

Rajan Vs. John

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Court : Kerala

Decided On : Dec-08-2011

Judge : K.M. Joseph & a.M Shaffique

Appeal No. : R.F.A.No.777 of 2011 & O.P.(C) No.3310 of 2011

Appellant : Rajan

Respondent : John

Advocate for Def. : Shri. K.R. Mohanan

Advocate for Pet/Ap. : Shri. C. Varghese Kuraikose

Judgement :

K.M. Joseph, J.

The above cases being connected and being between the same parties, we dispose of the two cases by the following common Judgment.

2. The appellant is also the petitioner. The parties are brothers. A suit for partition resulted in a preliminary decree. The parties were declared to be entitled to 1/3rd share in the property. The property which is the subject matter of dispute, is an extent of 11.850 cents with a shop room and residential building situated at Thrippunithura.

3. Originally, the first respondent filed I.A.No.4560 of 2009 seeking to pass final decree. The said Application was later on withdrawn. According to the first respondent, it was on the basis that there was some compromise. Still later, Ext.P2 Application which was numbered as I.A.No.1642/2011 was filed by the respondents. It was purported to be filed u/O.20 R.18 and O.26 R.13 and Ss.54 and 151 of the C.P.C. The prayer was as follows:

“For the reasons stated in the accompanying affidavit, this Honourable Court may be pleased to appoint an Advocate Commissioner to conduct an auction among the petitioners and the respondent herein for the sale of the plaint schedule property, or by conducting public auction sale if the sale among the co-owners is not feasible and to allot 1/3rd share each of the sale amount to each of the petitioners respectively and allowing the costs of the proceedings.” Thereupon, the learned Second Additional Sub Judge, Ernakulam proceeded to pass an order dated 8th July 2011. The said order is produced as Ext.P3 in the Original petition and it is also the order which is produced in the Appeal which is alleged to be the deemed decree within the meaning of the Partition Act. The said order reads as follows:

“Petitioners are also ready to participate in the auction sale. Hence this court orders auction sale of the decree schedule property among the co-owners. Sale will be conducted in open court on 22.8.2011 at 2.30 P.M. Also furnish the fair value if any, fixed by the Government”.

Petitioner/appellant filed I.A.No.51671/1. It was a petition purportedly filed u/S.3 of the Partition Act, 1893 (hereinafter referred to as the Act). The I.A. reads as follows:

“For the reasons stated in the accompanying affidavit, it is most respectfully prayed that this Honourable Court may be pleased to order valuation of the shares of the petitioners in I.A.No.1642/2011 which they are having upon property to the partition and offer the same to the petitioner herein for purchase in tune with the statutory provisions in the interest of justice.”

A Counter Affidavit was filed which is produced as Ext.P5 in the Original Petition. The learned Judge proceeded to pass Ext.P6 order dismissing the Application filed by the petitioner/appellant. The prayer sought in the Original Petition is to quash Ext.P6. A further direction is sought to the IIInd Additional Sub Court, Ernakulam to effect a proper valuation of the shares of the respondents and to offer the same to the petitioner in view of S.3 of the Act by allowing Ext.P4 Application.

4. The petitioner in the Original Petition also filed R.F.A. No.777/2011. Even though the Office had actually noted defect, the Court had directed number of the Appeal on the basis that the impugned order would be a deemed decree u/S.8 of the Act.

5. As already noted, Ext.P3 in the Original Petition is produced as the deemed decree in the Appeal which we have already extracted.

6. We heard Shri C. Varghese Kuraikose, learned counsel for the appellant/petitioner and also Shri K.R. Mohanan, learned counsel appearing on behalf of the respondents. Learned counsel for the appellant/petitioner would submit that this is a clear case where the court has acted illegally in passing Ext.P6 order which was produced in the Original Petition. He would submit that undoubtedly, the respondents have made a request for sale of the property within the meaning of S.2 of the Act. The appellant/petitioner had made an oral request and it was also followed up by filing Ext.P4 wherein he sought to exercise the rights vested on him under Section 3 of the Act. He would submit that Section 3 vests on him an indefeasible right at the moment a request is made within the meaning of S.2 of the Act. He would point out the terms of Ext.P2 which we have extracted, to contend that there was indeed a request u/S.2 of the Act. He would also invite our attention to the contents of the Affidavit accompanying Ext.P2 to contend that the respondents actually wanted a public sale. He placed reliance on the following case law:

1) R. Ramamurthy Aiyar (dead) by L.Rs. v. Raja V. Rajeswararao (AIR 1973 SC 643).

2) Hooghly Docking and Engineering Co. Ltd. v. M.M.P. Lines (P) Ltd. and Ors. (AIR 1983 Cal.267).

3) Sathi Lakshmanan v. Mohandas (2008 (4) KLT 401).

4) Jagdish and Ors. V. Nathi Mai Keriwal and Ors. (AIR 1987 SC 68).

7. Per contra, Shri K.R. Mohanan, learned counsel for the respondents would submit that the request made in Ext.P2 was for an auction among the shares and only if it was not feasible, a public sale was requested for an the composite request in the nature contained in Ext.P2 could by no stretch of imagination be treated as one u/S.2 of the Act. He would emphasise that the sale contemplated on the strength of a request u/S.2 of the Act can only be a public sale. He would submit that the provisions of the Partition Act must be construed strictly. In support of his contentions, learned counsel for the respondents placed reliance on the following case law:

1) L. Ram Prasad v. Mt. Mukandi and Anr. (AIR 1929 All.443).

2) (Darbhamulla) Subbamma v. Valivetti Veeravya and Ors. (AIR 1932 Mad.15).

3) Sreedharan (Defendant) v. Baskaran (Plaintiff) (1963 KLT 692).

4) Sainaba and Ors. V. Abdurahiman Koya and Ors. (1982 KLT SN 31 (Case No.48).

5) Anthony Ammal v. Antony (1983 KLT 645).

6) Paragodan v. Lakshmikutty (1993) (2) KLT SN 33 (Case No.33).

7) Sahasranama Iyer v. Ravindranathan (1999 (2) KLT SN 50 (Case No.54).

He would contend that actually the order which is alleged to be deemed decree under Section 8 of the Act is not a deemed decree. This would be the inevitable result of acceptance of his argument that there is no order for sale under Section 2 of the Act.

8. The decision in *R. Ramamurthi Aiyar (dead) by L.Rs v. Raja V. Rajeswararao* (AIR 1973 SC 643), was a case where a suit for partition was filed and there, the prayer was that the Court should direct the property to be sold by public auction, in exercise of its inherent power and to pay the plaintiff his one-half share in the net proceeds. The defendant filed a written statement and resisted the decree for sale. He also stated that he is ready and willing to buy the plaintiffs share, and that the Court may order valuation. Apparently, the plaintiff sought to withdraw the suit. The said request was allowed with liberty to file a fresh suit. The Apex Court dealt with two questions, firstly what is the scheme of Ss.2 and 3 of the Partition Act and secondly whether the court was justified in permitting withdrawal of the suit and whether the defendant had acquired an indivisible right u/S.3 of the Act. The Court proceeded, inter alia, to hold as follows, after referring to Sections 2 and 3 of the Act:

“The scheme of Sections 2 and 3 apparently is that if the nature of the property is such or the number of shareholders is so many or if there is any other special circumstance and a division of the property cannot reasonably or conveniently be made, the court can in its discretion, on the request of any of the shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and distribute the proceedings among the shareholders. Now where a court has been requested under Section 2 to direct a sale any other shareholder can apply for leave to buy at a valuation the share or shares of the party or parties asking for sale. In such a situation, it has been made obligatory that the court shall order a valuation of the share or shares and offer to sell the same to the shareholder who has applied for leave to buy the share at a price ascertained by the court. In other words, if a plaintiff in a suit for partition has invoked the power of the court to order sale instead of division in a partition suit under Section 2 and the other shareholder undertakes to buy at a valuation, the share of the party asking for sale, the court has no option or choice or discretion left to it and it is bound to order a valuation of the share in question and offer to sell the same to the shareholder undertaking or applying to buy it at a valuation. The purpose underlying the section undoubtedly appears to be to prevent the property falling into the hands of third parties if that can be done in a reasonable manner. It would appear from the Objects and Reasons for the enactment of the

Partition Act that as the law stood the court was bound to give a share to each of the parties and could not direct a sale or division of the proceedings. There could be, instances where there were insuperable practical difficulties in the way of making an equal division and the court was either powerless to give effect to its decree or was driven to all kinds of shifts and expedients in order to do so. The court was, therefore, given a discretionary authority to direct a sale where a partition could not reasonably be made and the sale would, in the opinion of the court, be more beneficial to the parties. But, having regard to the strong attachment of the people in this country to their landed possessions, the consent of the parties interested at least to the extent of a moiety in the property was made a condition precedent to the exercised by the Court of the new power. At the same time, in order to prevent any oppressive exercise of this privilege, those shareholders who did not desire a sale were given a right to buy the others out at a valuation to be determined by the Court.”

The Court proceeded to hold that u/S.3 of the Act, there is a right with the shareholder and the court has no option.

“11. A question which presents a certain amount of difficulty is at what stage the other shareholder acquires a privilege or a right under Section 3 when proceedings are pending in a partition suit and a request has been made by a co-owner owning a moiety of share that a sale be held. One of the essential conditions for the applicability of Section 2 of the Partition Act is that it should appear to the court that a division of the property cannot reasonably or conveniently be made. To attract the applicability of Section 3, all that the law requires is that the other shareholder should apply for leave to buy at a valuation. Once that is done, the other matters mentioned in Section 3(1) must follow and the court is left with no choice or optio. In other words, when the other shareholder applies for leave to buy at a valuation, the share of the party asking for a sale, the court is bound to order valuation of his share and offer to sell the same to such shareholder at a price to be ascertained.”

In *Somnath Bose v. Manasendra Nath Bose and Ors.* (AIR 1983 Cal.265) which arose under the Act, the Court had directed sale to the shareholders offering the

highest price. The Division Bench of the Court held that the applicant/co-sharer could not subsequently challenge the order and ask for a sale to him at the Court's valuation. Learned counsel for the petitioner would point out that the facts are distinguishable in so far as, the applicant therein had himself participated and unlike the facts in the said case, in this case, the petitioner/appellant had not given his consent for holding an auction among the sharers. We may notice that in the said case, the Court states that prima facie the application made by the respondent's counsel was not an application under Section 2. A learned Single Judge of this Court in *Sathi lakshmanan v. Mohandas* (2008 (4) KLT 401), inter alia, held as follows:

“15. The legal position can thus be summed up as follows:

“(1) In a suit for partition, if it appears to the court for the reasons stated in S.2 of the Partition Act that a division of the property cannot reasonably and conveniently be made and that sale of the property would be more beneficial to all the sharers, court has to direct sale. The sale so contemplated is definitely a public sale. But the order for sale can be made only on the request of the shareholders interested individually or collectively to the extent of one moiety or upwards.

(2) When such a request is made to the court to direct a sale, any other shareholder or shareholders can apply under S.3 of the Act for leave of the court to buy the share of the party asking for sale, at a valuation. In such a case, court has to order valuation of the share of the party asking for sale.

(6) If there is no request as provided under S.2 of the Act for sale of the property by a shareholder or shareholders interested individually or collectively to the extent of one moiety or upwards, S.3 cannot have any application.

(7) If Ss.2 and 3 of the Act has no application, partition is to be effected dehors of the provisions of the Partition Act.

(8) In such a case, if all the shareholders agree or the court finds that suit property is incapable of division in specie, it is for the court to devise the most appropriate and suitable method which is beneficial for all the shareholders for a just and fair

division of the property. The court has the inherent power to devise the most suitable means. Court can allot the property to one share with a direction to pay owelty to the other sharers. Court can also direct a sale of the property among the shares or public and divide the sale proceedings among the sharers, depending on the facts and circumstances of each case. It cannot be said that in no case there cannot be a sale of the property among the sharers or a public sale. What is the best mode of division in such a case is to be decided by the court on the facts of that case. Whatever be the course so adopted, it must be the most beneficial to all the sharers. It is not the interest of that shareholder in possession of the property is to be looked into, but the interest of all the shareholders.”

9. Passing on to the case law relied upon by the respondents, in L. Ram Prasad v. Mt. Mukandi and Anr. (AIR 1929 All.443) rendered by a Bench of that Court, the request was apparently made by the plaintiff who was a 2/3rds sharer that the sale may be held and whoever among the co-shares offered the highest bid may be given the property. The question which fell for consideration of the Court was whether the said request was a request u/S.2 of the Act. The Court held as follows:

“We are of opinion that in order to see whether any request by a party amounts to a request for sale under S.2, we must consider the exact request made by the party. In the present case, the request made by the plaintiff, who is a two-thirds sharer, is that a sale may be held and that whoever among the co-sharers offers the highest bid may be given the property. It clearly does not contemplate a sale at which any outsider could bid and the plaintiff should have no option at any time whatsoever and under any circumstance whatsoever to retain possession of or buy in the whole property. If such a request is treated as a request under S.2, it is apparent from S.3, Partition Act, that if the shareholder of a smaller interest chooses, he can ask for leave to buy the property at a valuation by the Court, and if he does not do so, then the property is to be sold under the provisions of S.6, Partition Act, when the plaintiff can bid for the property to ensure that a proper price is obtained for the property at the sale. In our opinion, the Partition Act must be construed strictly as the provisions of the Act, especially Section 3, exclude the right of the majority shareholder to acquire the property, the subject of partition at

the option of the minority shareholder. On a reference to paragraph 5 of the plaint, it is clear that there was no unconditional request by the plaintiff to sell the property, and we cannot accept the contention of the other side that when a conditional offer is made by the holder of the majority shares of the property, the plaintiffs request to buy at any valuation can be ignored at the mere will of the minority shareholder.”

In (Darbhamulla) Subbamma v. Valivetti Veerayya and Ors. (AIR 1932 Mad.15) a learned Single Judge of the said Court has surveyed various case law. The Court held as follows:

“Independent of the Partition Act, the Court has an inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable, for effecting a just partition: AIR 1929 All.443, Appr: 111C 370, Ref.

Where a sale is directed under Section 2, and Section 3 does not apply, it is nevertheless governed by Section 6: AIR 1926 Cal.1190 : 24 1C 273 and AIR 1927 All.686, Expl.”

In Sreedharan v. Bhaskaran (1963 KLT 692), the Court only reiterated that it has the general power of sale for equitable distribution. The very same concept is seen reflected in the judgment in Sainaba and Ors. V. Abdurahiman Koya and Ors. (1982 KLT SN 31 (C.No.48). In Anthony Ammal v. Antony (1983 KLT 645), a learned Single Judge, apart from reiterating that even without request, the Court has power to order sale, held as follows:

“Rule 234 of the Civil Rules of Practice insists that in the case of a sale among the sharers only, the sale is to be conducted in open court. Simply because the Commissioner is an Officer of the court, it does not mean that a sale by him will be a sale in open court as insisted by Rule 234(2) of the Civil Rules of Practice.”

That the Court’s power to order sale where the property is incapable of partition dehors Section 2 of the Act, was reiterated again by a Division Bench of this Court in Parangodan v. Lakshmikutty (1993 (2) KLT SN 33 (C.No.33). Lastly, a learned

Single Judge of this Court was dealing with a case in *Sahasranama Iyer v. Ravindranathan* (1999 (2) KLT SN 50 (C.No.54) which is, on facts also, very apposite. The Court, inter alia, held as follows:

“A reading of the plaint in this case would show that the plaintiffs had requested for sale of the properties among the sharers or in public auction. This request was not for sale of the properties in public auction only. This would mean that they have not given up the right to purchase the property and therefore, the request should not be construed as one for sale under Section 2 of the Partition Act. In these circumstances, I am not persuaded to hold that the plaint discloses the request for sale of the properties under Section 2 of the Partition Act”.

We also notice that a learned Single Judge of the Rajasthan High Court in *Ram Gopal v. Bhikam Chand and Ors.* (AIR 1964 Raj.29) also dealt with a case of request for sale among the shareholders and as to whether it was one contemplated u/S.2. The Court held, following the decision in *Jadunandan Singh v. Bechan Koeri and Ors.* (AIR 1929 All.442) and other case law, that such a request cannot result in the invocation of S.3(1) of the Act.

10. Learned counsel for the appellant would submit that there is nothing in S.2 of the Act which would show that what is contemplated is a public sale. However, he would concede that there are observations in the judgment of the Apex Court in *Badri Narain Prasad Choudhary v. Nil Ratan Sarkar* (AIR 1978 Sc 845), which detract from the said proposition. Therein, the Apex Court, inter alia, held as follows:

“13. It will be seen from the above analysis that the request contemplated in No.(i) is a sine qua non for directing a sale because such a request necessarily signifies his willingness to have his share converted into money, so that the co-sharers may, by means of the procedure provided in Section 3 buy them out. The request for sale envisaged by Section 2 must be one for public sale. If no such request has been made to the Court, Section 3 cannot be brought into operation”.

11. Counsel for the appellant/petitioner would submit that it may not be treated as a ratio decidendi of the case and it should be treated as an obiter observation. He

would also submit that there is nothing in S.2 from which a Court can come to the conclusion that the sale contemplated on a request must be a public sale. He would invite our attention to Ss.3 and 6 of the Act to contend that the sales contemplated in Ss.3 and 6 are clearly not public sales. Yet, he points out that under Section 8, the order for sale u/Ss.2, 3 and 6 are treated as deemed decrees. Therefore, he would contend that the sale which is contemplated u/S.2 need not be a public sale. The more important contention raised by him, in our view, is however that what Ss.2 and 3 contemplated is only that there must be a request for a sale and up on there being such a request for sale, a sharer would get an indefeasible right to request for a valuation and to purchase it as contemplated in the said provision. In this case, there was such a request. He would contend that the fact that it is second in chronological order, that is the mere fact that the request is for a public sale, if the sale among the sharers is not feasible, will none-the-less be a request for public sale also and, therefore, the moment Ext.P2 application was made, the appellant/petitioner acquired a vested right u/S.3. He would submit that the purport of S.3 is not only to avert a sale to a stranger, but also to prevent oppression of the minority sharers.

12. The request made by the respondents in Ext.P2 is clearly not one exclusively seeking a public sale of the property in question. The request, as contained in the petition which we have already extracted, is in tune with the statements contained in the accompanying affidavit, that is, what the respondents sought was that the court may order a sale among the sharers and it was only if the court found that sale among the sharers was not feasible, the respondents requested for a public sale. We are of the view that what is contemplated u/Ss.2 and 3 is that there must be a request for a public sale. This conclusion of ours is in accord with the law laid down by the Apex Court in *Badri Narain Prasad Choudhary v. Nil Ratan Sarkar* (AIR 1978 Sc 845 Para.13) which we have extracted above. We are unable to accept the contention of the appellant/petitioner that the contents of para.13 of the judgment is by way of obiter. The Court was actually considering the question whether the request in the said case would qualify as a request u/S.2 of the Act. The basis/rationale of the judgment is, in our view, contained in para.13 of the judgment. That apart, even assuming for a moment it was not the ratio decidendi, an obiter by the Apex Court may have high persuasive value. More importantly,

while it is true that the public sale is nowhere found in S.2, if we examine the scope of Sections 2 and 3, it becomes self-evident that the intention of the Legislature was to prevent a sale of family property in favour of a stranger, if the same could be averted by giving an opportunity to any of the sharers to apply to purchase the share of the others on the basis of a valuation. When a sale takes place among the sharers and one of the sharers purchases the property, the property would remain within the family. That is essentially the distinction between a public sale, which necessarily would result in strangers succeeding in purchasing the property and an auction among the sharers which would result in the property remaining within the family. Once this object of the Legislature is borne in mind, the solution to the problem which is posed before us would follow without much difficulty. Without there being a request within the meaning of S.2, a sharer will not have a right u/S.3. There can also be no dispute for the proposition that the Court retains its inherent power to pass such order as would ensure fair and equitable distribution of the assets in partition. The inherent power extends to ordering a sale. The power includes the ordering of a sale among sharers. It is true that a sale u/S.3 is not a public sale. The sale contemplated is one to be held in favour of the shareholder as contemplated in S.3. S.4 does not contemplate a public auction. Therefore, though the orders of sale u/S.2, 3 and 4 are deemed to be decrees, the incidents of the said provisions are clearly different.

13. It is true that in Section 3 of the Act, what is provided is that on a request being made under Section 2 to direct the sale, it will be open to any other shareholder to apply for leave to buy at a valuation, in which case it is incumbent on a court to order valuation. Ss.2 and 3 of the Act reads as follows:

“2. Power to court to order sale instead of division in partition suits.-

Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such

shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

3. Procedure when sharer undertakes to buy,-

(1) If in any case in which 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 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:

(2) If two or more shareholders severally apply for leave to buy as provided in subsection (1), the court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.”

Thus, if there is a request within the meaning of Section 2, Section 3 creates a legal right in favour of the other shareholders to invoke Section 3. The crucial question, however, would be whether in a case of a composite request as in the facts of this case, it could be said to be a request under Section 2 of the Act. Learned counsel for the appellant, however relied on a judgment of the Apex Court in *Rani Aloka Dudhoria and Ors. V. Gowtam Dudhoria and Ors.* (AIR 2010 SC 53). Therein, there was a preliminary decree for sale of the property. In terms of the said decree and order dated 20th July, 1979, the valuation of the suit property was to be done by a well known valuer. The order was passed on the basis of an agreement between the parties. It was further stated in the judgment in para.70 that ascertainment of the valuation of the suit property was directed in terms of Ss.2 and 3 of the Act. The said order had not been varied, altered or modified. An auction was held and the questions which really arose for consideration before the court were as stated in paras.64 and 66:

“64. The core question which arises for our consideration is as to whether the said purported auction was held de hors the provisions of the Partition Act, 1893 or in accordance therewith. Indisputably, the property situated at Netaji Subhas Road, Calcutta, is a double storeyed building on a land measuring 12 cottah. It is situated at a prime location.

66. Validity of the sale of the said properties, as indicated hereinbefore, is in question inter alia on the premise that:-

(i) The provisions of the Partition Act have not been complied with.

(ii) Seven out of eight plaintiffs had no notice as regards the date fixed for auction.

(iii) Defendants/respondents in any event having not deposited the amount required within the time stipulated, the auction sale was required to be set aside”.

The Court did refer to the decision in R. Ramamurthi Aiyer’s case (supra) (AIR 1973 SC 643) and the decision of this Court in Sathi Lakshmanan v. Mohandas (2008 (4) KLT 401) among other cases. Thereafter, the attention of the Court was drawn to Badri Narain Prasad Choudhary v. Nil Ratan Sarkar (AIR 1978 SC 845). The Court proceeded to hold as follows:

“81. The said decision does not lay down any legal principle. In any event, it has no application to the facts of the present case, keeping in view the extent of the properties, as indicated by us heretobefore. We may furthermore notice that therein unfortunately attention of this Court was not drawn to the decision of this Court in K. Ramamurthi Iyer (AIR 1973 SC 643) (supra)”.

Thereafter, the Court referred to the decision in Malati Ramchandra Raut (Mrs.) v. Mahadevo Vasudeo Joshi ((1991) Supp.1 SCC 321) wherein, the following paragraphs was referred to:

“9. It is the duty of the Court to order the valuation of the sharers of the party asking for a sale of the property under Section 2 and to offer to sell the shares of such party to the shareholders applying for leave to buy them in terms of Section 3 at the price determined upon such valuation.”

Still further, the Court referred to T.S. Swaminathan v. Official Receiver of West Tanjore (AIR 1957 SC 577). Learned counsel for the appellant/petitioner placed considerable reliance on paragraph 86 and we extract the same as follows:

“86. We may quote with approval the meaning of the term “owelty”:-

“Owelty”.- When an equal partition cannot be otherwise made, Courts of equity may order that a certain sum be paid by the party to whom the most valuable property has been assigned. The sum thus directed to be paid to make the partition equal is called ‘Owelty’.”

This could clearly show that the Court has no power to direct sale de hors the provisions of the Partition Act”.

Thereafter, the Court referred to Section 6 of the Act and dealt with the argument based thereon. On the strength of the said judgment, counsel for the appellant made an attempt to contend that the decision of the Apex Court in Badri Narain Prasad Choudhary v. Nil Ratan Sarkar (AIR 1978 SC 845) that the sale contemplated u/S.2 is a public sale, may not be good law. He would also point out that the sale in the case was a sale among the partners. He would further emphasise that, at any rate, the Court held that de hors the Partition Act, the Court has no power to order a sale. It is necessary to refer to Ss.6 and 7 of the Act. Section 6 purports to provide for the procedure for a sale u/S.2. It provides that it shall be subject to a reserved bidding and that the amount of such a bidding is to be fixed by the court. Sub-ss.(2) and (3) being relevant, we extract the same:

“6. Reserved bidding and bidding by shareholders.-

(1) xx xx xx

(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same as to the court may seem reasonable.

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder”.

Thereafter, S.7 provides for the procedure to be followed in respect of sales under the Act. We have already noticed that a sale u/S.2 is covered by the provisions of S.6. The other sales which are contemplated under the Act are u/Ss.3 and 4 of the Act. S.9 also provides that in any suit for partition, the court may, if it thinks it fit, make a decree of partition of part of the property to which the suit relates and the sale of the remainder under the Act.

14. We are of the view that in the decision of the Apex Court in Rani Aloka Dubhoria and Ors v. Goutam Dubhoria and Ors. (AIR 2010 SC 53) it was not really dealing with the issues which have arisen in the facts of this case. In this case, this Court is concerned with the question as to whether the sale is ordered on the basis of a request for such a sale u/S.2 of the Act. In the decision of the Apex Court relied on by the appellant, as already noticed, there was already a preliminary decree for sale, apparently u/S.2 of the Act and the decree itself provided for the valuation to be done. The question really which arose was whether the auction held was a valid one and the various aspects which arose out of the auction which gave room for complaint have already been set out by us. No doubt, it included the question whether when the property is put to auction, the provisions of the Partition Act would apply. It was a case where, as already noted, there was a sale ordered u/S.2 of the Act. The procedure prescribed for a sale u/S.2 of the Act is as contemplated u/S.6 of the Act. Furthermore, the preliminary decree itself on consent contemplated valuation to be done. It is true that there is a statement in para.86 which we have extracted that the court has no power to direct sale de hors the provisions of the Act. The wealth of case law which we have already considered, points to the principle that there is an inherent power to order the sale in a case where the Act may not apply. In fact, the judgment of this Court in Sathi Lakshmanan v. Mohandas (2008 (4) KLT 401) also expressly speaks of the power to order sale of the property among the sharers or public. There is no ratio decidendi laid down in the statement of the Apex Court in Rani Aloka Dubhoria and Ors. V. Goutam Dudhoria and Ors. (AIR 2010 SC 53) (in para.86)

which is applicable to the issue which arises for our consideration.

15. When a composite request was made for a sale among the sharers and in the alternative it was prayed that if it is not found feasible, then a public auction maybe held, what really the respondents in this case have sought before the court, cannot be treated as requesting the court to hold a sale within the meaning of S.2. The main prayer before the court was to have a sale among the sharers. The request for public sale would really spring in to being only if the court were to find that the request to hold a sale among the sharers could not be allowed. No doubt, if such a stage is reached or if the sharers who moved the petition with a composite prayer press for the prayer for holding public auction, then certainly it would become a request within the meaning of S.2 and the rights available u/S.3 will spring in existence. While it is true that in S.3 the requirement is that there must be a request which will give a concomitant right to the other sharers, so much so, the request cannot even be permitted to be withdrawn as is clear from the decision in *R. Ramamurthi Ayyar (dead) by L.Rs. v. Raja V. Rajeswararao* (AIR 1973 SC 643) (supra), in this case, such a request has not been made, as explained above. Furthermore, we have already noted that the whole purpose behind conferring a right on the co-sharers is to avert a public sale which would result in strangers acquiring family property. Once this aspect is also borne in mind, the mere absence of the words “and a sale is ordered on the basis of the request” in S.3 of the Act, may not be material.

16. The result of this discussion is that we come to the conclusion that the request made in Ext.P2 cannot be treated as a request for a sale u/S.2 of the Act. The sale, therefore, cannot be treated as one ordered u/S.2 of the Act. u/S.8 of the Act, what is rendered appealable treating the order as a decree, is only the orders for sale made u/S.2, 3 of 4 of the Act. The order dated 8.7.2011 which is sought to be clothed with the trappings of a deemed decree by the appellant, is an order to conduct auction among the co-owners. We have already held that it was not done on the basis of a request u/S.2 of the Act. If that is so, it cannot be treated as an order for sale u/S.2 of the Act within the meaning of S.8 of the Act. If that be so, the order cannot be treated as a decree. In such an eventuality, the Appeal itself is not maintainable. We hold so.

17. As far as Ext.P6 order is concerned, we see nothing illegal or erroneous in the reasoning or the conclusion arrived at by the learned Additional Sub Judge. On the other hand, it accords the view which we have taken that the request which was made was not a request u/S.2 of the Act and, therefore, the court below rightly refused the prayer in Ext.P4 to order valuation and sale u/S.3 of the Act in favour of the petitioner. In such circumstances, we find no merit in the Original Petition also.

The upshot of the above discussion is that the Original Petition is without any merit. The Original Petition is dismissed. The Regular First Appeal is dismissed as not maintainable.

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