

R. Ramamurthi Iyer

Vs

Raja V. Rajeswara Rao

Civil Appeal No. 871 of 1971

(A. N. Grover, D. G. Palekar JJ)

22.08.1972

JUDGMENT

GROVER, J. -

1. This is an appeal by certificate from a judgment of the Madras High Court arising out of a suit for partition instituted on the original side of that court.

2. Raja V. Rajeswara Rao the respondent herein and Raja V. Maheswara Rao (deceased) who were brothers owned the cinema known as Odeon at Woods Road, Madras in equal shares. This property was leased out by them to Isherdas Sahni and Bros. In 1965 Raja Maheswara Rao filed a suit in which it was stated that apart from other properties owned by the two brothers Odeon Cinema which consisted of land, buildings, theatre, furniture, talkie equipment etc., was owned by them in equal shares. The lease in favour of Isherdas Sahni and Bros. was to expire on April 30, 1967. As we are concerned only with the cinema property in the present case it is unnecessary to refer to the pleadings relating to other properties belonging to the two brothers. In Para 11 of the plaint it was pleaded that having regard to the nature of the property it was not possible or convenient to divide it into two halves by metes and bounds. It was prayed that the court in exercise of its inherent jurisdiction should direct the property to be sold by public auction and pay the plaintiff his 1/2 share in the net proceeds, the sale being subject to the lease in favour of Isherdas Sahni and Bros. In the written statement filed by Raja Rajeswara Rao it was denied that the Odeon Cinema property was not capable of division into two halves by metes and bounds and it was averred that such a division was not only possible but it would be also just and proper. The right of the plaintiff in the suit to invoke the inherent powers of the court for a decree for sale was denied. Paras 6 and 7 are reproduced below :

"6. The defendant submits that the suit property is very easily capable of division by metes and bounds into two shares. The defendant wants to retain his share of the suit property and he does not want to sell or part with the property. The plaintiff is not entitled to a decree for sale of the suit property.

7. In the event of this Honourable Court holding that the suit property is incapable of division into two shares, the defendant submits that he is ready and willing to buy the plaintiff's share in the suit property and prays that this Honourable Court may be pleased to order a valuation of the plaintiff's share to be made in such manner as this Honourable Court may think fit and proper and offer to sell the said share to the defendant at the price so ascertained with suitable directions in that behalf. The defendant is willing to buy the plaintiff's share."

Para 12 was to the effect that in the event of the court ordering sale of the suit property a decree might be passed in favour of the defendant for the purchase of the plaintiff's share at a valuation determined by the court. On July 26, 1965, the Court appointed a Commissioner for the purpose of determining various matters which would enable the court to decide whether the property was capable of division by metes and bounds. It appears that before the Commissioner the defendant consistently pressed for a scheme being suggested by which division of the property in dispute could be effected. The report of the Commissioner, dated August 27, 1965, indicates that he had considerable difficulty in suggesting a division. This is what he said :

"My submission would therefore be that though the property could be divided in the manner desired by the defendant the space which is shown as GI..... its situation is such that business of the type contemplated by the defendant could not be started therein without detriment to the functioning of the theatre."

It is clear from the order of the learned Single Judge that the prima facie impression which he had formed after inspection of the property was that it was not capable of division by metes and bounds. He had given no final decision on the matter when an oral application was made by the plaintiff for withdrawing the suit with liberty to institute a fresh suit. An objection was raised before the trial judge that because the defendant had invoked the provisions of Section 3 of the Partition Act plaintiff could not be permitted to withdraw the suit. The trial Judge, however, took the view that so long as a preliminary decree had not been passed in the partition suit it was open to the plaintiff to withdraw the same. Considering the question whether liberty should be granted to bring a fresh suit under order 23, Rule 1, the trial judge treated it to be axiomatic that in a suit for partition or redemption when a plaintiff withdraws his suit he will be entitled to file a fresh suit as the cause of action is a recurring one. This is what the trial judge said :

"Even if the plaintiff is not granted permission, under Order 23, Rule 1, Civil Procedure Code, he will nevertheless have a right to file a suit for partition at any time he pleases. In view of this obvious right of the plaintiff, it has to be held that the plaintiff is entitled, particularly, in terms of Order 23, Rule 1, to bring a fresh suit."

The suit was dismissed as withdrawn.

3. On October 14, 1966, Raja Maheswara Rao sold his half share in Odeon to N. C. Subramaniam and his sons who in their turn sold that share to Isherdas Sahni and Bros. (P) Ltd. on January 19, 1970, Raja Rajeswara Rao who was defendant in the original suit filed an appeal to the Division bench of the High Court. During the pendency of the appeal the plaintiff died having a Will and by an order passed by the court on October 13, 1967, the executor appointed by the plaintiff under the Will was impleaded as second respondent in the appeal.

4. The Division Bench of the High Court considered that the following questions arose for determination :

(1) Whether the court has an inherent power of sale of the property which is not capable of division apart from the provisions of the Partition Act and whether the plaintiff invoked only such an inherent power and not the power under Section 2 of the aforesaid Act ?

(2) Whether the plaintiff having invoked the jurisdiction of the court under Section 2

of the Partition Act is entitled to withdraw the suit under Order 23, Rule 1 of the Civil Procedure Code at the same time reserving his right to file a fresh suit on the same cause of action ?

(3) At what stage should the request under Section 2 be made, and

(4) Has the defendant who has invoked the jurisdiction of this Court under Section 3 of the Partition Act an indefensible right to compel the plaintiff to sell the plaintiff's half share to him at a valuation and prevent the plaintiff from withdrawing the suit ?

On the first question the High Court expressed the view that the Partition Act conferred on the court in a suit for partition a power of sale in certain specified circumstances. No general power of sale could be spelt out from the provisions of that Act. It was held that Section 2 of the Partition Act had been invoked by the plaintiff and the plaintiff could not withdraw a suit in the circumstances of the present case. It was further held that the request of the defendant under Section 3(1) of the Partition Act must be inquired into by the trial judge. Accordingly the appeal was allowed and the trial Judge was directed to restore the suit to his file and frame the necessary additional issue and proceed to dispose of the request made by the defendant under Section 3(1) of the Act in accordance with law. The present appeal has been brought against that judgment.

5. During the pendency of the appeal in this court Ramamurthi Iyer the executor appointed by the Will of late Raja Maheswara Rao, who had filed the appeal here, died on December 24, 1971. Smt. J. Padmini wife of M. Jayaraj filed C.M.P. 2227/72 for being brought on record as the second appellant on the ground that she was the only person competent to represent the estate of the deceased Raja Maheswara Rao. Another petition C.M.P. 1781/72 was filed in this Court by Isherdas Sahni and Bros. (P) Ltd. on the ground that the said company was the assignee of late Raja Maheswara Rao and was still his legal representative and should be impleaded in his place. On July 18, 1972, this Court allowed Smt. Padmini to be impleaded as appellant but declined the prayer for substitution as appellant of Isherdas Sahni and Bros. (P) Ltd. The company was, however, allowed to intervene in the appeal.

6. Learned counsel for the parties agreed before us that the only question which survives and which requires our decision is whether in the circumstances of the present case the trial court could allow withdrawal of the suit. This involves the determination of the correct position under Order 23, Rule 1 of the C.P.C., in respect of a suit for partition of joint property in which the provisions of the Partition Act have been invoked or are sought to be applied. Order 23, Rule 1 of the C.P.C., to the extent it is material, is as follows :

"Order 23, Rule 1. - At any time after the institution of the suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

Rule 2. - Where the Court is satisfied -

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit In

respect of the subject-matter of such suit or such part of a claim.

Rule 3....."

In *Bijayananda Patnaik v. Satrughna Sahu & Others* ((1964) 2 SCR 538 : AIR 1963 SC 1566 : (1963) 1 SCA 463.), in which an election appeal was sought to be withdrawn it was observed that where an application for withdrawal of a suit is made under Order 23, Rule 1(1), the court has to allow that application and the suit stands withdrawn. It is only under sub-rule (2) where a suit is not being withdrawn absolutely but is being withdrawn on condition that the plaintiff may be permitted to institute a fresh suit for the same subject-matter that the permission of the court for such withdrawal is necessary. In *Hulas Rai Baij Nath v. Firm K. B. Dass & Co.* ((1967) 3 SCR 886 : (1968) 1 SCJ 624 : AIR 1968 SC 111.), a suit for rendition of accounts had been filed. The defence was that the accounts had been settled before any preliminary decree for rendition of accounts was passed. The plaintiff applied for withdrawal of the suit. This court held that there was no ground on which the court could refuse to allow withdrawal of the suit because no vested right in favour of the defendant had come into existence at the point of time when withdrawal was sought. Certain situations were envisaged where different considerations might arise e.g., where a set-off might have been claimed under Order 8 of the C.P.C., or a counter claim might have been filed. Even if the defendant in a suit for rendition of accounts could claim a decree for the amount due to him after rendition of accounts no such right could possibly be held to exist before the court passed a preliminary decree for rendition of accounts. It was particularly noted that in the case of suit between principal and agent it was the principal alone who normally had the right to claim rendition of accounts from the agent.

7. Counsel for both sides have sought to derive support from the above decisions of this court. On behalf of the appellant it has been contended that under Order 23, Rule 1 there is an unqualified right to withdraw the suit if the plaintiff does not wish to proceed with it. It is conceded that if any vested right comes into existence before the prayer for withdrawal is made the court is not bound to allow withdrawal; but it is suggested that this can happen only in very limited circumstances, i.e., where a preliminary decree had been passed or in those cases where a set-off has been claimed or a counter claim has been made. According to the appellant no preliminary decree had been passed in the present suit and thus no vested right had come into existence in favour of the defendant. There was no question of any counter claim or set-off and therefore the trial court was fully justified in allowing withdrawal of the suit. If the matter were to be viewed only in the above light the appellant's contention would have a good deal of force. But the nature and incidents of a partition suit and the consequences which ensue once the provisions of the Partition Act are invoked or sought to be applied must be considered before the contentions of the appellant's counsel can be accepted.

8. The Partition Act was enacted to amend the law relating to partition. Sections 2 and 3 are as follows :

"Section 2. - 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.

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 direction in that behalf.

(2) If two or more share-holders, 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."

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 share-holders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and distribute the proceeds 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 court was bound to give a share to each of the parties and could not direct a sale or division of the proceeds. There could be instances where there was 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 last to the extent of a moiety in the property was made a condition precedent to the exercise 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.

9. A question immediately arises whether after a share-holder has applied for leave to buy at a valuation under Section 3 the other share-holder who has requested the court to exercise its power

under Section 2 of ordering sale can withdraw the suit under Order 23, Rule 1 of the Civil Procedure Code. The answer to this question will depend on the nature of the right or privilege which vests in the co-sharer to seek to derive benefit of the provisions of Section 3. In some of the decided cases a choice or option given to the shareholder under Section 3 has been treated as a right or a privilege. See *Jhamandas Lilaram v. Mulchand Pahlumal* (24 IC 273.) and *Nitish Chandra Ghose v. Promode Kumar Ghosh* (ILR (1958) 1 Cal 243 at 247.). It was argued on behalf of the appellant that even if a right or privilege is conferred by Section 3 on a shareholder once the other shareholder has invoked the procedure prescribed by Section 2 of the Partition Act it is not a vested right which can come into existence only if a preliminary decree has been passed by the court or if a mutual compromise has been effected between the parties. Our attention has been invited to the decisions of this court mentioned before in which the passing of a preliminary decree or a compromise being effected were treated as creating a vested right which prevented the plaintiff in a suit for partition from withdrawing it if the other shareholders were not agreeable. According to the learned counsel for the appellant the only decision in which the point under consideration has been directly considered is that of Viswanatha Sastri, J., in *Hasan Badsha v. Sultan Raziah Begum* (AIR 1949 Mad 772 : 1949 MWN 609 : (1949) 1 MLJ 520.). There both parties had conceded that the property was incapable of being divided by metes and bounds and that it should be sold under the provisions of the Partition Act. The defendant applied to purchase the property under Section 3. A Commissioner was also appointed to report whether the property was capable of division and he reported that it could not be divided by metes and bounds. The plaintiff sought to withdraw the suit. It was held that he was entitled to do so because the court had not made a valuation and an order that the half share of the plaintiff should be conveyed to the defendant on the valuation determined by the court. It might be that an advantage had accrued to the defendant as regards the admissions made in the plaint about the impracticability of dividing the property. That did not clothe the defendant with any enforceable right and did not prevent the plaintiff from exercising the right of a suitor to withdraw the suit. This authority has also been strongly relied upon for the similarity of facts in the present case. Here also, it is pointed out, the court had not come to the conclusion that the property was incapable of division by metes and bounds nor had any valuation been made or order passed for its sale under Section 3 of the Partition Act. On the other hand reliance has been placed by the learned counsel for the respondent on the right which inheres in the other shareholder to claim partition once an action for partition has been instituted. Even if the plaintiff does not wish to prosecute that suit or wishes to withdraw it the defendant or defendants can ask for being transposed to the array of plaintiff to have his or their share partitioned. The following observations of Crump, J. in *Tukaram Mahadu Tandel v. Ramchandra Mahadu Tandel* (ILR 49 Bom 672.), have been cited in support of the above submission :

"But there are other and wider considerations which lead me to hold that plaintiff could not have withdrawn so as to defeat the defendants' claim. It is relevant to point out that in a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another [Order 23, Rule 1(4)]."

It has further been emphasised that in a partition suit the plaintiff is not wholly dominus litis and even on the assumption that Section 3 confers a privilege or an option on the shareholder who is a defendant in a suit for partition the plaintiff is debarred from defeating the exercise of that privilege or option by restoring to the device of withdrawing a suit under Order 23, Rule 1.

10. It seems to us that the true position under Sections 2 and 3 of the Partition Act so far as Order 23, Rule 1, C.P.C., is concerned must be determined in the light of the rule enunciated by Crump, J.

in the above case as that rule has seldom been doubted and there is a large body of judicial opinion to support it. (See the cases at Page 224, Law of Co-shares by D. N. Guha). The various stages in the proceedings would be as follows under Sections 2 and 3 of the Partition Act :

- (1) In a suit for partition if, it appears to the Court that for the reasons stated in Section 2 a division of the property cannot reasonably and conveniently be made and that a sale of property would be more beneficial it can direct sale. This can be done, however, only on the request of the shareholders interested individually or collectively to the extent of one moiety or upwards.
- (2) When a request is made under Section 2 to the court to direct a sale any other share-holder can apply under Section 3 for leave to buy at a valuation the share of the other party asking for a sale.
- (3) The court has to order valuation of the share of the party asking for sale.
- (4) After the valuation has been made the court has to offer to sell the share of the party asking for sale to the shareholder applying for leave to buy under Section 3.
- (5) If two or more shareholders severally apply for leave to buy the court is bound to 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.
- (6) If no share-holder is willing to buy such share or shares at the price so ascertained the application under Section 3 shall be dismissed, the applicant being liable to pay all the costs.

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 option. 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.

12. Coming back to the question of withdrawal of a suit in which the provisions of Sections 2 and 3 of the Partition Act have been invoked we find it difficult to accede to the contention of the appellant that the suit can be withdrawn by the plaintiff after he has himself requested for a sale under Section 2 of the Partition Act and the defendant has applied to the court for leave to buy at a valuation the share of the plaintiff Section 3. In England the position about withdrawal has been stated thus, in the Supreme Court Practice, 1970 at page 334 :

"Before Judgment. - Leave may be refused to a plaintiff to discontinue the action if the plaintiff is not wholly dominus litis or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him."

As soon as a shareholder applies for leave to buy at a valuation the share of the party asking for a sale under Section 3 of the Partition Act he obtains an advantage in that the court is bound thereafter to order a valuation and after getting the same done to offer to sell the same to such shareholder at the valuation so made. This advantage, which may or may not fulfill the juridical meaning of a right, is nevertheless a privilege or a benefit which the law confers on the shareholder. If the plaintiff is allowed to withdraw the suit after the defendant has gained or acquired the advantage or the privilege of buying the share of the plaintiff in accordance with the provisions of Section 3(1) it would only enable the plaintiff to defeat the purpose of Section 3(1) and also to deprive the defendant of the above opinion or privilege which he has obtained by the plaintiff initially requesting the court to sell the property under Section 2 instead of partitioning it. Apart from these considerations it would also enable the plaintiff in a partition suit to withdraw that suit and defeat the defendant's claim which, according to Crump J., cannot be done even in a suit where the provisions of the Partition Act have not been invoked.

13. In the argument of the learned counsel for the appellant emphasis has been laid on the fact that in the present case the court did not give any finding that the property was not capable of division by metes and bounds. It is thus pointed out that the essential condition for the application of Section 2 of the Partition Act had not been satisfied and Section 3 cannot be availed of by the respondent unless it had first been found that the property could be put to sale in the light of the provisions of Section 2. This submission has hardly any substance inasmuch as the trial court had prima facie come to the conclusion that a division by metes and bounds was not possible. That was sufficient so far as the proceedings in the present case were concerned. The language of Section 3 of the Partition Act does to appear to make it obligatory on the court to give a positive finding that the property is incapable of division by metes and bounds. It should only "appear" that it is not so capable of division. It has further been contended that the respondent had maintained throughout that the property was capable of division. He could not, therefore, take advantage of the provisions of the Partition Act. Further, he never made any proper application involving the provisions of Section 3 of the Partition Act and all that he said in his written statement, was that in case the court held that the said property was incapable of division into two shares he was ready and willing to buy the plaintiff's share in the suit at a valuation to be made in such a manner as the court might think proper. In our opinion, this was sufficient compliance with the requirement of Section 3 of the Partition Act. Section 3(1) does not contemplate a formal application being filed in every case. The words employed therein simply mean that the other shareholder has to inform the court or notify to it that he is prepared to buy at a valuation the share of the party asking for sale. In the written statement even if it was maintained that the property was not capable of division by metes and bounds the alternative prayer was necessarily made in Para 7 which would satisfy the requirements of Section 3 of the Partition Act.

14. Our attention has been invited by the learned counsel for the appellant to certain English decisions and in particular to the case of *Peter Pitt and Others v. Thomas Webb Jones* (5 AC 651.), and the statement in *Halsbury's Laws of England*, Vol. 24, Second Edition (Hailsham Edn.) Paras 745 to 747. It has been pointed out that in the English Partition Act, 1868 (31, 32 Victoria, Cap. 40) Sections 3 and 5 are similar in terms to Sections 2 and 3 of the Indian Partition Act. The statement in *Halsbury's Laws of England* and the law laid down in the decided cases, it is urged, do not support the view which has been pressed on behalf of the respondent. The view expressed was that the court had a discretionary jurisdiction if any interested party requested for sale to order sale notwithstanding the dissent or the disability of any other party, if it appeared to the court it would more beneficial for the parties interested. The provisions of the English Partition Act do not appear to be in *pari materia* with those of the Indian Partition Act and we do not consider that any

assistance can be derived from the English law on the points which are being determined by us.

15. In the result the appeal fails and it is dismissed. But in view of the entire circumstances we leave the parties to bear their own costs in this court.

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