



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 17.11.2016
Delivered on: 30.11.2016

WEB COPY

CORAM :

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

Second Appeal (MD) No.658 of 2016

C.M.P. (MD) No.10764 of 2016

1.T.B.Venkatachari
2.T.V.Ravi
3.T.V.Kennady
4.T.V.Vincent
5.T.V.Vargheeze

: Appellants/ 3rd, 16th to 19th Respondents/
Defendants 3 and LRs. of 7th defendant

-Vs-.

1.R.Santhana Lakshmi,
W/o.S.R.Rajaraman,
2/35, N-86th Street, Seattle, U.S.A.,
Rep. by Power Agent S.J.Mani,
S/o.Jagannatha Iyer,
residing at Anna Nagar West,
Madras. : 1st Respondent/Appellant/Plaintiff

2.S.R.Bashyam
3.Dr.S.B.Rajesh Ram : 2nd and 3rd Respondents/1st and 2nd
Respondents / 1st and 2nd Defendants
K.K.Krishnaveni (Died)

4.Saroja Singha : 4th Respondent/5th Respondent/ 5th
Defendant
Indira Kuthruff (Died)
Balambal (Died)

5.Helmate Kuthruff : 5th Respondent/8th Respondent/ LRs of
5th Defendant Indra Kuthruff

6.Ramesh Kuthruff : 6th Respondent/9th Respondent/ LRs of
5th Defendant Indra Kuthruff

7.Suresh Kuthruff : 7th Respondent/10th Respondent/LRs
of 5th Defendant Indra Kuthruff

8.K.L.Krishnamoorthy : 8th Respondent/11th Respondent/ LRs
of 4th Defendant Krishnaveni

<https://hcservices.ecourts.gov.in/hcservices/>

9.K.K.Premchand : 9th Respondent/12th Respondent/ LRs



10.K.K.Padmanabhan : 10th Respondent/13th Respondent/ LRs of 4th Defendant Krishnaveni
11.M.Shanthi : 11th Respondent/14th Respondent/ LRs of 4th Defendant Krishnaveni
12.N.R.Anuja : 12th Respondent/15th Respondent/ LRs of 4th Defendant Krishnaveni

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, to set aside and reverse the decree and judgment passed in A.S.No.107 of 2003, dated 09.03.2015 on the file of the II Additional District & Sessions Judge, Thanjavur allowing the appeal granting relief of Pre-emption and remanding the same by set aside the judgment and decree of the Additional Subordinate Judge, Kumbakonam in O.S.No.28 of 1994, dated 03.12.2002 and allow the second appeal, thereby dismissing the suit in O.S.No.28 of 1994 on the file of the Additional Sub Court, Kumbakonam with costs through out.

For Appellants : Mr.M.V.Santharaman

JUDGMENT

The third defendant and the legal representatives of the 7th defendant in the suit in O.S.No.28 of 1994 on the file of the Additional Sub Court, Kumbakonam, are the appellants in this Second Appeal. The first respondent in this Second Appeal filed a suit in O.S.No.28 of 1994 for declaration of plaintiff's preemptive rights over the suit property and for consequential relief of possession of the suit property upon depositing the amount equivalent to the market value of 4/5th share of the suit property. The suit is also for the relief of preliminary decree for ½ share of the plaintiff in the suit property. The suit property is a tiled house and a house site measuring an extent of 1338 square feet.

2.The case of the plaintiff, as pleaded in the plaint, are as follows:

2.1.The suit property is a dwelling house and was owned by Rama Iyer and his brother Naga Iyer. Rama Iyer is the father of the plaintiff and defendants 1,4 and 6. By virtue of subsequent transactions, Rama Iyer got the entire suit property and it was his ancestral property. While the first defendant is the brother of the plaintiff, the defendants 4 to 6 are the plaintiff's sisters. Rama Iyer died intestate in the year 1978, leaving behind his son, the first defendant and four daughters as his legal heirs. Since the property was not divided between the sharers, the plaintiff is entitled to 1/5th share in the suit property.

<https://hcservices.ecourts.gov.in/hcservices/>

2.2.The plaintiff was living in the United States along with her husband and she used to stay only in the suit house



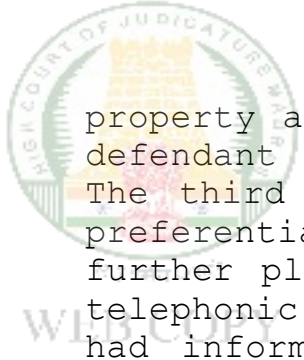
whenever she visits India.

2.3. The first defendant along with the second defendant who is the son of first defendant sold the suit property to the third defendant for a consideration of Rs.1,90,000/- under a registered sale deed dated 14.06.1993. The sale deed is not binding on the plaintiff, as she is not a party to this document. Since the suit property is a dwelling house and plaintiff is a co-sharer, she is entitled to right of preemption under Section 22 of the Hindu Succession Act. The defendants 1 and 2 have, without the knowledge of the plaintiff, obtained alleged release from plaintiff's sisters and sold the suit property along with the son of the second defendant. The first defendant cannot alienate the suit property to the third parties without the knowledge and consent of the plaintiff and the plaintiff is, therefore, entitled to the suit property by way of exercising her right of preemption. Even the other sisters of the plaintiff did not inform her about the intention to transfer their right in favour of the defendants. Since the suit property have been sold by the defendants 1 and 2 as their absolute property, the entire transaction is only to defeat the rights of the plaintiff. The third defendant is not a *bona fide* purchaser, as he has purchased the property knowing fully well about the specific share of the plaintiff in the suit property.

2.4. The plaintiff also by way of amendment questioned the further alienation of the suit property by the third defendant in favour of his wife, namely, the seventh defendant.

3. The suit was contested by the defendants 1 and 2 by stating that the plaintiff knew very well about the release deed executed by her other sisters and that she also gave her consent to the first defendant to treat the suit property as his absolute property. The defendants 1 and 2 further pleaded that the third defendant is a *bona fide* purchaser and that the sale deed is binding on the plaintiff inasmuch as the plaintiff is fully aware of the sale deed in favour of the third defendant. It was also the case of the defendants 1 and 2 that before the sale, the plaintiff was fully informed by the first defendant through phone and that the plaintiff gave her full consent for the sale in favour of the third defendant. The first defendant further took up a stand that the plaintiff is not a coparcener and that he is not bound to inform the plaintiff before making any alienation. Another legal plea that was raised by the first defendant is that the suit property being a dwelling house, the plaintiff, a female member, has no preferential right as she is entitled to seek partition only if the male heir chooses to divide the dwelling house.

4. The third defendant, the purchaser, also contested the suit by filing an independent written statement. He disputed the claim of plaintiff to 1/5th share and urged that the plaintiff is entitled to only 1/10th share as the suit property is the ancestral



property and upon the death of the plaintiff's father, the first defendant is entitled to one half of the suit property by birth. The third defendant further contended that the plaintiff has no preferential right, as she is not a coparcener. It was the further plea of the third defendant that the third defendant had telephonic conversation with the plaintiff and that the plaintiff had informed the third defendant that she had relinquished her right orally in favour of the first defendant. It was also pleaded by the third defendant that the plaintiff had further stated, during the telephonic conversation, that she would relinquish her right, as done by her sisters, in writing by executing necessary documents, when she come over to Kumbakonam.

5.The trial Court accepted the case of the defendants that the plaintiff had agreed to relinquish her rights and that she is not entitled to get any preference, being a female heir, by virtue of Section 22 of the Hindu Succession Act. The trial Court has further held that the plaintiff is not entitled to seek any relief after the completion of transfer of interest in favour of the third defendant. Since the suit property is in the enjoyment of a strangers, namely, defendants 3 and 7, the plaintiff is not entitled to the right of preemption. Aggrieved by the findings of the trial Court, the plaintiff preferred an appeal in A.S.No.107 of 2003 on the file of the II Additional District and Sessions Court, Thanjavur. The lower appellate Court, upon consideration of the legal and factual issues, allowed the appeal and decreed the suit as prayed for. As against the judgment and decree of the lower appellate Court, the present Second Appeal has been preferred by the third defendant and the legal heirs of the seventh defendant.

6.The learned counsel for the appellant raised the following substantial questions of law in the memorandum of grounds:

(1) *Whether the First Appellate Court can go beyond pleadings and non-denial of the factum of consent of the plaintiff when the plaintiff was not examined to deny the facts pleaded without denying the same in writing and by evidence?*

(2) *Whether the First Appellate Court can grant a preemption right to a Hindu Woman who was not a coparcener?*

(3) *The preemption right section of Hindu Law was repealed when the appeal was pending and whether the Court can grant a relief to the plaintiff on a Law which was repealed at the time of passing the judgment?*

(4) *Whether the Court cannot take adverse inference of the fact that the plaintiff was not examined*



to prove her case and the plaintiff's power agent cannot depose as the plaintiff when the transaction and admission in between plaintiff and 3rd defendant was pleaded?

(5) Whether the relief of partition can be ordered when there is no power to file suit for partition to the power agent who signed the plaint and conducted the suit as power agent?

(6) Whether the judgment of the Lower Appellate Court in granting relief of preemption right when the same is repealed is not a violation of the Hindu Succession Act?

(7) Whether the evidence of power agent for the executive act of principal in which principal alone can be cross examined can be accepted against Order 3, Rule 2 C.P.C.?

7. He has also raised additional grounds and additional substantial questions of law. The additional substantial questions of law are as follows:

(1) Whether evidence can be let in or looked into when a plea is taken in the reply notice and not denied in the first instance by way of reply in the plaint?

(2) Whether in a suit for partition and preemption the claims and rival claims of the parties can be looked in a probable manner and not beyond reasonable doubt?

(3) Whether in a civil suit the question of burden of proof is only "Balance of probability and not beyond reasonable doubt"?

(4) Whether an entire suit of partition and preemption could be decided on a single averment of deposition made by one party without going through the entire pleadings, evidence and circumstances of the case?

(5) Whether the Court can decide that the entire sale deed is invalid when 9/10 share owner sales the property and can hold that the entire sale is invalid excepting in respect of 1/10th share?

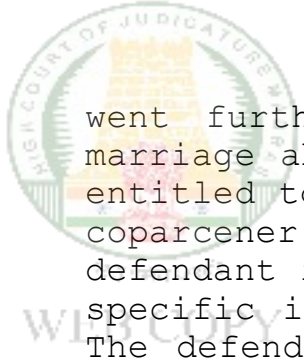
8. The learned counsel for the appellants made the following submissions:

<https://hcservices.ecourts.gov.in/hcservices> 8.1. The plaintiff is not a coparcener and hence, she is not entitled to claim any right of preemption as provided under Section 22 of the Hindu Succession Act.



8.2. When the first defendant and the third defendant specifically pleaded about the factum of consent given by the plaintiff, the lower appellate Court has simply accepted the case of the plaintiff without considering the evidence in this regard. Having regard to the fact that the plaintiff was not examined to prove her case, the lower appellate Court ought to have drawn adverse inference against her. The lower appellate Court accepted the evidence of the power of attorney agent of the plaintiff. The lower appellate Court erred in granting the relief of preemption right ignoring the repeal of the provision. When it is not required in law to prove a fact beyond reasonable doubt and the Court is entitled to accept a fact by balancing probabilities, the lower appellate Court has certainly committed an error in holding that the first defendant has not proved the plaintiff's consent for the alienation of the suit property in favour of the third defendant. Since the plaintiff is only entitled to 1/10th share, the Courts below are not justified in decreeing the suit to declare the preemptive right of the plaintiff over the suit property.

9. In case, any heir specified in clause (1) of the schedule, desires to dispose of his interest in the property inherited by him along with others, under the provisions of the Act, any other heir, who inherited the property simultaneously, has a preferential right to acquire that interest by purchase. The preferential right to acquire the property as per Section 22 of the Act is confined to cases of devolution of property upon two or more heirs specified in clause (1) of the schedule. Any alienation in derogation of the right of any other sharer is voidable and the suit to set aside the alienation is maintainable. Having regard to the scope and object and the language employed in Section 22, any sharer or any heir, who proposes the transfer of his or her right in the property is bound to inform the other heirs so that the other heirs may exercise the preferential right they have, to acquire the interest proposed to be transferred. In the present case, the case of the first defendant in the written statement is self contradictory. First of all, the first defendant took up a stand that the plaintiff is not a coparcener and that she has no right in the ancestral residential house under Section 22 of the Hindu Succession Act. According to the first defendant, his definite stand is that the plaintiff has no preferential right and Section 22 of the Hindu Succession Act will not apply. It is also further pleaded by the first defendant that Section 23 of the Act will not come into operation unless the male heir chooses to divide the dwelling house and that the plaintiff has no right or share over the suit property. Thirdly, it was contended by the first defendant that the plaintiff did not claim any share and gave her full consent for the sale of the suit property through phone to the first defendant. The third defendant also pleaded a similar case denying the right of plaintiff to have a share in the property. The third defendant



went further and pleaded that the plaintiff who has given in marriage about twenty years before the death of her father is not entitled to the right of preemption particularly when she is not a coparcener. Having regard to the pleadings that was taken by the defendant in defence, the findings of the lower appellate Court is specific in rejecting the contentions of the defendants 1 and 3. The defendant also argued before the Courts below that the right of preemption cannot be exercised after the completion of transfer. Though this plea was accepted by the trial Court, the lower appellate Court has rightly held that the separate suit filed by the plaintiff claiming right of preemption is maintainable.

10. Section 22 of the Hindu Succession Act reads as follows:

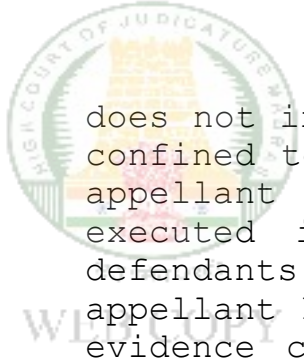
"Section 22. Preferential right to acquire property in certain cases (1) Where, after the commencement of this Act, interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolve upon to two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

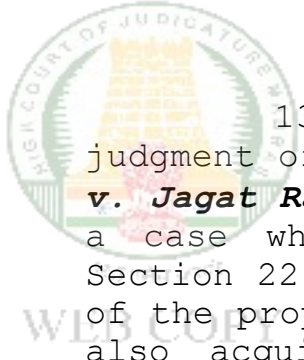
Explanation.-In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf."

11. The applicability of Section 22 of the Hindu Succession Act in respect of the coparcener is raised as an issue. Reading of Section 22 gives a clear picture that the provision



does not indicate that the application of Section 22 of the Act is confined to coparceners. The learned counsel for the plaintiff / appellant argued that the consent of plaintiff for the sale deed executed in favour of the third defendant is proved by the defendants in the present case. The learned counsel for the appellant has not produced any other material than the portion of evidence considered by the lower appellate Court. It is to be noted that the sale deed under Ex.A3 has been executed by the first defendant in favour of the third defendant by describing the first defendant as the absolute owner of the suit property. The alleged consent would have been referred to in the document had it been a fact. The first defendant has executed the sale deed without disclosing the right of the plaintiff or the fact that the plaintiff is a co-heir along with the first defendant to get a definite share over the suit property. Having regard to the conduct of the first defendant in denying the right of the plaintiff and to deal with the property as the absolute property, his case that he has consent for the sale in favour of the third defendant is not believable.

12.The lower appellate Court has considered the various circumstances which would indicate the falsity of the case pleaded by the defendants 1 and 3. The specific stand taken by the defendants 1 and 3 in their respective written statement also indicate that they would not have sought for consent from the plaintiff, having regard to their definite case that the plaintiff had no right of preemption under Section 22 of the Hindu Succession Act. Since the first defendant executed the sale deed as his absolute property without reference to the share of the plaintiff, his case that he executed the sale deed with the permission of the plaintiff is improbable. The learned counsel for the appellant vehemently contended that that plaintiff has failed to examine herself to prove her case. It is not in dispute that the plaintiff is residing abroad during trial and that the suit itself was filed only through her power of attorney agent. However, the learned counsel for the appellant admitted the position that the plaintiff filed an application to examine herself as witness when she had come to her native place. However, her attempt to examine herself as witness was thwarted by the defendants who have sought time to file counter in the petition instead of permitting the plaintiff to examine herself as a witness. Hence, despite her attempt to examine herself as a witness, she could not do so before she left India due to the circumstances created at the instance of appellants. This one circumstance would show the conduct of the defendants and the tendency to take prevaricative stand to suit their convenience. Hence, the contentions of the leaned counsel for the appellants on the merits of the case are not appealing and the findings of the lower appellate Court on this issue is well founded and supported by reasons.



13.The learned counsel for the appellants relied upon a judgment of the Hon'ble Supreme Court in the case of **Lachhman Dass v. Jagat Ram and others** reported in **2007 SAR (Civil) 250**. This is a case where the plaintiff claimed right of preemption under Section 22 of the Hindu Succession Act only against the purchasers of the property without impleading the appellant, a tenant who has also acquired the same property from the original purchasers before the filing of the suit. After holding that the decree in the suit based on the compromise between the plaintiff and the first purchasers is not binding on the subsequent purchasers of the property who has purchased the property prior to the suit, the Hon'ble Supreme Court further held that the plaintiff namely daughter of the original owner is not a co-sharer along with the original owner. It was also held that the appellant, the subsequent purchaser who has purchased the property prior to the suit filed by the plaintiff has a right to question the decree in the suit for preemption based on compromise. This judgment has no application to the facts of the present case. Having regard to the findings of Courts below, there is no merit in the questions of law raised in this Second Appeal.

14.The appellants have filed a petition to receive additional evidence in C.M.P.(MD)No.10764 of 2016. The additional evidence sought to be relied upon by the appellant is nothing but the written arguments of plaintiff in reply in the suit. No argument was advanced relying upon this additional evidence. As a matter of fact, this Court noticed that the purpose for relying upon this document earlier was different. In these circumstances, there is no merit in this petition and hence, dismissed.

15.In view of the conclusions of mine, the submissions of the learned counsel for the appellants have no substance and this Court find no infirmity or error in the judgment of the lower appellate Court. Hence, the above Second Appeal is **dismissed**. However, there is no order as to costs.

Sd/-

Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

SRM

TO

1 The II Additional District & Sessions Judge,
Thanjavur

2 The Additional Subordinate Judge, Kumbakonam
+1cc to Mr.T.R.Subramanian Advocate Sr.No. 74332

JAM/27.12.16/SKN/9p-4c

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Pre-Delivery Judgment made in
Second Appeal (MD) No.658 of 2016
30.11.2016