

Amar Nath and others v. Jhandhu Lal and others
(M. M. Punchhi, J.)

limitation. It is for this reason that section 239 of the Code of Criminal Procedure now warrants a reasoned order of discharge so that it can be challenged by way of revision. The State having remained content with it cannot be allowed to agitate and claim that it must put to trial the accused under section 467, Indian Penal Code, by framing a charge. Thus, it is held that the learned Additional Sessions Judge had no power to order a fresh trial of the accused on framing of a charge whilst hearing an appeal against an order of conviction of another offence. It is further held that the appellate Court in the instant case did not exercise its revisional power suo motu or otherwise for it was oblivious of the order of discharge dated 12th June, 1975. And this Court shall not undertake the exercise of revision, for it is not a case for interference, more so after a long and protracted proceedings in the Courts below.

(9) For the foregoing reasons, the question posed at the very outset has to be answered in the negative.

(10) Resultantly, this revision petition is allowed; the impugned order so far as it relates to the ordering of a fresh trial of the petitioner for offence under section 467, Indian Penal Code, is hereby set aside but otherwise his order of acquittal for offence under section 419, Indian Penal Code, remains unchallenged. Ordered accordingly.

N.K.S.

Before M. M. Punchhi, J.

AMAR NATH and others,—Petitioners.

versus

JHANDHU LAL and others,—Respondents.

Civil Revision No. 2926 of 1981.

May 5, 1982.

Partition Act (IV of 1893)—Sections 2, 3, 4 & 8—Code of Civil Procedure (V of 1908)—Sections 2(d) and 115—Suit for partition of immovable property—Property considered to be not divisible and auction ordered—Requirements of sections 2 & 3 of the Partition Act not complied with—Such order directing auction—Whether

could be deemed to be a decree and appealable under section 8—Revision under section 115 of the Code—Whether competent—Sections 2 & 3—Scope of.

Held, that sections 2 & 3 of the Partition Act 1893 are siamese-twins and inextricably linked up. The request postulated under section 2 can be even by one or more share holders interested individually or collectively to the extent of one moiety or upwards. It is not just when request is made that the court can accede to the same. It can only do so by putting to use section 3 which puts fetters on its powers and raises expectancies for other shareholders. Thus, a request under section 2 must give a right to the other shareholders to apply for leave to buy on a valuation the share or shares of the party or parties asking for sale. The Court is then mandatorily required to order the valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in this behalf. Even if the conditions envisaged in section 2 are existent the Court has discretion to direct or not to direct the sale of the property and distribution of the proceeds. Where some of the co-sharers alone made an oral request to the court and without associating other co-sharers for the purposes of the requirement of section 3, the Court ordered the property to be put to auction publically without ever fixing the reserved bidding required to be so fixed under section 6 of the Act, the order under section 2 cannot be visited with a deemed result that it would tantamount to a decree within the meaning of section 2 of the Code of Civil Procedure as it would not mean a formal decision which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The order of the Court having failed to conform to the standards of a decree as known to section 2 of the Code of Civil Procedure, the same cannot be deemed to be an order which took the colour of a civil court decree and is hence not appealable under section 8 of the Act. In the processual law of our country an appeal is in the nature of a rehearing of the original cause. It lies on a matter of fact as also on a matter of law. It pre-supposes that the Court of appeal acts as the Court of correction over the orders passed by the Subordinate Court in the exercise of its jurisdiction. But when jurisdiction is misused, exceeded or withheld by a Court and the product of its deliberations do not conform even to a semblance of the order envisaged under the provision of law then the power is there with the revisional Court to put that Court back to its jurisdiction. The availability of the appellate remedy in such circumstances cannot be a clog to the exercise of the revisional jurisdiction. (Paras 7, 8, 10 & 11)

Petition Under Section 115 C.P.C. for the revision of the order of Shri K. C. Gupta, Senior Sub-Judge, Ambala, dated 17th September, 1981, appointing Shri A. K. Jain as Local Commissioner requiring him to fix a date in consultation with the applications for a wide

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publicity to be given of the auction and submit his report on or before September 14, 1981.

Jinendra Kumar Sharma, Advocate & Yogesh Kumar Sharma, Advocate, for the Petitioner.

M. S. Jain, Advocate, for the Respondents.

JUDGMENT

M. M. Punchhi, J. (Oral)—

(1) The parties to the litigation, out of which this revision petition has arisen, had joint properties in Naraingarh, district Ambala. Out of them the plaintiffs filed a suit for partition in which a preliminary decree was granted in their favour entitling them to 1/3rd share of the properties. The next step taken by the trial Court was to appoint a Local Commissioner to Partition the properties by metes and bounds. The Local Commissioner,—*vide* his report, dated September 14, 1981 expressed his inability to do so for he found that three out of the four properties were practically dilapidated and the fourth was a shop in possession of a tenant. Having regard to the number of parties being 22 in all (five plaintiffs and 28 defendants) he suggested that partition could only be effected if it be made on the basis of valuation and open auction. He was of the view that it was impossible otherwise to carve out 1/3rd share from each property.

(2) The report of the Local Commissioner (Shri A. K. Jain, Advocate) came up for consideration before the trial Court on September 17, 1981 in the presence of Shri Lal Chand Jain, Advocate, for the plaintiffs. The learned Judge took into account the contents of the report. Though it is not said in the order in so many words that the report of the Local Commissioner was being accepted as such but seemingly accepting the same, the learned Judge appointed the same Shri A. K. Jain as Local Commissioner requiring him to fix a date in consultation with the applicants for a wide publicity to be given of the auction and submit his report on or before September 14, 1981. It is this order which is the subject-matter of the challenge in this Court.

(3) Some additional facts which are emergent from the file summoned are that in pursuance thereof the properties were sold.

and have fetched price to the tune of Rs. 1,72,000. The auction had even taken place before the present petitioners approached this Court. This is a factor which is sought to be used against the petitioners reflecting their contumacy and lack of *bona fides*.

(4) A preliminary objection too has been taken to the maintenance of this petition on the ground that the impugned order was passed under section 2 of the Partition Act, 1893 (hereinafter referred to as 'the Act') and the same was an order which took the colour of a civil Court decree and hence appealable under section 8 of the said Act. If the objection is to be sustained, concededly this petition cannot be converted into an appeal in this Court for, the appeal lay before the District Judge as he had alone the jurisdiction.

(5) Mr. Jinendra Kumar Sharma, learned counsel for the petitioners, has met the objection as to the maintainability of the petition by contending that an order which squarely falls within the ambit of section 2 of the Act alone is appealable under section 8 thereof and none other. According to him there are three essential conditions which are required to be fulfilled before an order can be said to be one under section 2 of the Act inasmuch as (1) it has, to be made on request of a party to the suit, (2) the Court has to come to a finding that there is no way out except to auction the property and (3) the Court must under section 6 of the Act fix reserved price for the purpose. He supports his argument from the pleadings on the file to contend that there was no such request made by any party, nor could it be reflected from any document, and none could even be inferred on the file or even from any statement of any party. On the other hand Mr. M. S. Jain, learned counsel for the contesting respondents contends that such request can even be made orally provided the Court is conscious that a request has been made. And in the instant case he contends that the request was made orally by the plaintiffs as it is inferentially evidence from the order now impugned.

(6) Intergrouping the respective contentions of the parties it would be essential to examine the provisions of sections 2 and 3 of the Act which may be reproduced here :—

"2. *Power to Court to order sale instead of division in partition suits.*—Whenever in any suit for partition in

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which, if instituted prior to the commencement of this Act, a decree for partition might have been made. It appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

- (3) *Procedure when sharer undertakes to buy.*—(1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf. (2) If two or more shareholders severally apply for leave to buy as provided in sub-section (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”.

(7) Sections 2 and 3 of the Act, as they seem to me, are siamese-twins and inextricably linked up. The request postulated under section 2 can be even by one or more shareholders interested individually or collectively to the extent of one moiety or upwards. It is not just when request is made that the Court can accede to the same. It can only do so by putting to use section 3 which puts fetters on its powers and raises expectancies for other shareholders. Thus a request under section 2, must give a right to the other shareholders to apply for leave to buy on a valuation the

share or shares of the party or parties asking for sale. The Court is then mandatorily required to order the valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholders at the price so ascertained, and may give all necessary and proper directions in this behalf.

(8) As objected to by the learned counsel for the respondents, that since orders under sections 2, 3 and 4 of the Act are appealable under section 8, there is no connection between sections 2 and 3 or their inter-linking. The answer is found in *Badri Narain Prasad Choudhary and others v. Nil Ratan Sarkar* (1). Their Lordships of the Supreme Court while interpreting conjointly sections 2 and 3 of the Act took into account the word "may" occurring in section 2 and observed that even if the conditions envisaged in the section are existant, the Court has discretion to direct or not to direct the sale of the property and distribution of the proceeds. It was held in the intent that these two sections were interlinked.

(9) As is plain from the language of the impugned order the applicants alone were co-sharers who perhaps had made an oral request to the learned Judge. Without associating other co-sharers for the purposes of the requirement of section 3, the learned Judge ordered property to be put to auction publically. It is nowhere in the body of the order that the Court ever fixed the reserved bidding required to be so fixed under section 6 of the Act. Seemingly no such stage had arisen at that time because only the Local Commissioner was to give wide publicity to the auction by beat of drum in Naraingarh. Whether any such reserved bidding was fixed before the auction took place or not is not the concern for the disposal of the present petition.

(10) In the processual law of our country an appeal is in the nature of a rehearing of the original cause. It lies on a matter of fact as also on a matter of law. It pre-supposes that the Court of appeal acts as the Court of correction over the orders passed by the Subordinate Court in the exercise of its jurisdiction. But when jurisdiction is misused, exceeded or withheld by a Court and the product of its deliberations do not conform even to a semblance of the order envisaged under the provision of law then the power is

(1) A.I.R. 1978 S.C. 845.

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there with the revisional Court to put that Court back to its jurisdiction. The availability of the appellate remedy in such circumstances cannot be a clog to the exercise of the revisional jurisdiction. As has been noticed earlier the jurisdiction was assumed by the Court under section 2 and not inter-linked with section 3 of the Act. That is a material irregularity, so patent on the record.

(11) It not only is a material irregularity in the exercise of its jurisdiction but is rather in forsaking it to give an out of shape colour to its order. In such a situation an order passed under section 2 cannot be visited with a deemed result that it would tantamount to a decree within the meaning of section 2 of the Code of Civil Procedure as it would not mean a formal decision which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The impugned order having failed to conform to the standards of a decree as known to section 2 of the Code of Civil Procedure. The preliminary objection thus raised by the respondents is over-ruled. And once that is done the automatic result is that the impugned order has to be set aside, for, the impugned order is not in conformity with sections 2 and 3 of the Act.

(12) Resultantly, this petition succeeds and the impugned order is hereby set aside. The trial Court will now proceed in accordance with law. No costs.

N.K.S.

Before G. C. Mital, J.

PUNJAB STATE and others,—*Appellants.*

versus

RAM LUBAYA,—*Respondent.*

Regular Second Appeal No. 1563 of 1981.

May 4, 1982.

*Punjab Civil Services (Punishment and Appeal) Rules, 1970—
Rule 5—Penalty of stoppage of increments with cumulative effect*