has been passed; vide *Khirode Chandra Ghoshal v. Saroda Prosad Mitra* (1) and *Pran Krishna Bhandari v. Surath Chandra Roy* (2). The same view has been taken in the Bombay High Court; vide *Khanderao v. Balkrishna* (3). We see no reason to differ from the view taken in these cases. The decision of a learned single Judge of this Court in the case of *Abdul Haq v. Moti Lal* (4) has been brought to our notice. It is not

(1) (1910) 7 Indian Cases, 436.

(2) (1918) I.L.R. 45 Cal. 873.

(3) (1921) 23 Bom. L.R. 1083.

(4) (1923) 71 Indian Cases 983.

necessary to express any opinion as to the soundness of the decision in that case as the point involved there was different from the one which arises before us.

For the reasons given above we dismiss this appeal. We make no order as to the costs of this appeal as the respondents have not appeared.

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 DWARKA
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Before Mr. Justice Bennet and Mr. Justice Verma

RAHIM BAKHSH (PLAINTIFF) *v.* KISHEN LAL AND ANOTHER
(DEFENDANTS)*

1938

 December, 19

Civil Procedure Code, section 47; order XXI, rule 92—Execution of decree for sale on mortgage—Property, not mortgaged, wrongly included in sale proclamation and sale certificate—No objections raised by judgment-debtor—Suit for recovery of the excess property against decree-holder auction-purchaser—Maintainability.

In execution of a decree for sale on a mortgage some property belonging to the judgment-debtor which did not form part of the mortgaged property was by mistake included in the sale proclamation, the sale, and the sale certificate. No objection was taken by the judgment-debtor at any of these stages of execution. Subsequently he brought a suit for recovery of this property against the auction purchaser, who was the decree-holder himself: *Held*, that the judgment-debtor should have proceeded by way of objections in the execution court, and his suit was barred by section 47 and order XXI, rule 92 of the Civil Procedure Code.

Mr. K. C. Mukerji, for the appellant.

Mr. K. C. Mital, for the respondents.

BENNET and VERMA, JJ.:—This is a second appeal by the plaintiff against a decree of the lower appellate court dismissing his suit. The following pedigree is relevant:

AMIR BAKHSH
(died 50 years ago)

Azim-Uddin
(deceased)
married
Mst. Saliman
(defendant 2)

Wazir
(deceased)

Saini
(deceased)

Rahim Bakhsh
(plaintiff)

*Second Appeal No. 209 of 1936, from a decree of N. L. Singh, Second Civil Judge of Saharanpur, dated the 2nd of November, 1935, reversing a decree of Bijepal Singh, Munsif of Haveli, dated the 5th of May, 1934.