

CASE NO.:  
Appeal (civil) 5297 of 2005

PETITIONER:  
Gour Hari Maity & Ors

RESPONDENT:  
Shew Shankar Shaw & Anr

DATE OF JUDGMENT: 18/10/2006

BENCH:  
A.K.MATHUR & LOKESHWAR SINGH PANTA

JUDGMENT:  
JUDGMENT  
O R D E R

Heard learned counsel for the parties.

We have perused the order of the trial court as well as of the High Court.. A suit for partition was filed by Gour Hari Maity & Ors. with the following prayers :

" a) for preliminary decree as per share of the plaintiffs mentioned above.  
b) for appointment of survey commissioner.  
c) for final decree after holding commission as per preliminary decree.  
d) for costs of the suit.  
e) for any other relief/reliefs which the plaintiffs may be entitled under the law and equity.  
Your petitioner as in duty bound shall ever pray."

One Chhangur Shaw died on 20.12.1962 leaving behind his wife Munga Debi and his daughter Sumitra. Sumitra had two sons; Gayadin and Munnalal. Munga Debi who had a half share transferred her half share =, = to Gayadin and Munnalal. The property was being looked after by Shew Shankar Shaw at Calcutta whereas Munga Debi and Sumitra were residing at Benaras (U.P.) Thereafter, it appears that a suit was filed by Munnalal and others for injunction and possession against Shew Shankar Shaw which was contested by Shew Shankar Shaw but during the pendency of the suit, Munnalal sold his share of the property to Shew Shankar Shaw and rest of the property was sold to Gour Hari Maity and others. Gour Hari Maity and others filed a suit for possession and partition impleading Shew Shankar Shaw as a defendant. Shew Shankar Shaw contested the suit and took the plea of adverse possession. Gour Hari Maity and others did not prosecute their case and in that suit, an application was filed by Shew Shankar Shaw claiming right of pre-emption. In the application for pre-emption moved by Shew Shankar Shaw, he submitted that Gour Hari Maity is not prosecuting the suit properly and, therefore, he may be transposed as a plaintiff and his right for pre-emption may be decided in the matter. Unfortunately, the trial court accepted the prayer of Shew Shankar Shaw and transposed him as a plaintiff in the suit filed by Gour Hari Maity and proceeded to decide the partition suit and application for pre-emption. The trial court disposed of the suit declining the prayer of the transposed plaintiff Shew Shankar Shaw for right of pre-emption. In that suit it was held that plaintiffs (Gour Hari Maity and others) were entitled to get partition by mets and bounds and a preliminary decree was passed. Shew Shankar Shaw was given 1/4th share in respect of the suit property and separate possession by metes and bounds and it was ordered that Gour Hari Maity & others were

entitled to 3/4th share jointly and the parties were given two months' time from the date of the order to effect partition by metes and bounds amicably, failing which any of the parties will be at liberty to apply to court for partition by metes and bounds by way of appointment of a pleader Commissioner and the application for pre-emption was dismissed on contest.

Aggrieved against this order, Shew Shankar Shaw ( the transposed plaintiff) approached the High Court challenging the order and decree passed by the trial court. The High Court confirmed the 3/4th share of Gour Hari Maity and others and granted right of pre-emption in favour of Shew Shankar Shaw and directed the matter be remanded back to the court below for the purpose of valuation of 3/4th share held by the respondents ( the appellants before us) and to direct and effect sale thereof to the appellant ( the respondent before us) provided he pays the value as fixed by the court and in the manner to be directed by the court. Aggrieved against his order of the High Court the present appeal has been preferred by the appellants.

Though we do not appreciate the approach of the trial court in transposing the defendant as plaintiff in a suit for partition filed by Gour Hari Maity & others ( the appellants herein) and deciding the rights of the parties but the trial court did it for the benefit of the plaintiff and others and as the suit has already been decreed in favour of Gour Hari Maity & others ( the appellants before us) and their 3/4th share has already been determined and direction was given to settle amicably and if not to apply before court for appointment of pleader Commissioner who will make proper division by metes and bounds. The High Court has, of course, reversed the finding of the trial court to the extent of pre-emption and directed that the respondents herein have a right of pre-emption and directed the trial court to determine the valuation in case the respondents herein are interested in buying on the amount determined by the court and in the manner to be directed by the court. So far as this part of the impugned order is concerned, we need not interfere because it will be open for the court to determine the valuation of 3/4th share of the property in question i.e. 14/1A and in case the respondents are willing to pay that amount determined by the court then the decree may be passed in favour of the respondents. It will be open for the court to determine the fair market value of the property in question. With these observations, the appeal is disposed of. There will be no order as to costs.