

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BALSHET GOPALSHET SONAR (ORIGINAL DEFENDANT-OPPONENT),
APPELLANT, v. MIRANSAHEB VALAD DADESAHEB DARUWALE,
(ORIGINAL PLAINTIFF-APPLICANT), RESPONDENT.*

1398.

July 5.

*Partition Act (IV of 1893), Sec. 3, Sub-secs. 2, 4—Suit by transferee for partition—
Suit for partition by sharer against transferee—Procedure.*

Section 4(1) of the Partition Act (IV of 1893) applies only where the transferee sues for partition.

Where the suit is brought by the sharer against the transferee, section 2 must be applied.

In cases where section 4 applies, the Judge should make a valuation of the share of the transferee only and direct its sale.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona.

Appeal from an order in execution proceedings.

The plaintiff brought this suit to recover his share of a house. The first two defendants were his brother and mother, and he complained that during his minority the house which had belonged to his deceased father had been sold in 1879 by them to the third defendant. He claimed to recover a half share of the house which was in the possession of the fourth defendant, to whom the third defendant had sold it.

The plaintiff obtained a decree declaring that the sale by defendants Nos. 1 and 2 was not binding upon him and that he was entitled to recover a $\frac{7}{16}$ share in the house.

* Second Appeal, No. 158 of 1898.

(1) Section 4 of Act IV of 1893 :—

“4 (1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder 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 and proper directions in that behalf.

“ (2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.”

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In execution the fourth defendant applied to be permitted to buy the plaintiff's share, and it being admitted that the house could not be divided, the Subordinate Judge ordered a valuation to be made by a Commissioner, who valued the whole house at Rs. 500 and directed that it should become the property of the fourth defendant on his paying the plaintiff the value of his share, viz., Rs. 218-12-0. The Subordinate Judge was of opinion that, as the fourth defendant was already the owner of the larger portion of the house, he ought to be permitted to buy the plaintiff's share.

The plaintiff appealed and the Judge reversed the order of the Subordinate Judge. He applied section 4 of the Partition Act (IV of 1893) and directed the house to be sold by auction and that the plaintiff should be permitted to buy the share of the fourth defendant if he chose to pay its value so ascertained.

The fourth defendant appealed to the High Court.

M. B. Chaubal, for appellant:—The Judge was wrong in holding section 4 applicable. The house was not a family dwelling-house. No member of the plaintiff's family had lived there since 1877, in which year it was mortgaged with possession and in 1879 it was sold to the third defendant. Section 4 applies only when a transferee sues for partition, but here it is a sharer who sues the transferee. The Judge was also wrong in directing an auction. He should have valued the house.

Chintamani A. Rele, for the respondent:—We are entitled to the benefit of section 4. The fourth defendant is the owner of a large share of the house. It is not possession but ownership that brings section 4 into operation—*Vaman v. Vasudev*⁽¹⁾. The fact that it is a sharer and not a transferee who is plaintiff is immaterial. The existence of a suit between them is sufficient. This is a partition suit and all the parties are on an equal footing. Each party can apply for his share whether he be a plaintiff or defendant. An auction-sale was the best mode of ascertaining the value of the house. If section 4 does not apply, the case will come under section 3, clause 2.

PARSONS, J.:—The District Judge applied section 4 of the Partition Act (IV of 1893) to this case apparently without

(1) See *supra* p. 73.

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noticing that that section in its terms relates only to cases where the transferee sues for partition. The suit here was by the sharer against the transferee. He has also made a mistake in ordering that the house should be sold by auction. It is true that he has also ordered that the value of the transferee's share should be paid by plaintiff if he is willing to buy it, but in a sale by auction there is the possibility of a purchase by a third party and that is not provided for. As we construe the Act, if section 4 applied to the case and plaintiff could have and had undertaken to buy the share of the transferee, the Judge should have made a valuation of that share only and directed its sale.

In this case, however, it is not section 4, but section 2, which must be applied. Practically this makes no difference in the order that will have to be passed, since section 4 (2) directs that the procedure prescribed in section 3 (2) shall be followed in circumstances similar to those that now exist in this suit.

They are as follow:—The parties were agreed that a division of the house could not conveniently be made, and the Court at the request of the largest shareholder, the defendant, who owns $\frac{9}{16}$ of the house, directed a sale of it. When the case was before the District Court, the position was this:—Each of the parties had asked for leave to buy the share of the other at a valuation; and the Subordinate Judge had ordered a valuation of the house and had ascertained its value to be Rs. 500. All then, it appears to us, that the District Court could do under section 3 (2), if he considered that valuation incorrect and that the market value of the house should be determined by a sale by auction, was to order a sale of the shares to the shareholder who offered to pay the highest price above that valuation; in other words, the Court had to put the house up to auction between the parties at the reserved price of the valuation, and distribute the purchase-money in the proportion of the share owned by each.

We reverse the order of the District Judge and remand the case for the above procedure to be followed. Costs to be costs in the cause to be dealt with by the Judge when finally disposing of the case.

Order reversed and case remanded.