

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

CR No. 3264 of 2014(O&M)
Date of decision : November 20, 2015

Atal Sareen

..... Petitioner

Versus

Saroj Sareen and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Kanwaljit Singh, Senior Advocate with
Mr. Jaswant Singh, Advocate
for the petitioner.

Mr. Abhinav Gupta, Advocate
for respondent No.1.

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Amit Rawal, J (oral).

The petitioner-defendant has challenged the impugned order whereby the application filed under Order 7 Rule 11 CPC seeking rejection of the suit, filed under Section 22 of the Hindu Succession Act, 1956 (hereinafter called as 'the Act') on behalf of respondent-plaintiff, claiming preferential right in respect of the suit property, has been dismissed.

Mr. Kanwaljit Singh, learned Senior Advocate assisted by Mr. Jaswant Singh, Advocate submits, that the respondent-plaintiff had earlier instituted a suit bearing No.131 of 2002 claiming a separate possession by way of partition to the extent of 1/5th share in the property bearing ES 245 situated at Nakodar

Road, Jalandhar and as well as for setting aside of the sale deed dated 27.8.2003 executed in favour of Mamta Kaura in respect of land measuring 3 Marlas. The suit vide judgment and decree dated 18.5.2010 was partly decreed to the extent that the respondent-plaintiff along with the co-sharer were held entitled to a separate possession by way of partition. However, during the pendency of the aforementioned suit, the respondent-plaintiff filed a suit under Section 22 of the Act, in the year 2006 for the same very property claiming preferential right in the area alleged to have been purchased by Mamta Kaura. On receipt of the notice of suit, an application under Order 7 Rule 11 sought rejection of the plaint, on the premise that Kaushalya Sareen was owner of 1/5th share and she, during her life time sold her share to Mamta Kaura vide sale deed dated 27.8.2003 which has subsequently been purchased by the plaintiff vide sale deed dated 4.1.2007. At the best, the petitioner-defendant had become co-sharer in view of the partition decree dated 18.5.2010.

He further submits that Section 22 of the Act, could not be made in view of the law laid down by the Hon'ble Supreme Court in **Atam Parkash Vs. State of Haryana AIR 1986 (SC) 859.**

Mr. Abhinav Gupta, learned counsel appearing on behalf of the respondent No.1 submits that there is no illegality and perversity in the order under challenge as it is a question of fact and law, thus suit cannot be rejected in the manner and mode as sought to be. At the best, trial court can be directed to decide the issue of maintainability as preliminary issue.

I have heard learned counsel for the parties and appraised the paper book.

It is a matter of record that in the suit, resulted into passing of judgment and decree dated 18.5.2010, a specific issue with regard to the sale deed dated 4.1.2007 was carved out, as issue No.4-A which reads as under:-

“Whether sale deed dated 4.1.2007 executed by defendant No.1-A in favour of defendant No.3 is illegal, null and void and is not binding upon rights of the plaintiff? OPP”

The trial court rendered finding on issue No.4-A in favour of the petitioner-defendant and the aforementioned judgment and decree has attained finality. Even otherwise as per the ratio decidendi culled by the Hon'ble Supreme Court, a preemptory right to a co-owner is not available. The respondent-plaintiff could not have during, the pendency of the previous suit claimed separate possession as 1/5th share cannot be claimed as a preemptory right viz-a-viz share of other co-owner. Once the petitioner-defendant has been held to be co-owner viz-a-viz 1/5th share and another 1/5th share which has been purchased during the pendency of the suit, (in total 2/5th share), in my view, the suit under Section 22 of the Act was not be maintainable.

In my view, the respondent-plaintiff could not claim preferential right as per judgment and decree *ibid*, all the co-owners have got their respective shares. It is prerogative of the share holder to sell the share to any third party without offering his share to other

co-owners. The aforementioned facts have not been noticed by the trial court while declining the application under Order 7 Rule 11. Thus, impugned order is not sustainable in the eyes of law,much less has been passed exceeding the jurisdiction.

Accordingly, the impugned order is set aside. The suit aforementioned is hereby rejected.

The revision petition stands allowed.

(AMIT RAWAL)
JUDGE

November 20 , 2015
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