

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6692 OF 2005

Rani Aloka Dudhoria and others

.... Appellants

Versus

Goutam Dudhoria and others

.... Respondents

WITH

CIVIL APPEAL NOS. 6693-6694, 6697, 6695 AND 6696 OF 2005

J U D G M E N T

S.B. SINHA, J.

Plaintiffs in a suit for partition are appellants before us. The dispute between the parties relates to three items of properties described in Schedules 'A', 'B' and 'C' of the plaint.

Shorn of all unnecessary details the fact of the matter is as under :-

Azimganj Raj Estate belonged to Raja Bejoy Singh Dudhoria. He died in 1933. He was survived by two sons namely Kumar Chandra Singh Dudhoria (KCSD) and Kumar Padam Singh Dudhoria (KPSD) who succeeded to his estate. On or about 16.10.1953 a mutual partition was entered into between KCSD and KPSD. Some joint family immovable properties were divided and allotted between them on 50 : 50 basis. It was also agreed that in future also on no account whatsoever there shall be any deviation from this allotment and they would equally share the profit and loss arising out of business.

KPSD died on 5.05.1968 and was survived by his widow Rani Aloka Dudhoria and seven daughters, appellants herein except Seema Duhoria, the original plaintiff No. 6. Respondents are heirs and legal representatives of KCSD.

On or about 5.07.1977, a suit for partition was filed by the appellants against KCDS and his sons, which was numbered as C.S. No. 384 of 1977, wherein they admitted equal division of certain immovable properties described in Schedule 'A' of the plaint and sought equal division thereof

between the parties in respect of properties mentioned in Schedule 'B' of the plaint.

On or about 20.07.1979 a preliminary decree was passed in the suit declaring shares in respect of Schedule 'B' properties – half : half between the plaintiffs and the defendants.

One Shri Nirmal Kumar Mitra, Advocate was appointed as Commissioner of Partition for the purpose of dividing the properties between the parties and determining their respective liabilities (taxes etc) on half and half basis. It was furthermore directed that valuation of the property situated 91, Netaji Subhash Road, Kolkatta be got done by a valuer and then offered to the parties for sale.

Several meetings were held by the Commissioner during the period 30.10.1979 and 10.02.1982.

In the meantime, however, KCSD, died on 16.12.1980 leaving behind defendants No. 2 to 6 as his heirs and legal representatives.

On or about 10.07.1982 an application was filed by the defendants praying inter alia for the following directions to the Commissioner :

- “(a) to divide the properties in Schedule C by holding a lottery amongst the parties and thereby allotting two lots accordingly;
- (b) for determination of tax and other liabilities.”

By a consent order dated 1.09.1982 the said application was allowed, directing:

“By consent of the parties there will be an order in terms of prayer (a) of the petition, except the Commissioner of Partition will sell out through lottery the premises at Jiaganj, where the post office is situated. The commissioner of Partition will divide the properties as mentioned in Schedule ‘C’ into two lots. It is agreed by and between the parties that the division of the properties into two lots first option will be given to the client of Mr. Anindya Mitra to choose the first lot. It is recorded that such properties as mentioned in Schedule ‘C’ have already been divided into two lots by the defendants, which would be submitted to the Commissioner of Partition for the purpose of holding the lottery. Such lottery will be held by the Commissioner of partition within two months and one half from date. Whoever is in possession of the title deed in respect of the properties will submit the same to the Commissioner of partition for the purpose of handing them over to the party concerned. By consent of the parties there will also be an order in

terms of prayer (b) of the parties, so far as prayers (d) and (e) of the petition are concerned. Mr. Deb Kumar Sinha, Advocate of M/s Mukherjee & Biswas and Mr. Ananda Agarwalla, Advocate of M/s Rajesh Khaitan & Co. will sell the property situated at Serampore along with the tank and hold the sale proceeds of such sale for the purpose of making payment in respect of the liabilities of the joint properties. Such liabilities will be ascertained by them and approved at a meeting of the parties and thereafter disbursement will be made, and the balance amount will be held by them till further orders of this Court. Such balance amount is to be deposited in a short terms fixed deposit account with any nationalized bank. Although the entire order has been passed by consent of the parties. Mr. Chakraborty submitted that this order be recorded to be made without prejudice to the main contentions made by the parties in the original suit. It is further recorded that the client of Mr. Chakraborty has not filed any affidavit in reply and under the circumstances he does not admit the allegations as contained in affidavit in opposition.”

In the proceedings dated 18.10.1982 the Commissioner observed: ‘it is unfortunate nothing has yet been done on behalf of the plaintiffs with regard to supplying of scheme of partition’.

The Commissioner asked the parties to give a clear and definite answer to his query as to how they propose to make valuation of the

properties for implementation of the aforesaid consent order dated 1.09.1982.

An application was made for dismissal of Shri Nirmal Kumar Mitra as a Commissioner of Partition. While declining the said prayer, the High Court by its order dated 5.07.1983 appointed Mr. Ranajit Mitra, Advocate as Joint Commissioner of Partition to act jointly with him and carry out the order dated 1.09.1982, the operative portion whereof reads as under:

“...Under the circumstances, at this stage it was not open to Mr. Anindya Mitra’s client to urge that the properties should be valued first before the same are put up for lottery by the Commissioner of Partition. Various charges have been levied against the Commissioner of Partition and in view of loss of confidence by the plaintiff as also the defendants including the defendant no. 6 in the Commissioner of Partition, on the basis of which they have prayed for removal of the Commissioner of Partition. This Court does not wish to remove the Commissioner of Partition at this stage. Mr. Ranajit Mitra is appointed Joint Commissioner of Partition to act with the Commissioner of Partition jointly and carry out this Court’s order passed on 1.9.82 forthwith. There is also a similar direction on Mr. Deb Kumar Sinha as also Mr. Ananda Agarwalla to carry out the earlier order. Costs would be costs in the cause.

The Commissioner of Partition was given 76 GMS. To be as remuneration, the Joint Commissioner of Partition would also receive the

same remuneration of 76 Gms. to be shared by both the parties equally.

It has further been brought to the notice of this Court by Mr. A.C. Kar that inspite of inventory being made and statement having been given by the previous Commissioner of Partition of the moveable properties, these moveable properties and missing and to the steps had been taken with regard thereto.

All parties including the Joint Commissioner of Partition to act on signed copy of the minutes of this order on the usual undertaking.”

On or about 10.06.1983 defendants/respondents made yet another application for direction, inter alia, praying that:

- “a) Plaintiffs be directed to choose any one of the lots from either annexure ‘J’ or ‘K’ herein.
- b) The lot chosen by the plaintiffs be allotted to them and the other lot be allotted to the defendants;
- c) Alternatively, the lots prepared by the defendants be put to lottery and allotment made in accordance with the result of the lottery”

On or about 25.07.1983, a meeting of the Joint Commissioners was held in which properties which were not in dispute were amicably divided. It was suggested in the meeting that defendants should submit their valuation in respect of the suit properties of Rajbari, Azimganj and Dharmshala at Azimganj, (which were said to be impartible estates and were not included in any of the two lots) and the plaintiffs shall have an option either to accept the offer and take properties at that valuation or to ask the defendants to purchase the properties at that valuation. In respect of third property being, viz., situated at 91, Netaji Subhash Road, Calcutta it was directed that both the plaintiffs and defendants would come with their own valuation and if valuation thereof is agreed upon by the parties, then the order dated 20.07.1979 shall be carried out.

In the meeting held on 30.07.1983 plaintiff No.2, Sheela selected lot 'B' out of the two lots suggested in the defendants' scheme, and accordingly lot 'A' was allotted to the defendants. Plaintiffs and defendants declared that they do not have title deeds of any of the properties nor they have created any encumbrances in respect of the properties. After some discussions, the Joint Commissioners of Partition inter alia issued the following directions :

“(b) It is made clear that on 2nd August, 1983 the parties will come prepared with their valuations in respect of the three properties being premises No.91, Netaji Subhas Road, Calcutta, Rajbari at Azimganj and Dharamsala at Azimpunj.

(c) On 2nd August, 1983 the Joint Commissioners of Partition will hold auction in respect of the said three properties at the valuation which the parties will make which would be accepted as the reserve price.

(d) In the event either the plaintiffs or the defendants do not give their valuation in respect of any of the said three properties, then the procedures which were decided during the last meeting held on 25th July, 1983 would be followed.”

On or about 16.08.1983 the defendants made the third application inter alia praying for : (a) decree of partition in terms of allotment made by the Joint Commissioners in its meeting dated 30.07.1983; and (b) direction to the Commissioners for allotment of the 3 remaining properties without valuation.

On the said application, it was recorded that an order had already been passed in terms of prayer (a). An order was also passed in terms of prayer (b). It, however, appears that the prayers (a) and (b) made in the

notice of motion and the application were different. Whereas in the prayer (b) of the notice of motion, allotment of the properties was to be made, without valuation, no such prayer was made in the application itself. In this connection, we may notice that prayer (b) in the notice of motion was:

“(b) Directions be given to the Joint Commissioner of Partition regarding allotment of properties being premises No.91, Netaji Subhas Road, Calcutta, Rajbati at Azimganj and Dharamshala at Azimganj to offer the property to the parties for being bid without valuation”

In the application, however the prayer (b) reads as under:

“(b) Directions be given to the Joint Commissioner of Partition regarding allotment of properties being premises No.91, Netaji Subhas Road, Calcutta, Rajbati at Azimgange and Dharamshala at Azimganj;”

We may also note the order passed by Khastgir, J. in the following terms:

“The matter was adjourned from time to time to enable the parties to finally sign the terms of settlement. But the parties could not agree to the clauses suggested by the plaintiffs that in the event the plaintiffs became the successful bidders of the

joint family properties the defendants should indemnify and keep the plaintiff safe and harmless in respect of any encumbrances or charge affecting such properties which might have been created by Kumar Chandra Singh Dudhoria, since deceased or his heirs and successors. Similarly the plaintiffs agreed to indemnify to keep the defendants safe and harmless in respect of any encumbrances and any charge affecting such properties which might have been created by Kumar Padam Singh Dudhoria or his heirs and successors. That clause appears to be reasonable in as much as the parties who bid for such properties and purchase the same at such auction held by the Joint Receivers may not suffer due to some encumbrances created by the erstwhile owners. Under the circumstances for the protection of interest of both the parties such clause should be there in the order itself.

An Order in terms of prayer (a) of the petition had already been passed for partition in terms of allotment made at the joint meeting of the Commissioner of Partition held on 30th July, 1983. There will also be an order in terms of prayers (b) and (c) of the petition.”

We will advert to this question a little later.

It, however, appears that during the period 11.06.1984 and 7.07.1991, i.e., for a period of about seven years, no demarcation in respect of lot ‘A’ and lot ‘B’ properties had taken place. No step was taken by any of the parties to purchase the said properties, one way or the other. The

question cropped up again before the Commissioner, in a meeting held on 7.07.1991, wherein on behalf of the appellants, Amita, Appellant No. 4 participated.

It was agreed to by and between the parties that as in terms of the order of the court, the three properties were to be auctioned between them, valuation of those three properties by any valuer was not necessary. Such a consent appears to have been given to do away with the expenditures which were required to be incurred therefor.

Admittedly the appellants remained absent in some meetings held by the Joint Commissioners of Partition. By a letter dated 27.08.1991, the Joint Commissioners expressed their unhappiness thereover stating that as they were professional people, the parties should cooperate. It was directed:

“By notice dated 21st August, 1991 we fixed a meeting today at the residence of Mr. Nirmal Mitra, one of the Joint Commissioners for the purpose of implementation of the decisions taken by us during the meeting held on 7th July, 1991. This meeting was extremely important. Mr. Goutam Dudhuria, one of the party attended the residence of Mr. Nirmal Mitra in time and waited till 7.30 P.M. However, no one attended on behalf of the Plaintiffs and the net result is that we could not hold the said meeting. We do not appreciate this kind of conduct of any of the parties. Parties

should realize that we are professional people and we cannot afford our time to be wasted in this manner.

Be that as it may, please take notice that on 11th September, 1991 we shall hold the scheduled meeting at 4.30 p.m. at the Bar Library Club, first floor, High Court, Calcutta. You are requested to attend the said meeting along with your respective clients. During the said meeting we will take the necessary decisions relating to the items recorded in the minutes of the meeting dated 7th July, 1991. Should any party fail to attend the said meeting on the scheduled day then the decision would be taken in his/her absence.”

Yet again for a period of about 2-3 years, steps were taken only for demarcation of other properties in Lot ‘A’ and Lot ‘B’. The question as regards implementation of the order dated 11.06.1984 and partition of the three properties without valuation in the aforementioned situation cropped up once again.

Defendants moved the fourth application on or about 22.01.1997 stating that one of the Joint Commissioners, viz., Mr. Ranojit Mitra was elevated as a Judge of the Calcutta High Court and in view of the non-cooperation of the appellants herein at the meetings before the Commissioner, the question of division and disposal of the three properties

was still hanging; and the properties being in a dilapidated condition require repairs and furthermore tax liabilities were mounting.

Directions were sought for on the following terms:

- “a) Mr. Nirmal Kumar Mitra, Bar at law be directed to act as the Sole Commissioner of Partition with consequential directions;
- b) Minutes of the meeting dated December, 19, 1993 and February 27, 1994 along with the plan annexed thereto being annexure ‘O’, ‘G’ and ‘H’ respectively to this petition be treated as part of the order dated June 11, 1984 and be drawn up and completed accordingly.
- c) The commissioner of Partition be directed to:
 - (i) Sell the three properties referred to in paragraph 1 of this petition in terms of the order dated June 11, 1984 after giving peremptory direction to all concerned in this regard;
 - (ii) In the event of either of the parties failing to attend the date to be fixed by the commissioner of partition for auction, liberty be given to the commissioner of partition to permit the parties present to purchase the said properties at their own valuation.
- (iii) Ascertain and apportion the liability of the estate and devise ways and means to liquidate the same.
- (iv) To complete allotment to the successful bidders within a stipulated time as may be fixed by this Hon’ble Court.”

Sujit Sinha, J. on the said application by an order dated 10.09.1997 directed that Shri Nirmal Kumar Mitra to remain the sole Commissioner and furthermore directed Shri A.P. Aggarwal, who appeared on behalf of the appellants, to file an affidavit to the said application, the next date wherefor was fixed on 10.03.1997.

By an order dated 10.03.1997, the learned Judge noted that the Commissioner had made partition, allotment and demarcation of the other properties in accordance with the decree and directed him to carry out the order dated 11.06.1984 in respect of allotment of the remaining three properties within four weeks, wherefor seven days' notice was required to be served on the parties in order to enable them to appear personally or through their advocate and to proceed even ex-parte if any of the parties chose not to appear.

Notice, pursuant to the said order, was served upon the learned advocates for the parties. By way of abundant caution, however, notices were directed to be served on three of the plaintiffs, viz., Plaintiff Nos. 1, 3

and 6. According to the appellants, plaintiff - appellant No. 1 herein was unwell and away to Delhi. Plaintiff No. 3 had married long back and had been staying in USA for more than 15 years and the plaintiff No. 6 Seema was colluding with the defendants. No notice admittedly had been served upon Amita, plaintiff No. 4. It, however, appears that Shri A.P. Aggarwal appeared and sought for adjournment inter alia on the premise that Rani Aloka Dudhoria, appellant No. 1 herein was ailing. No adjournment, however, was granted. Liberty was given to the parties to mention the matter before the court for extension of time. It is stated that in the meantime the parties had changed their addresses. Amita had shifted her residence from 48, Gariahat Road, Calcutta to 48/2B, Gariahat Road, Calcutta.

A prayer for extension of time was made only by the counsel for the respondents. The time was extended by three weeks, i.e., upto 7.05.1997 .

The Commissioner held a meeting on 8.05.1997. According to the appellants, no notice was served on them. A notice, however, was sent on 28.04.1997 to M/s. Rajesh Khaitan & Co. intimating him about holding of the meeting on 8.05.1997. According to the appellants, Mr. Anand

Aggarwal did not inform them despite having knowledge as regards the changed address and contact numbers. In the said meeting, however, Seema participated. She appeared with advocate Anand Aggarwal.

Appellants contend that she had no authority therefor.

In the said meeting, the learned Commissioner noticed the orders of the High Court dated 20.07.1979 and 11.06.1984 so far as the same related to auction of the property on a half and half share basis to be held by the parties and the same was to be conducted between the two groups stating:

- “(a) Bid offer shall be made with regard to 50% interest and on acceptance of the bid, the successful bidder will pay 10% of the consideration immediately by cheque and the balance within 45 days.
- (b) In default of balance consideration, the initial 10% shall stand forfeited and the bid shall stand annulled, whereupon the other party shall have the option to purchase the property at the same price and on the same terms and conditions.
- (c) The successful bidder will have the conveyance made in respect of the 50% interest of the other party within 3 months of the date of payment of the full consideration and the other party shall take necessary steps to comply therewith.
- (d) Simultaneously with the payment of the entire consideration the other party shall hand over possession along with all

documents relating to title or tenancies to the successful bidder.”

The bid in respect of the aforesaid three properties was to take place on 9.05.1997.

Seema admittedly did not participate in the bid. Defendant No. 2 alone made a bid of Rs. 7 lakh for the Rajbari property and a bid for Rs. 75,000/- for Dharamshala property. Defendant Nos. 2 and 3 made a joint bid of Rs. 24 lakhs for the properties situate at 91, Netaji Subhash Road.

It is not in dispute that the Rajbari property was situate on 4 bighas of land. It contained more than 100 rooms. The Dharamshala property is a double storeyed building situate on about one bigha of land. The Netaji Subhash Road property is situated on 12 ½ cottahs of land. In the said bid proceedings, it was, however, shown that the plaintiff No. 1 was allegedly present and cheques had been handed over to her, as would appear from:

“ RAJBARI AT AZIMGANJ:

Plaintiffs –x Defendants No. 2 and 3 jointly

Rs.7,00,000/-

A cheque for Rs.35,000/- (Rupees thirty five thousand) only being 5% of earnest money bearing No. 629603 dated 09.05.97 drawn on Federal Bank Limited, Bhowanipur, Calcutta is handed over by Sidharth Dudhoria, the defendant No.3 to Rani Akola Dudhoria, the Plaintiff No.1

A cheque for Rs.35,000/- (Rupees thirty five thousand) only being 5% of earnest money bearing No. 378915 dated 09.05.97 drawn on Federal Bank Limited, Bhowanipur, Calcutta, is handed over by Shri Goutam Dudhoria, the defendant No.2 to Rani Aloka Dudhoria the Plaintiff No.1

DHARAMSHALA AT AZIMGANJ:

Plaintiffs –x Defendant No. 2 Rs.75,000/-

A cheque for Rs.75,000/- (Rupees Seventy five thousand) only being 10% of the earnest money bearing No. 378917 dated 09.05.97 drawn on Federal Bank Limited, Bhowanipur, Calcutta is handed over by Mr. G. Dudhoria, the defendant No.2 to Rani Akola Dudhoria, the Plaintiff No.1

91, NETAJI SUBHAS ROAD, CALCUTTA

Plaintiffs –x Defendant No. 2
Rs.24,00,000/-

A cheque for Rs.2,40,000/- (Rupees Two lakhs forty thousand) only being the agreed earnest money bearing No. 378916 dated 09.05.1997 drawn on Federal Bank Ltd., Bhowanipur, Calcutta is handed over by Shri Dudhoria the defendant No.2 to Rani Akola Dudhoria, the Plaintiff No.1”

The appellants contend that the plaintiff No. 1 was not and could not have been present on the said day in the High Court as she was at Delhi. There is no denial to such assertion.

The Defendants' advocate served a notice asking the plaintiffs to discharge their obligations under the conditions of sale finalised on 8.05.1997 including handing over of document relating to title, tenancies, attornment, etc.

According to the plaintiffs, this letter had not been sent to or forwarded to the plaintiffs. Stipulated period of 45 days expired on 20.06.1997. Allegedly, despite the same, payments had not been made by the defendants in respect of any of the properties. A meeting was held only on 30.06.1997 whence it was stated on behalf of the appellants that they were not in possession of any documents in respect of properties at Azimganj although the plaintiffs had agreed to hand over all the documents available with them.

On behalf of the defendants/respondents, a letter dated nil addressed to Mr. Anand Agarwal was issued, stating:

“In this regard we also refer you to the meeting held at our office on 30th June which was attended by you with your client. As it has been represented by your clients through you that they are not in possession of any paper pertaining to the Rajbati and Dharamshala we under instruction of our clients forward you herewith three several cheques aggregating to Rs.6,97,500/- being the balance payment in respect of the said two properties for payment to your clients. It may further be noted as agreed that you shall at your earliest sent to us a list of documents in your clients possession relating to 91, Netaji Subhas Road, Calcutta and would also confirm whether all your clients are available to sign papers relating to transfer of the above properties and/or receipt of such confirmation our clients would pay the balance consideration of the said third property alternatively an application would be made for final disposal of the suit and upon such order as the Hon’ble Court may direct necessary steps will be taken.

Along with the said letter, the following cheques were enclosed, all of which were drawn in favour of Mr. Anand Agarwal:

- “1. Cheque No. 629605 dt. 1.7.97
Drawn by Siddharth Dudhuria on
the Federal Bank Ltd.
of Bhowanipore for Rs.3,15,000/-
2. Ch. No. 382712 dt. 1.7.97 drawn by Goutam Dudhuria
on the Federal Bank Ltd., Bhowanipore for Rs.67,500/-
3. Cheque No. 382713 dt. 1.7.97 drawn by

Goutam Dudhuria on the Federal Bank Ltd.,
Bhowanipore for Rs. 3,15,000/-“

It, however, stands admitted that the said cheques have not been encashed. The said payments furthermore were only in relation to two of the properties.

According to the plaintiffs, the appellant Nos. 1 and 4 allegedly returned to Calcutta only on 17.07.1997.

It is, at this juncture, Amita Dudhuria wrote a letter dated 24.07.1997 to M/s. Rajesh Khaitan & Co. asking for copies of all the orders and minutes of the meetings which had taken place in their absence alleging that that Mr. Agarwal had all along been aware that Sheela Jain and herself had been looking after the matter and that they had been away from Calcutta.

Rani Aloka Dudhuria is said to have gone back to Delhi with Seema for treatment again on 28.07.1997. Allegedly, neither Seema nor Amita Dudhuria disclosed about the development of the case to her. However, in the meantime, xerox copies of the documents relating to 91 Netaji Subhash

Road were forwarded to the defendants by the appellants in terms of a letter dated 23.07.1997.

Thereafter Amita alone made an application on 22.09.1997 for cancellation of the sale of the three properties, stating:

“(1) In 1996-97, Rani Aloka, P1, and Seema, P6 had shifted from the original house to reside together at a new place in Calcutta; she herself (Amita) had shifted to a separate new place.

(2) Amita had left Calcutta to stay at Delhi for a year (1996-97) for medical treatment of her mother, Rani Aloka, P1.”

It was prayed:

- “b) The purported sale of three properties namely premises no. 91, N.S. Road, Calcutta 700 001, Rajbati in Azimganj and Dharamsala at Azimganj on May 9, 1997 by the Commissioner of Partition Mr. Nirmal Kumar Mitra, Barrister at Law, be set aside and/or cancelled;
- d) Order dated March 10, 1997 passed by the Hon’ble Justice Sujit Kumar Sinha be recalled and/or set aside.
- e) Commissioner of Partition and/or Receiver be directed to make fresh inventory of all movables and/or immovable lying inside Rajbati, Azimganj.”

On the next day, i.e., on 23.09.1997, the respondents made the fifth application for confirming the sale of all the three properties in their favour. Appellant No. 4 took a change of her attorney from M/s. Rajesh Khaitan & Co. to M/s. Dipak Dey & Associates.

A.N. Ray, J. (as the learned Chief Justice then was) gave an opportunity to the appellant to bid for the three properties again but they failed to do so. It is alleged that for the first time Mr. Anand Agarwal informed Rani Aloka Duhoria about the application filed by Amita, Goutam and Sidharth. Rani Aloka instructed him to oppose the application for confirmation of sale of the defendants and to support the application of Amita.

On 2.12.1997, Amita agreed to pay Rs. 20 lakhs in response to the defendants' offer and sought for six months' time to deposit Rs. 10 lakhs towards 50% of the amount but the High Court rejected the said prayer stating that it was made with a view to delay the matter. The application for confirmation of sale was, therefore, allowed, stating:

“It was urged that notice of the sale was not given to all the parties. The advocates-on-record were all along with notice of what was happening before the Learned Commissioner of Partition. If

some party did not appear it was only because he or she did not choose to appear.

If the history of this litigation is reviewed it will be seen that the plaintiffs have not been active at all in the matter of the present litigation. All steps were taken by Mr. Chakraborty's Clients all along."

The other plaintiffs also changed their lawyers replacing Anand Agarwal with M/s Victor Moses & Co.

Two Letters Patent Appeals, one by Amita and another by other plaintiffs except Seema, were filed, which were marked as APOT No. 742 of 1997 and APOT No. 71 of 1998.

The Division Bench by an order dated 8.01.1999, with the consent of the parties, directed resale of the properties, stating:

"It is recorded that all allegations against Mr. Anand Agarwal, Advocate of M/s Rajesh Khaitan & Co., Advocates, are withdrawn. Mr. Agarwal agrees to continue to represent Miss Sheema Dudhoria.

Let this matter appear in the list marked "TO BE MENTIONED" for filing of Terms of Settlement.

Miss Sheema Dudhoria is directed to be personally present in Court on that date.”

Terms of settlement between the parties were considered. Some changes were proposed. The agreed terms were signed by the parties on 28.01.1999. Amita offered a sum of Rs. 21 lakhs. An objection was raised on behalf of Goutam and Sidharth that Amita should not be given the opportunity to bid separately. In view of the said controversy, the Division Bench released the matter by an order dated 29.01.1999.

We may, however, notice that whereas the Division Bench in its order dated 8.01.1999 recorded that all allegations against Mr. Anand Agarwal were withdrawn, a submission has been made before us that as the settlement could not have been given effect to, the same also stood withdrawn.

A special leave petition was preferred by Amita as also the other plaintiffs except Seema.

By an order dated 13.03.2003, this Court refused to interfere in the matters on the premise that the appeal had emanated from an interim order.

Contentions of the parties were however left open to be urged before the High Court.

By reason of an order dated 10.02.2004, the Division Bench dismissed the Letter Patents Appeals being APOT Nos. 742 of 1997 and 71 of 1998.

On or about 12.03.2004, cheques representing the amount of balance consideration were forwarded by Goutam and Sidharth, which are said to have not been encashed.

A review application was filed by the parties which has been dismissed by reason of the impugned judgment dated 20.08.2004.

Mr. Manoj Goel, learned counsel appearing on behalf of the appellants, would submit:

I. The impugned judgment cannot be sustained as the auctioneers had in collusion committed fraud on the plaintiffs and/ or the court, the particulars whereof are :-

- (i) The application dated 22.01.1997 was moved by the defendant No. 2 after a complete lull of 13 years when the plaintiff No. 1 was unwell and the plaintiff No. 4 was to take her to Delhi for treatment. Thus, all proceedings took place behind their back.
- (ii) At no point of time, the necessity of valuing the property having been given up, only because a chartered valuer was not to be appointed, the same would not mean that the property was not to be valued at all. Plaintiffs tainted before the Commissioner as and when they noticed therefor.
- (iii) When one of the Joint Commissioners was elevated as a High Court Judge and when a prayer had been made earlier that Mr. N.K. Mitra be replaced by another Commissioner, the prayer for his appointment as a sole Commissioner was an act of fraud on court on the part of the respondents.
- (iv) As the defendants knew that there was a provision for reserved price to be fixed as per the agreement between the parties, as would appear from the order dated 11.06.1984, the prayer purported to have been made to value the said properties on their individual basis was illegal. Consequently, the sale without fixing

a reserved price was also illegal. In any event, the sale should not have been confirmed as the price was low and one of the plaintiffs had outbid the defendants' offer but stringent conditions were imposed, viz., minimum payment despite the fact that the auction purchaser themselves did not comply with the said conditions.

- (v) A peremptory order dated 10.03.1997 was taken by the defendants when except plaintiff No. 6, no other plaintiff was available.
- (vi) The Commissioner could not have devised his own procedure as regards service of notice despite the order dated 10.03.1997 that notice should be served to all the parties. There was no reason to serve notices only on plaintiff Nos. 1, 3, and 6 although it was the plaintiff No. 4 who had been representing them. Notice was not and could not have been served upon the plaintiff Nos. 1 and 4 as at that point of time they were not in Calcutta. The notice dated 5.04.1997 asking the parties to appear on 10.04.1997 was for a period of less than seven days' despite the clear directions by the High Court as contained in its order dated 10.03.1997. The minutes of the meeting were again served on the Advocate and not on the parties in violation of the court's orders dated 11.06.1984 and 10.03.1997.

- (vii) Four weeks' time although had been prayed by Mr. Anand Agarwal on the ground of illness of plaintiff No. 1, adjournment was given for a lesser period so as to enable the defendants to complete the entire deal within the said period.
- (viii) Although the Commissioner advised the parties to seek extension of time as the four weeks' time had expired, an application was made in respect thereof by the respondents without making the appellants aware thereof.
- (ix) Although the time granted by the court expired on 7.05.1997, the purported sales were carried on 8.05.1997 and 9.05.1997 when the Commissioner had become functus officio.
- (x) Mr. Anand Agarwal had never informed the plaintiffs about the meetings dated 8.05.1997 and 9.05.1997 and on the said dates only defendant Nos. 2 and 3, their counsel and plaintiff No. 6 with Mr. Anand Agarwal were present. It was for the first time that the plaintiff No. 6 Seema ever participated in the court proceedings or proceedings before the Commissioner.
- (xi) Despite the fact that the Plaintiff No. 6 was a minor when the suit was instituted, which fact was known to Mr. Anand Agarwal, she not having attained majority executed a power of attorney in

favour of the plaintiff No. 1. She could not have represented the plaintiffs. No such proof of authority was even asked by the defendants, nor any proof therefor was filed. This appears to be strange as the Commissioner who had been taking the proceedings since 1979 knew that Sheela Jain and Amita alone were representing the plaintiffs.

- (xii) Although the property situated at Shrirampore was to be sold for discharging joint fiscal liabilities of both the parties, one of the conditions which was put was that the bidder shall pay and bear the municipal and other land taxes.
- (xiii) Although 10% of the consideration amount was to be paid through a cheque drawn in favour of the plaintiff No. 1, representing the other plaintiffs, a cheque was drawn in favour of plaintiff No. 6 who put the same in the joint account with the plaintiff No. 1 and also withdrew the amount.
- (xiv) Although in the terms of sale it was stipulated that the balance consideration would be paid within 45 days, but the amount in respect of Rajbari and Dharamshala properties situate at Azimganj was tendered only on 3.07.1997 i.e. much after the said stipulated period in violation of Clause (c)(ii) as also Clause (g) in terms

whereof no extension of time was permissible. No payment has been made till date in respect of the property situated at 91, Netaji Subhash Road property which was offered only in 2004.

- (xv) Although no documents of title or other papers were available, in respect of the properties in suit as would appear from the minutes of the meeting of the Joint Commissioner dated 30.07.1983, Clause (f) of the terms could not have been made a condition to be fulfilled simultaneously with the payment of the entire balance consideration.
- (xvi) For holding of meeting dated 9.05.1998, no notice / communication was sent to the parties except the defendants and Seema. No inter-branch meeting took place which was in violation of the terms of the preliminary decree. Although the plaintiff No. 1 was not present in the meeting dated 9.05.1997, it was shown that the cheques towards 10% payment in respect of three properties were handed over to her which clearly points out the fraudulent action on the part of the defendants and their collusion with plaintiff No. 6 and even the Commissioner.
- (xvii) Although the defendants were aware that no document of title was available, in their communication dated 20.06.1997, they sought to

enlarge the time for payment by writing a letter just three days prior to the expiry of 45 days period and put a condition of simultaneously for handing over of documents.

(xviii) No explanation has been offered by Mr. Anand Agarwal as also the plaintiff No. 6 as to why they had not objected to such tender of payment which was contrary to the stipulated terms of sale held on 8.05.1997 which clearly demonstrates that they had been colluding with the defendants.

(xix) Cheques drawn in the name of Advocate on Record was no payment in the eye of law particularly when the initial cheque in respect of the deposit of 10% from the bid amount was drawn in the name of the plaintiff No. 1. There is nothing on record to show as to at whose instance the cheques were drawn in the name of advocate and he had agreed to accept the same.

(xx) Yet again, so far as the property situated at 91, Netaji Subhash Road is concerned, no simultaneous payment was made which was in violation of the terms of conditions of sale. As the said property was a tenanted one, the question of handing over of actual physical possession thereof did not and could not arise.

- II. The properties being impartible in nature, the sale of the said properties could have taken place only in terms of the provisions of Order XXVI, Rule 18 of the Code of Civil Procedure as also those of the Partition Act.
- III. The High Court in its order did not advert to the question as to whether Seema had any authority or not to represent the appellant wrongly but proceeded to hold that the plaintiffs, being not diligent, were not entitled to any relief.
- IV. The High Court committed a serious illegality insofar as it failed to deal with the contentions raised by the appellants on fraud and collusion of the parties.
- V. The Commissioner had no authority to put the properties on auction on 8.05.1997 which was beyond the period of three weeks granted by the court.
- VI. No bid having taken place either inter-parties or intra-parties and as the defendant Nos. 2 and 3 had bid only individually the same could not have been confirmed.
- VII. As the properties were put on auction, the valuation of the property was not relevant.

Mr. P.S. Narasimha, learned counsel appearing on behalf of the appellants in Civil Appeal Nos. 6693-94 of 2004 would contend:

- (i) The High Court committed a serious error to consider that the parties were not diligent throughout on an assumption that the matter had been going on from 1979 although diligence on their part for a period of four months was only relevant.
- (ii) As the plaintiff No. 6 was at all material time and still is supporting the defendants, the High Court should have considered the fact that the plaintiffs had not been present when the auction took place.
- (iii) Serious allegations of fraud and collusion made against the advocate were withdrawn in view of the fact that a settlement between the parties had been arrived at and as the settlement could not be given effect to, withdrawal of allegations against him also stood withdrawn.
- (iv) The direction on the part of the learned Single Judge to deposit the entire amount was unfair as even the defendants did not deposit the entire amount by way of fulfillment of the condition of sale which although raised in the review application but had not been dealt with. As in terms of clause c(iii) of the condition of sale, the

amount was to be forfeited, the sale was confirmed but no payment had been made within a period of six months.

- (v) In terms of the provisions of the Partition Act, valuation of the property was mandatory in nature. It was to be made both before and after the preliminary decree.
- (vi) Although the question as to whether a fraud has been practised or not is a matter of proof, the High Court committed an illegality insofar as it refused to enquire into the matter.

Mr. Sunil Gupta and Mr. Altaf Ahmed, learned senior counsel appearing on behalf of the respondent Nos. 1 and 2, on the other hand, would contend:

- (i) The appellants did not file any application before the learned Single Judge to challenge the sale of the plaintiffs' share in the said properties in favour of the defendants. They merely supported the application of the plaintiff No. 4 who alone had filed an application before the learned Single Judge to assail the said sale.

- (ii) When the plaintiff No. 2 Sheela was in Calcutta, she represented the plaintiffs. After her marriage, plaintiff No. 4 Amita represented the plaintiffs and when Amita also was not available, plaintiff No. 6 Seema represented the plaintiffs because none of the other plaintiffs were in Calcutta. She herself stated before the Commission on 09.05.1997 that she had been authorised to attend the meeting and to receive cheques for and on behalf of the plaintiffs. Moreover, Seema, Amita and Rani Aloka were residing together when Rani Aloka was in Calcutta during 1996-97. This fact clearly shows a perfect harmony between Rani Aloka, Seema and Amita and, thus, the allegation that Seema did not have any authority to represent them is manifestly an afterthought.
- (iii) As regards the allegation of lack of notice of the meetings before the Commissioner, the same is also false as the plaintiffs or their advocate had notice of all the meetings and even the terms of the bidding were settled in presence of Seema and the plaintiffs' advocate. Under Chapter I, Rules 6 and 13 of the Original Side Rules of Calcutta High Court, an advocate of a party is entitled to represent his/ her client in the suit and in all matters in connection therewith.

- (iv) No allegation of collusion on the part of their advocate was made by the plaintiffs before the learned Single Judge. Furthermore, all allegations made against their advocate were withdrawn by the plaintiffs before the Division Bench.
- (v) As regards alleged collusion between Seema and the defendants, no evidence in support thereof has been furnished.
- (vi) What happened in the meetings dated 8.05.1997 and 9.05.1997 was merely the implementation of what had earlier been agreed to between the parties in the meetings dated 25.07.1983, 30.07.1983 and 7.07.1991.
- (vii) As regards valuation of the property before bidding the plaintiffs had agreed that valuation of the three properties was not necessary which is evident from the orders dated 5.07.1983 and 11.06.1984 as also the minutes of the meetings dated 25.07.1983 and 30.07.1983. Moreover, there had never even been a suggestion to the court by any side that since the property is indivisible for the reasons stated in Section 2 of the Partition Act, there needs to be a public sale. The sale took place only as an equitable measure for the purposes of carrying out the division ordered in the preliminary decree.

- (viii) The plaintiffs have never cooperated with the defendants or the Commissioner in implementing the orders of the court and failed and/ or neglected to attend several meetings called by the Commissioner.
- (ix) Under Section 12 of the Limitation Act, 1963, for the purpose of computing the limitation period, the day on which the order was passed has to be excluded. As the last extension of time was granted by an order dated 17.04.1997 for three weeks, it would expire on 8.05.1997 and not on 7.05.1997. Furthermore, the terms and conditions of the bidding process were finalized on 8.05.1997 and on 9.05.1997, only the same were given effect to.

The relationship between the parties is not in dispute. The extent of the joint family properties is also not in dispute. We are concerned with only 3 impartible properties as described in Schedule 'B' of the plaint, namely – premises No. 91, Netaji Subhas Road, Calcutta, Rajbari at Azimganj and Dharamshala at Azimganj. Indisputably the said properties were put to auction, a bidding was held by the Commissioner of Partition on 9th May, 1997. So far as the property - Rajbari at Azimganj is concerned, defendant Nos. 2 and 3 had purchased it jointly for a sum of Rs.7,00,000/-

whereas the property commonly known as Dharamshala at Azimganj was purchased by defendant No.2 alone for a sum of Rs.75,000/-. Similarly the property at Netaji Subhas Road, Calcutta was purchased by defendant No.2 alone for a sum of Rs.24,00,000/-

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 ½ cottah. It is situated at a prime location.

Rajbari at Azimganj has been constructed on a land measuring more than 4 bighas. The building consists of more than 100 rooms. Indisputably again a large number of joint movable properties situate therein. The property known as Dharamshala at Azimganj also has a double storeyed building situate on 1 bigha of land approximately.

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.

When a property is put to auction in a suit for partition, the provisions of the Partition Act, indisputably, shall apply.

Section 2 of the Partition Act, 1893 provides that whenever in a suit for partition in which, if instituted prior to the commencement of the Act, a decree for partition might have been passed, 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 property and distribution of the processes would be more beneficial for all the shareholders, the court may, direct sale thereof subject to the

condition that the request therefor had come from a shareholder or shareholders interested individually or collectively to the extent of one moiety or upwards. What therefore was necessary is that there should be a request from a shareholder ; a formal prayer to that effect may not be necessary ; a positive finding that the property is incapable of division by metes and bounds would be necessary and that the property cannot be reasonably or conveniently be partitioned.

Section 3 of the Act envisages sale of the property within the shareholders. It unlike the provisions of the Code of Civil Procedure, does not debar a shareholder from taking part in auction inter alia on the premise that the shareholder may be interested in keeping the property to himself. A balance must be struck in regard to the individual interest of the shareholder having regard to the conflicting interest in the respective bids vis-à-vis the value of the property.

Parties have half share in each of the properties in suit. In terms of the preliminary decree and order dated 20th July, 1979 valuation of the suit property was to be done by a well known valuer. Such an order was passed on the basis of an agreement between the parties. Ascertainment of

valuation of the suit property was directed in terms of Sections 2 and 3 of the Partition Act. The said order indisputably had not been varied, altered or modified.

Azimganj properties had initially been put in two lots. However, subsequently the defendants-respondents through their application dated 16th August, 1983 took out the same from that two lots. From various applications as also of the proceeding before the Commissioner of Partition, no mechanism could be agreed upon for division of the said properties. It was, therefore, a case where the requirement of Section 2 of the Partition Act were clearly attracted. An application was also filed on 16th August, 1983 by the defendants/respondents stating :-

“11. Your petitioner states that in order to obviate the question of valuation of properties a base price be fixed from which the parties may be at liberty to bid as was the order made His Lordship the Honourable Mr. Justice A.K. Sarkar on 20th July, 1979 and the same procedure be followed in respect of the three properties.”

Thus, base or the reserve price was to be fixed for the said properties also. The said decision is fortified from the Minutes of the Meeting dated

30th July, 1983 of the Joint Commissioner and the order of the Court dated 10th June, 1984.

Before the High Court specific ground in this behalf had been taken. In fact there is a clear admission on the part of the defendants/respondents as would appear from their application dated 16th August, 1983 that the properties were kept out of the lots since they were incapable of partition by metes and bounds.

It furthermore appears that in their counter-affidavit the defendants/respondents have clearly admitted:

“Thereafter the defendants in the said suit being Kumar Chandra Singh Dudhuria and his branch prepared a Scheme for partition of the immoveable properties and submitted the same to the Commissioner of Partition. The said Scheme suggested, inter alia, that three properties which could not be partitioned by metes and bounds namely Premises No.01, Netaji Subhas Road, Calcutta, Rajbari and Dharamshala at Azimganj (hereinafter referred to as the said properties) be offered to the parties for sale through bidding without valuation. The rest of the joint immovable properties were divided into two lots viz. “A” and “B”.

It may not, therefore, be correct to contend that the provisions of the Partition Act were not attracted.

Sub-section (2) of Section 3 mandates valuation to be made by the court at which a sale of the share or shares can be directed to be made only when the highest price is offered to be paid by another co-sharer. Sub-section (3) of Section 3 thereof provides that if no shareholder is willing to buy share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incidental to the application or applications, which leads to the conclusion that in the absence of pre-determining valuation in regard to the half share of the properties, the properties in question could not have been put to auction sale.

It has been contended that the plaintiffs agreed that valuation of the property was not necessary. The said contention cannot be accepted for more than one reason, firstly because of the order passed by the High Court in passing a preliminary decree, which could be varied or modified only by a subsequent order ; secondly because once the provisions of the Partition Act are held to be applicable, keeping in view the legal principles attracting

construction of Sections 2 and 3 thereof, no deviation, therefore, in our opinion was permissible.

It is not the contention of the plaintiffs/appellants that only a public sale was permissible in law but even in regard to agreed inter se sale amongst the co-sharers, the provisions of the Partition Act were required to be followed.

In K. Ramamurthi Iyer v. Raja V. Rajeswara Rao, [(1972) 2 SCC 721] this Court held :-

“ 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 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 the 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 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 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.

As regards construction of Section 3 of the Act it was held :-

“...The language of Section 3 of the Partition Act does not 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...”

[See also Sathi Lakshmana KC v. PC Mohandas, 2008 (4) KLT 401 and Smt. Rukmani w/o Late Ethraj v. Uday Kumar S/o Late B. Venkatesalu, ILR 2008 KAR 13]

Our attention has been drawn to a decision of this Court in Badri Narain Prasad Choudhary v. Nil Ratan Sarkar, [(1978) 3 SCC 30]. Therein while opining that Sections 2 and 3 of the Partition Act are interlinked, having regard to the fact that the property being small could not conveniently and reasonably be partitioned without destroying its intrinsic wealth, this Court evolved an equitable method to take the value of the property as Rs 50,000/- in 1963 and allowed a reasonable increase for the rise in price since 1963, taking into account the rise in price in the locality, and gave the defendant the first option to retain the whole property on

payment of 13/16 share of that valuation (including the increase) to the plaintiffs within a period of specified therein.

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 (supra).

It was urged before us that such a question having never been raised, this Court should not permit the same to be raised before this Court for the first time. It, however, appears that the plaintiffs/appellants raised the said contention in the grounds of appeal. Though raised, the same had not been considered by the Division Bench.

In any event if the defendants-respondents intend to invoke equity they must also do equity. As would appear from the record, apart from the order passed at the time of passing of the preliminary decree dated 20th July, 1979 but also from the Minutes of the Joint Commissioner's Meeting dated 30th July, 1983 ; application of the respondents dated 16th August, 1983 and from the order dated 10th June, 1984, it is clear that the provisions of the

Partition Act shall apply, particularly when in view of the decision of this Court in K. Tamamurthi Iyer (supra), neither any aforementioned application was necessary nor any specific finding thereto was imperative. Once it is held that the provisions of the Partition Act are applicable, the court was bound to comply with the provisions thereof. If that is the legal principle, on interpretation of the Partition Act as also from the decision of this Court, it must be held that the Commissioner of Partition and the High Court failed to comply with the said provisions.

In Malati Ramchandra Raut (Mrs) v. Mahadevo Vasudeo Joshi, [1991 Supp (1) SCC 321] this Court held :-

“9. It is the duty of the court to order the valuation of the shares 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.”

We may also notice that in T.S. Swaminathan v. Official Receiver of West Tanjore, [AIR 1957 SC 577], this Court held as under :-

“14. It must be remembered that the decree was one for partition of the properties belonging to the

joint family of which the Defendant 3 and the appellant were coparceners. While effecting such a partition it would not be possible to divide the properties by metes and bounds there being of necessity an allocation of properties of unequal values amongst the members of the joint family. Properties of a larger value might go to one member and properties of a smaller value to another and therefore there would have to be an adjustment of the values by providing for the payment by the former to the latter by way of equalisation of their shares. This position has been recognised in law and a provision for such payment is termed “a provision for owelty or equality of partition’.”

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.

This brings us to the question as to whether the provisions of Section 6(1) of the Partition Act have been complied with or not. Sub-section (1) of

Section 6 of the Partition Act mandatorily requires fixation of a reserved price. Parties appear to have agreed thereto before the Commissioner of Partition as would be cleared from the respondents' application dated 16th August, 1983. Such a stand had also been taken by the parties before the High Court as would appear from the order dated 11th June, 1984 which is to the following effect :-

“....It has been suggested by the Advocate on Record of the Petitioner as also of the defendants that a base price be fixed as the reserve price and thereafter the parties may be given the liberty to bid for the properties and the ultimately purchaser in turn would pay the half price to the other party...”

It is of significance to notice that respondents in their application dated 22nd January, 1997 prayed for a direction from the High Court to the Commissioner of Partition that “they may be given leave to sell the said properties without fixing any reserve price” as also “that a liberty be given to the Commissioner of Partition to permit the parties present to purchase the said properties at their own valuation.”

If the provisions of Section 6 of the Partition Act are imperative in nature any such prayer could not have been entertained. Such a

leave/liberty had not been granted to the Commissioner. The Commissioner was directed to carry out of the auction sale in terms of the order dated 11th June, 1984. It has been urged that the plaintiffs-appellants themselves agreed that the properties need not be valued. However, from the order dated 11th June, 1984 it appears that with a view to avoid the costs and expenditure to be incurred toward the appointment of the valuer, it was stated that the valuation of the properties need not be done by a valuer but the same would not mean that the plaintiffs-respondents had themselves agreed not to have any valuation of the properties at all. The respondents, however, had even not denied or disputed that he had also agreed to the same which would appear from the following statements made by respondent No.2 in his affidavit before the High Court, which read as under :-

“9. Your petitioner states that Advocate on behalf of your petitioner as also the Advocates, appearing for the other defendants had suggested that a base price be fixed as the reserved price and thereafter the parties may bid for the properties and ultimate purchaser shall have to pay the half price to the other party in order to obviate the costs and expenditure involved in having the properties valued by a valuer but the said suggestion was never acceded to by the plaintiffs. In this connection the copies of the minutes of the meeting dated 25th July 1983 and 30th July 1983 are annexed hereto and collectively marked as ‘D’.

...

...

.....

12. Your petitioner further states that if the properties are to be valued by a valuer the minimum costs of such valuation would be about Rs.25,000/- and your petitioner is not in a position to afford such expenses in respect of such valuation. If the procedure suggested by your petitioner is accepted neither the plaintiffs nor the defendants would be prejudiced in any way but expenses for valuation of the properties can be dispensed with.”

We may also notice from the order sheet dated 11th June, 1983 that the Court had allowed the prayers (b) & (c) of the petition and not of ‘Notice of Motion’ where prayer (b), as noticed hereinbefore, was to the following effect:-

“b) Directions be given to the Joint Commissioner of Petition regarding allotment of properties being premises no. 91, Netaji Subhas Road, Calcutta, Rajbati at Azimganj and Dharamshala at Azimganj.”

This court would go by the records of the High Court and not by the prayer made in the notice of motion.

No application for modification of that order had been prayed for. In any event the said order could not have been passed in supersession of the order dated 20th July, 1979. Valuation of a property of this nature even, in the interest of justice, is to protect the rights of the parties. Code of Civil Procedure provides therefor as would appear from Order XXI Rule 72A(2). Although the said provision may not ipso facto available but we are referring thereto, as apart from the fact that the court had such a duty to fix the reserve price, this Court in D.S. Chohan v. State Bank of Patiala, [(1997) 10 SCC 65] had set aside the sale for not complying with the statutory provisions of fixing the reserve price under Order XXI Rule 72A (2) of the Code of the Civil Procedure.

We have been taken through the conduct of the parties in great detail. Even if for the time being we keep aside non-appearance of some of the plaintiffs-appellants at each stage of the proceedings before the Commissioner(s) of Partition, it is clearly borne out from the records that admittedly notices had been issued by the Commissioner of Partition only to three plaintiffs on 5th April, 1997, namely plaintiff No1 ; plaintiff No.3 and plaintiff No.6. Why no notice was issued to Amita Dudhoria has not been explained. It is difficult to comprehend that only three of them were

chosen, - one of them being ill, another being in U.S.A. for more than 26 years and another allegedly colluding with the defendants.

It is not necessary for us to delve in detail in regard to the conduct of Shri Anand Aggarwal, Advocate, but in view of Rule 18 of Order XXVI of the Code of Civil Procedure, there cannot be any doubt, whatsoever that the Commissioner should have issued notice to all the parties.

Mr. Manoj Goel has placed reliance on a large number of decisions before us to contend that Rule 18 of Order XXVI is mandatory. We, however, need not advert to the said decisions as atleast seven out of eight plaintiffs contend before us that they did not have notice of bidding. None of the plaintiffs have been shown to have bid for any of the three properties. It is unlikely that they would stay out even if they had notice and allowed the defendants to bid behind their back. Sheema Dudhoria evidently had been supporting the defendants. Even the learned Single Judge recorded that she had given instructions to support the case of the defendants.

Such a notice was also necessary as in a suit for partition each party has an individual right. One of them atleast is siding with the defendants. Even the plaintiffs admittedly had received payment in part. Even the

defendants did not offer the bid jointly. Defendant No.2 in his individual capacity had offered his bid in one of the properties in his individual name and only with defendant No.3 in respect of one of the properties.

It must also be placed on record that the High Court in its order dated 10th March, 1997, categorically directed the Commissioner of Partition to give at least 7 days' clear notice to the parties before holding any such meeting so as to enable them to be present personally or through their advocates. Issuance of such a notice was imperative in character.

In D.S. Chohan v. State Bank of Patiala [(1997) 10 SCC 65], this Court held:

“...An objection was raised by the appellants against the acceptance of the said bid of the respondent on the ground that there was non-compliance with the mandatory provisions of Order 21, Rule 72-A CPC. The said objection was rejected by the learned Single Judge and the appeal filed by the appellants has been dismissed by the Division Bench of the High Court by the impugned judgment.

3. In view of the specific requirement contained in sub-rule (2) of Rule 72-A of Order 21 CPC that in cases where leave to bid is granted to the mortgagee, the Court shall fix a reserve price as regards the mortgagee and unless the Court otherwise directs the said reserve price has to be in consonance with requirement of clauses (a) and (b), it was incumbent for the Court to fix the

reserve price. In the order dated 2-1-1981 the Court, while permitting the respondent mortgagee to make the bid, did not give any direction regarding fixing the reserve price. The sale in favour of the respondent having been made in violation of the mandatory provisions of Order 21, Rule 72-A(2) CPC cannot be upheld and has to be set aside.”

A Division Bench of the Kerala High Court in Nedungadi Bank Ltd. v. Ezhimala Agri. Products [2003 (3) KLT 1011] while opining that “reserve price” and “upset price” though analogous and almost homologous but are not synonymous, stating:

“...While understood in the context in which the expression is employed in the code, "reserve price" means a price reserved at an auction as the minimum amount realisable by sale of the property so as to realise the entire mortgage debt or a proportionate portion of the mortgage debt- a price which will remain static during the sale unless the court on grounds of genuine diffidence on the side of the decree-holder chooses to reduce the same. Fixation of reserve price is peculiar to situations where court grants permission to mortgagee-decree-holders to bid in the auction. Upset price and reserve price are certainly the lowest prices for which the properties will be sold in auction. But the term "reserve price is exclusive to mortgagee-purchasers. The term "upset price" is used generally in respect of purchases by all others including third parties. When upset price has been

fixed, the bid should commence with that price and the sale will ultimately be held for an amount higher than that price. But in the case of reserve price, the bid can commence with the upset price which may be an amount below the reserve price. But the moment the mortgage-decree holder avails the leave granted to him by the court, the sale will be knocked down in his favour for the reserve price, though nothing prevents a conscientious decree-holder from bidding and purchasing for a higher amount.”

Emphasizing the need to comply with the statutory rules as contained in various provisions under Order XXI of the Code of Civil Procedure, this Court in Manilal Mohanlal Shah and Others v. Sardar Sayed Ahmed Sayed Mahmad and another [AIR 1954 SC 349] held that the inherent power of the court cannot also be resorted to circumvent the mandatory provisions of the Code.

This Court in Laxmikant Chhotelal Gupta v. State of Maharashtra, [(2007) 5 SCC 713] clearly held :-

“14. Even when an auction takes place under orders of the competent civil court, the procedures laid down in the Code of Civil Procedure are required to be complied with. Objections to the validity of sale at the instance of one party or the other are required to be considered and determined. Even an appeal lies against such an

order in terms of Order 43 Rule 1(u) of the Code of Civil Procedure.

15. Provisions of a statute, whether directory or mandatory, necessitating strict or substantial compliance are questions which must be determined by the courts. This Court thought that the High Court would do so. Presumably the effect and purport of this Court's order having not been brought to its notice, we, therefore, are of the opinion that the matter should be directed to be considered afresh by the competent authority. We are informed at the Bar that Respondent 4 being Assistant Commissioner of Sales Tax is the competent authority therefor. We, therefore, while setting aside the order of the High Court would direct the said authority to consider the contentions raised by the appellants herein on their own merits."

A large number of circumstances had further been brought to our notice to establish collusion and fraud. We may notice some of them.

The application dated 20th January, 1997 was moved after 13 years at the time when plaintiff No.1 was unwell and plaintiff No.4 had to take her to Delhi for treatment. No court proceeding had taken place for 13 years. A reserved price had not been fixed. Notices had not been given to all the

parties. For the said purpose, the Commissioner could not have devised his own procedure.

Sheema Dudhoria had shown an unusual interest in attending the meetings allegedly without instructions from other plaintiffs. Even Anand Agarwala, Advocate, appeared without notice. He did not raise any objection in that regard and even accepted the cheque after the expiry of 45 days wherefor no order of the court or the Commissioner of Partition was obtained.

If any auction had taken place by fraud or collusion the same is non est in the eyes of law. We are not suggesting that mere suspicion of fraud would amount to proof thereof but the High Court in our opinion should atleast have gone into such a question. The Division Bench, in our opinion, should also have gone into this question. If it required proof, the question should have been clearly answered by referring to the documents and other materials on record so as to enable it to arrive at a finding that no fraud or collusion had taken place. A finding to that effect one way or the other was required to be arrived at. The Division Bench proceeded on the basis that despite notices the plaintiffs did not participate in the proceeding without

considering as to whether their plea that they did not receive any notice was correct or not. Even the learned Single Judge did not return any finding. The learned Single Judge did not frame any issue. Furthermore some material irregularities had also taken place in the conduct of auction. Notice of clear 7 days had not been given to the plaintiffs. Only 10% of the sale amount was received by plaintiff No.6. Even that amount was in the name of Rani Aloka Dudhoria. The cheque was deposited in the joint account which was withdrawn by her alone.

On one occasion the High Court declined to confirm sale in favour of the appellants when six months' time had been asked for the purpose of deposit of the amount. However, such a request on the part of plaintiff No.4-appellant had not been acceded to.

The defendants-respondents did not deposit the amount within 45 days of the date of auction. It is stated that no payment had been made in respect of the property 19, Netaji Subhash Road, Calcutta. The cheque was made in the name of the Advocate on record. Although initially the cheque was drawn in the name of plaintiff No.2, there was no such stipulation therefor. Any payment made to Anand Aggarwala after the expiry of the stipulated period of 45 days must be held to be in violation of the terms and

conditions stipulated in regard to the sale of the property dated 8th May, 1977.

In Behari Kunj Sahkari Avas Samiti v. State of U.P. & Ors. [2008 (10) SCALE 551], this Court observed:

“13. In State of A.P. and Anr. v. T. Suryachandra Rao [2005(6) SCC 149] it was observed as follows:

By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non- economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.”

Fraud as is well known vitiates all solemn acts. Suppression of a document, it is also trite, may amount to fraud on the court. The effect of

commission of fraud must be taken note of. [See also Bank of India and Another v. Avinash D. Mandivikar and Ors. (2005) 7 SCC 690]

For the views we have taken, it is not necessary for us to go into the questions of fraud and collusion in details. The impugned judgments of the High Courts are set aside. We, however, keeping in view the peculiar facts and circumstances of the case and in exercise of our jurisdiction under Article 142 of the Constitution of India would issue the following directions:-

- (a) The matter shall be fixed before the learned Single Judge of the High Court under the heading “FOR BEING MENTIONED” on 6.04.2009, on which date all the parties shall remain present either personally or through their learned Advocates. No separate notice therefor need be issued.
- (b) The High Court shall pass an order as regards the valuation of the properties under the provisions of the Partition Act.
- (c) The High Court may either by itself or through the Commissioner of Partition or any other

Advocate/Commissioner cause an inter party auction to be held on a date to be fixed therefor.

- (d) All amounts deposited or paid to the parties by respondent No.2 and/or 3 shall be returned to them forthwith. If in the parties auction sale is not found to be possible, the High Court may pass such other order/orders as may deem fit and proper.

The appeals are allowed with the aforementioned directions. There shall be no order as to costs.

.....J.

(S.B. SINHA)

.....J.

(CYRIAC JOSEPH)

New Delhi

March 05, 2009