

**IN THE HIGH COURT FOR THE STATE OF TELANGANA:
HYDERABAD**

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CIVIL REVISION PETITION No.3099 of 2023

Between:

Mohd. Mujthaba Ali and another.

Petitioners

VERSUS

Mohd. Murtuza Ali and Ors.

Respondents

ORDER PRONOUNCED ON: 22.03.2024

THE HON'BLE SRI JUSTICE P.SAM KOSHY

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? : **Yes**

P.SAM KOSHY, J

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! Counsel for Petitioner(s) : Mr. B.Chandrasen Reddy

^Counsel for the respondent(s) : 1) Mr. Mohd. Murtuza Ali,
party-in-person for
respondent No.1

2) Ms. Vedula Chitralkha,
learned counsel for the
respondent Nos.3, 7, 8, 12,
16, 18, 19 and 20 to 23

<GIST:

> HEAD NOTE:

? Cases referred

1) (2009) 13 Supreme Court Cases 569

2) (1972) 2 Supreme Court Cases 721

3) 1991 Supp (1) Supreme Court Cases 321

THE HONOURABLE SRI JUSTICE P.SAM KOSHY

CIVIL REVISION PETITION No.3099 of 2023

ORDER:

The instant Civil Revision Petition under Article 227 of the Constitution of India has been filed by the petitioners assailing the order dated 04.10.2023 passed by the Court of the IX Additional Court Chief Judge, City Civil Court, Hyderabad (for short, 'the Court below) in I.A.No.775 of 2023 in O.S.No.19 of 2003.

2. Heard Mr. B.Chandrasen Reddy, learned Senior Counsel for the petitioners, Mr. Mohd. Murtuza Ali, party-in-person for respondent No.1, and Ms. Vedula Chitralkha, learned counsel for the respondent Nos.3, 7, 8, 12, 16, 18, 19 and 20 to 23.

3. Vide the said impugned order, the Court below has allowed the petition filed by the plaintiff under Section 2 of the Partition Act read with Section 75 of CPC vide I.A.No.775 of 2023. While allowing the said I.A., the Court below allowed appointment of an Advocate Commissioner to sell the schedule A and schedule B properties by way of public action.

4. The brief facts relevant for disposal of the instant Civil Revision Petition are that the plaintiff had filed O.S.No.19 of 2003 seeking for partition so far as schedule A and schedule B

properties are concerned. The aforesaid Suit was decreed in favour of the plaintiff vide judgment and decree dated 15.06.2016 and preliminary decree was passed allotting 1/8th share in schedule A and schedule B property in favour of the plaintiff as well as defendant Nos.2, 4, 5, 6 and 8 and 1/16th share each to defendant Nos.1, 3, 7 and 19. Schedule A property is house No.16-3-994/1 measuring 800 square yards at Malakpet, Hyderabad opposite to printing press. Schedule B property is house No.3-2-739 to 3-2-744 measuring 600-700 square yards at Chappal Bazar, Hyderabad.

5. Petitioners/defendant Nos.6 and 8 aggrieved of the preliminary decree filed an appeal vide C.C.C.A. No.233 of 2016 before this High Court which stood dismissed on 10.06.2022 upholding judgment and decree passed by the Court below. Subsequent to dismissal of the appeal, an I.A. was filed i.e. I.A.No.1623 of 2016 for appointment of an Advocate Commissioner which stood allowed on 20.03.2016. One Mr. D.Chandrashekar Reddy was appointed as the Advocate Commissioner, who in turn submitted his report on 30.05.2017. Meanwhile, the final decree was passed pursuant to I.A.No.1623 of 2016 and while passing the final decree, the Court below accepting the report submitted by the Advocate Commissioner held that the Suit schedule A and B properties were not divisible as per the preliminary decree with metes and bounds, therefore, it was advised for putting the

property on sale in public auction and the sale proceeds to be divided among all the parties. Subsequently, the instant I.A. i.e. I.A.No.775 of 2023 under Section 2 of the Partition Act read with Section 75 of CPC has been filed seeking for appointment of an Advocate Commissioner for selling the Suit schedule A and B properties and for division of the sale proceeds accordingly among the parties. It was this I.A. which stands allowed and against which the instant Civil Revision Petition has been filed.

6. It was the contention of the learned Senior Counsel for the petitioners that the Court below failed to appreciate the fact that the petitioners herein ought to have been given the right to preemption and permission to purchase the shares from other co-owners. The instant Civil Revision Petition has been filed on behalf of the defendant Nos.6 and 8 who have also been awarded equal share as that what has been awarded to the plaintiff i.e. 1/8th of the share in the Suit schedule property.

7. Learned Senior Counsel for the petitioners was contending that the Suit schedule property is in possession of the family members of the petitioners including that of the plaintiff for the last more than seventy (70) years. It was further contended that one of the floors in the Suit schedule A property was constructed by respondent No.8 out of his own funds which is also reflected in the Court proceedings. In addition, since it is in their possession

for more than seven (07) decades, the property is also sentimentally attached which also forces them to invoke provision of Section 3 of the Partition Act which has not been considered at all.

8. It was the further contention of the learned Senior Counsel for the petitioners that they are ready to pay an amount of Rs.8,00,00,000/- which is much higher than the market value of the property and had prayed for the right of preemption in favour of the petitioners.

9. It was contended that as regards the petitioners are concerned, they are only claiming right of preemption in the Suit schedule A property. So far as schedule B property is concerned, they do not have any objection if the said Suit schedule B property is put up in auction and the sale proceeds is distributed in accordance with the terms of the decree passed in the Suit for partition.

10. According to the learned Senior Counsel for the petitioners, respondent No.1 himself has quoted the value of schedule 'A' property at Rs.4,00,00,000/- and the petitioners herein who are the defendant Nos.6 and 8 in the original Suit are ready to pay an amount of Rs.8,00,000/- for the said property while claiming right of preemption in the Suit schedule 'A' property. It is the further contention of the learned Senior Counsel for the petitioners that in

terms of the judgment and decree, the two petitioners herein who are the defendant Nos.6 and 8 in the Suit are also entitled for one share each in the suit schedule A property.

11. If that be so, of the Rs.8,00,00,000/- which has been assessed by the petitioners to be the value of schedule 'A' property which they are ready to give for the subject property in which 1/8th of the share to each of the petitioners would come to Rs.1,87,50,000/- and which between the two would come to Rs.3,75,00,000/-. Accordingly, the petitioners herein are ready to deposit an amount of Rs.4,25,00,000/- i.e. the amount after adjusting Rs.3,75,00,000/- i.e. their share in the Suit schedule A property before the Court below. The petitioners have also made a statement that if the aforesaid proposal is accepted, the petitioners are also ready to relinquish their rights in the Suit schedule B property.

12. Respondent No.1/party-in-person on the other hand opposing the Civil Revision Petition submits that the proposal moved by the petitioners is not worth accepting. According to him, upon the property being put to auction, Suit schedule A property can fetch more price than what has even been quoted by the petitioners i.e. Rs.8,00,00,000/-. Under the said circumstances, respondent No.1 also would be getting larger share in the Suit schedule property.

13. Primarily respondent No.1 was opposing the proposal of the petitioners on the simple ground that the Advocate commissioner having visited the spot itself and found that the said property could not be portioned and distributed between each of the shareholders. Since the partition of the property was not practically possible, therefore, the only way for respondent No.1 in getting his share in the property was by way of auction which could fetch maximum value of the property considering the present day value.

14. On the other hand, the other respondent i.e. respondent No.16 who had filed her counter affidavit on behalf of respondent Nos.3, 7, 8, 12, 17, 18 and 19 opposed the Civil Revision Petition on the ground that since the decree has been finalized, the same could not be executed because of the present Civil Revision Petition and the interim order obtained therein.

15. However, learned counsel appearing for respondents submits that there does not seem to be any dispute on the part of the present petitioners in putting the Suit schedule B property in auction. Thereby at least that part of the decree would get executed and each of the parties to the Suit would get their respective share that they are legally entitled for.

16. According to the learned counsel for the respondents, the Suit schedule A property since it is situated on the main road,

there is all possibility of the same to fetch more than Rs.10,00,00,000/- in public auction. Therefore the offer given by the petitioners to that extent would be dis-advantageous so far as the other shareholders are concerned. According to the learned counsel, whatever be the course of action let the Civil Revision Petition itself be decided at the earliest so that the shareholders can get their share in the Suit schedule property after the auction at the earliest. Learned counsel further submits that since the litigation itself has now gone past twenty (20) years, let the entire dispute be laid to rest for all times to come.

17. Having heard the contentions put forth by all the counsels appearing for the respective parties and also the party-in-person, the impugned order has been passed on I.A.No.775 of 2023 in O.S.No.19 of 2003. The said I.A. has been filed by the petitioners under Section 2 of the Partition Act read with Section 75 of CPC seeking appointment of an Advocate Commissioner so as putting on sale the Suit schedule A & B properties by way of public auction. The preliminary decree in the said O.S.No.19 of 2003 was passed on 15.06.2016. As per the decree, the property was to be distributed as has been described in paragraph No.4 of this order. Upon appointment of an Advocate Commissioner who filed his report on 30.06.2017 holding that schedule A as also schedule B properties were not divisible as per the preliminary decree with metes and bounds. The Advocate Commissioner therefore in his

report advised for putting the property in public auction and the sale proceeds be divided among all the parties in terms of the share which falls on each of the parties. So far as the petitioners are concerned, they were entitled for only 1/8th share in the Suit schedule A and B properties.

18. Since the petition was filed by the petitioners herein substantively under Section 2 of the Partition Act read with Section 75 of CPC, it would be necessary also to take note of other provisions which are there in the Partition Act, 1893. In fact, it was under the very same Act that the respondent Nos.6 and 8, the petitioners in the present Civil Revision Petition had sought for right of preemption under Section 3 of the Partition Act.

19. For proper understanding and for convenience sake, it would be relevant at this juncture to quote Section 2 as well as Section 3 of the Partition Act, which for ready reference are reproduced herein under:

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

extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

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

20. In this context, if we look at the prayer made by the petitioners herein before the Court below, what clearly is reflected is that respondent Nos.6 and 8 contended that they are sentimentally attached to the said house as they are residing in the said premises for more than seven (07) decades. Hence, they do not want to forego the said property or put up the subject property for sale. Though in the petition filed before the Court below under Section 2 of the Partition Act, the plaintiff has quoted the price of the Suit schedule A property to be worth Rs.4,00,00,000/-. The petitioners who also have their share in the said property have quoted a price of Rs.8,00,00,000/- for the said property and of which they have also offered to pay an amount of Rs.4,25,00,000/- after deducting their individual share in the property worth Rs.3,75,00,000/- jointly from the total of Rs.8,00,00,000/- that they have offered. It was this application of preemption which has been rejected by the Court below against which the instant Civil Revision Petition has been filed.

21. If we look into the provisions of Sub-Section 1 and Sub-Section 2 of Section 3 of the Partition Act, it would reflect that there is a mandatory term which has been used by the law makers when they have held that the Court shall order for an appropriate valuation of the shares and may offer to sell the said Suit property at the price so ascertained. Thus, *prima facie*, it appears that the law makers were certain when they have enacted the said provisions that in the event of a claim of right to preemption, the interest of the said person who seeks right for preemption is protected as far as possible.

22. At this juncture it is relevant to take note of the decision of the Hon'ble Supreme Court in the case of **Rani Aloka Dudhoria and others vs. Goutam Dudhoria and others**¹ wherein the Hon'ble Supreme Court dealing with the provisions of the Partition Act in paragraph Nos.46, 48, 49, 53, 56, 57 and 58 has held as under:

“46. 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.

¹ (2009) 13 Supreme Court Cases 569

48. 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 proceeds 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 (*sic not*) be necessary and that the property cannot be reasonably or conveniently be partitioned.

49. 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-a-vis* the value of the property.

53. 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 predetermining valuation in regard to the half-share of the properties, the properties in question could not have been put to auction-sale.

56. As regards construction of Section 3 of the Act it was held: (*R. Ramamurthi Iyer case, SCC p. 730, para 13*)

"13. ...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. P.C. Mohandas and Rukmani v. Uday Kumar.*)

57. 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 13/16th 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 heretofore. We may furthermore notice that therein unfortunately attention of this Court was not drawn to the decision of this Court in *K. Ramamurthi Iyer*. 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.

59. In view of the decision of this Court in *K. Tamamurthi Iyer*, 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."

23. A similar view was also taken by the Hon'ble Supreme Court in the case of **R. Ramamurthi Iyer vs. Raja V. Rajeswara Rao**², wherein it held at paragraph Nos.11, 12 and 13 as under:

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

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

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

As soon as a shareholder applies for leave to buy at a valuation the share of the party asking for a sale under Section 3 of the Partition Act he obtains an advantage in that the court is bound thereafter to order a valuation and after getting the same done to offer to sell the same

² (1972) 2 Supreme Court Cases 721

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

13. In the argument of the learned counsel for the appellant emphasis has been laid on the fact that in the present case the court did not give any finding that the property was not capable of division by metes and bounds. It is thus pointed out that the essential condition for the application of Section 2 of the Partition Act had not been satisfied and Section 3 cannot be availed of by the respondent unless it had first been found that the property could be put to sale in the light of the provisions of Section 2. This submission has hardly any substance inasmuch as the trial court had prima facie come to the conclusion that a division by metes and bounds was not possible. That was sufficient so far as the proceedings in the present case were concerned. The language of Section 3 of the Partition Act does 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. Further he never made any proper application invoking the provisions of Section 3 of the Partition Act and all that he said in his written statement, was that in case the court held that the said property was incapable of division into two shares he was ready and willing to buy the plaintiff's share in the suit at a valuation to be made in such a manner as the court might think proper. In our opinion, this was sufficient compliance with the requirement of Section 3 of the Partition Act. Section 3(1) does not contemplate a formal application being filed in every case. The words

employed therein simply mean that the other shareholder has to inform the court or notify to it that he is prepared to buy at a valuation the share of the party asking for sale. In the written statement even if it was maintained that the property was not capable of division by metes and bounds the alternative prayer was necessarily made in para 7 which would satisfy the requirements of Section 3 of the Partition Act.”

24. In the case of **Malati Ramchandra Raut (Mrs) and others vs. Mahadevo Vasudeo Joshi and others**³ again dealing with the provisions of the Partition Act, the Hon’ble Supreme Court in paragraph No.9 has held as under:

“**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. As soon as a request for sale is made by a shareholder under Section 2, any other shareholder becomes immediately entitled to make an application under Section 3 for leave to buy the shares of the former. The right to buy having thus arisen and become crystallised, the date with reference to which valuation of the shares in question has to be made is the date on which the right arose.”

25. In the given legal position as has been laid down by the Hon’ble Supreme Court and also on due consideration of the provisions of Section 2 and Section 3 of the Partition Act, what clearly gets culled out is that, what is necessary for the Court to consider is as to what would be the most beneficial step for redressal of the grievance of the parties i.e. of the shareholders to the said property and also take a decision by which the property

³ 1991 Supp (1) Supreme Court Cases 321

fetches maximum price, so that each of the shareholders fetch maximum from the said property.

26. From the Advocate Commissioner's report one thing stands established that the Suit schedule A property is not one which is divisible in terms of the order passed in the Suit for partition. In that event only solution is to put the property for sale by way of auction. However, in terms of Section 3 if any of the shareholders or more than one of the shareholders are interested to retain the property, in the said event the property has to get valued and the person or persons who are interested in the said property and also is a shareholder would be entitled to pay the value of the said property to the remaining shareholders and can retain the property. Under the said circumstances, this Court is of the firm view that the decision of the Court below in rejecting the application for preemption filed by the petitioners herein was not justified.

27. What needs to be appreciated is that so far as the plaintiff is concerned, it now stands settled that he is more interested in putting the property to sale so that he can get his share by way of money. If the petitioners herein before the Court below are ready to pay the plaintiff/petitioner and other shareholders the money worth their share, it is that what is envisaged in Sub-Section 2 and Sub-Section 3 of the Partition Act. Therefore, to the aforesaid

extent, the Court below ought to have accepted the requested made by the petitioners herein.

28. The only dispute which remains to be seen is whether the property would fetch Rs.8,00,00,000/- in the market or more than Rs.8,00,00,000/-. In this context, in the opinion of this Court, it would had been far more appropriate if the Court below while allowing the property to be sold by way of auction would have only put the rider that whatever would be the highest price quoted, the said price should be first offered to the petitioners herein seeking their willingness whether they are ready to accept the said price. Further only on their unwillingness should the auction be finalized in favour of the highest bidder. If such a decision would have been taken, it would have met the grievance of the plaintiff/petitioner as well and would have saved the interest of the petitioners herein also wherein they intend to retain the Suit schedule property.

29. The Civil Revision Petition to the aforesaid extent stand allowed. It is ordered that let the Suit schedule A and B properties be put to auction and the price quoted by the highest bidder should be made available to the two petitioners herein seeking their willingness to purchase the said property at the highest price quoted by the bidder. That only in the event of the refusal by the petitioners should there be continuation of the auction proceedings and the same be finalized in favour of the highest

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bidder. Let the matter now be placed before the Court below afresh for a suitable direction to the Advocate Commissioner by fixing a fresh date for auction of the Suit schedule properties and the same be finalized in terms of the directions given by this Court in the preceding paragraphs.

30. No order as to costs.

31. As a sequel, miscellaneous petitions pending if any, shall stand closed.

P.SAM KOSHY, J

Date: 22.03.2024

Note: LR copy to be marked: Yes
B/O. GSD