

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.4464 of 2011 (O&M)

Date of decision : 22.09.2016

Pushap Lata

...Appellant

Versus

Rajesh Sethi and others

..Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

Present: Mr. Sumeet Mahajan, Sr. Advocate with
Mr. Amit Kohar, Advocate for the appellant.

Mr. Brijender Kaushik, Advocate for respondents.

Mr. Arun Sharma, Advocate for
Mr. T.K. Joshi, Advocate for respondent No.8.

Mr. Sanjay Jain, Advocate for respondent No.8(i).

Mr. Arvinder Arora, Advocate for respondent No.15.

AMIT RAWAL, J. (Oral)

The appellant-plaintiff is aggrieved of the concurrent findings of fact, whereby suit instituted by invoking the provision of Section 22 of the Hindu Succession Act, 1956, has been dismissed.

Mr. Sumeet Mahajan, learned Senior Counsel assisted by Mr. Amit Kohar, learned counsel appearing on behalf of appellants submits that both the Courts below have abrogated in not referring to the ratio decidendi culled out by Hon'ble Supreme Court in case *Atam Prakash Vs. State of Haryana and others, 1986 (2) SCC 249*, wherein the vires of the Punjab Pre-emption Act, 1913 was challenged and most of the provision were struck down but few of them were upheld. It is in this context, he has drawn

the attention of this Court to the paragraph 13 of the judgment. Same reads thus:-

“13. We are thus unable to find any justification for the classification contained in Section 15 of the Punjab Pre-emption Act of the kinsfolk entitled to pre-emption. The right of pre-emption based on consanguinity is a relic of the feudal past. It is totally inconsistent with the constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition quarter of a century ago, namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession are today irrelevant. The list of kinsfolk mentioned as entitled to pre-emption is intrinsically defective and self-contradictory. There is, therefore, no reasonable classification and clauses 'First', 'Secondly' and 'Thirdly' of Section 15(1)(a), 'First', 'Secondly', and 'Thirdly' of Section 15(1)(b), clauses 'First', 'Secondly' and 'Thirdly' of Section 15 (1) (c) and the whole of Section 15 (2) are, therefore, declared ultra vires the Constitution.”

Now the question posed before this Court is “where suit under Section 22 of 1966 Act, provision of which are according to the Courts below and respondent-defendants are paramateria, be maintainable or not? Before answering to the aforementioned question, I would refer to the brief preface of the matter. The appellant-plaintiff on 17.10.2007 instituted the suit challenging two sale deeds of 13.09.2007 in respect of suit properties by defendant No.2 to 10 in favour of defendant No.1. It has been averred that the co-owners, before executing the sale deed, were enjoined upon an obligation to offer to the plaintiff to purchase the share or not. Both the Courts below have dismissed the suit by relying upon the ratio decidendi

culled out in Atam Prakash's case (Supra) and as well as in *Harbir Vs. Rajpal, 2002 (2) RCR (Civil) 341*.

Mr. Mahajan, submits that fact finding of the Courts below without referring to the cross-examination of the appellant-plaintiff is not only erroneous but misplaced, for, there has never been any admission of knowledge of the aforementioned sale deeds. Alleged compromise dated 10.09.2007, Ex.D1 relied upon by the defendant has not been proved in accordance with law, in essence, mere exhibition of documents does not dispense with its proof as it do not bear the signatures of any of the parties. He further submits that Atam Prakash's case (Supra) came to be, again pondered upon, by Hon'ble Supreme Court in case *Krishna minor through his father and Guardian and others Vs. State of Haryana and others, 1994 (4) SCC 703*, and same very view, as expressed in Atam Prakash's case, has been reiterated. Even by the Hon'ble Division Bench of this Court in *Smt. Bhag Bhari and others Vs. Smt. Sarla Devi and others, 1988 (2) RRR 347*.

He further submits that both the aforementioned judgments i.e. *Krishna's minor through his father and Guardian and others's* case and *Smt. Bhag Bhari's case (Supra)* in Harbir case (Supra) have not been adverted/referred to by the Single Judge of this Court though, prima facie Court had opined that ratio decidendi given in Atam Prakash's case would be applicable but in the penultimate paragraph left the question open as there was no representation on behalf of appellant by dismissing in default appeals.

Per Contra, Mr. Brijender Kaushik, learned counsel appearing on behalf of contesting respondent submits that on reading of the entire

examination and cross-examination of the plaintiff, it reveals that she had knowledge of the property being sold to the defendant No.1 who is none-else but family member. There were other properties of Chanan Mal which with mutual consent have been sold to third party, in essence, have not been challenged, thus, irresistible conclusion is liable to be drawn that execution of the sale deed was not done surreptitiously. The applicability of Punjab Pre-emption Act, 1913 has been struck down in Atam Prakash's case and the provision of Section 22, thus being paramateria, cannot be enforced by the Court by invoking Section 9 of the Code of Civil Procedure and thus urges this Court for affirming the findings under challenge.

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

During the course of hearing, this Court called upon the counsel representing their respective parties for amicable settlement as sale deeds aforementioned are in respect of 5/6th share whereas appellant is claiming 1/6th share. The plaintiff's husband namely K.R. Bathla present in the Court has been called upon and apprised that appellant-being his wife can be compensated in terms of money qua 1/6th share, by keeping in view the consideration of the present market value and answer was that he wants the property for running computer Centre, free of cost, for young people/aspirants. Noticing the intention of the appellant-plaintiff, this Court is left with two options (i) either to accept the contention of the appellant in toto or (ii) uphold the provision of law. Keeping in view the peculiar facts, circumstances and intention of the appellant. I decline the Ist relief. Answer to the question noticed above is owing to the following fact that the

provisions of Section 22 of 1956 Act would be applicable but on ascertaining the intention is not entitled to the relief as sought for.

I am in agreement with the submission and contention of Mr. Mahajan, Senior Counsel particularly after noticing para No.13 of the judgment in Atam Prakash's case.

The aforementioned judgment as noticed above was also referred to in paragraph No.6 of judgment rendered in Krishna Minor's case (Supra) reiterating the view expressed in Bhau Ram's case noticed in Atam Prakash's case. Same reads thus:-

“6. In view of the aforesaid we cannot agree with the contention advanced by Shri Pandey that Atam Prakash case needs reconsideration because it based its decision on Bhau Ram Vs. Baij Nath Singh, AIR 1962 SC 1476 which had dealt with the constitutionality of Section 16 and not with Section 15(1)(b). This aspect of the matter has no relevance inasmuch as Section 16 also had conferred the right of pre-emption on co-sharers, which had been upheld as constitutionality valid for reasons noted above. Not only this, Ram Sarup case too had regarded this restriction qua co-sharers as reasonable.”

Similar provision came to be again discussed before Division Bench of this Court in Smt. Bhag Bhari and other's case (Supra) in paragraph No.4. Same reads thus:-

“4. The preferential right to acquire the interest in the joint property proposed to be transferred has been guaranteed to the co-sharers only under the said Section 22. The attack against the right of pre-emption of a co-sharer on the basis of Article 14 has also been turned down by a recent judgment of the Supreme Court in Atam

Parkash Vs. State of Haryana and others, 1986(1) 89 PLR 329 : 1987 RRR 116. The right of pre-emption guaranteed under Section 22 of the Act, therefore, would also not be open to challenge on the basis of Article 14 of the Constitution. The argument based on Article 15 was that the right of pre-emption under the said section has been guaranteed only to Hindus whereas it is not available to non-Hindus living in India. It was, therefore, argued that provisions of Section 22 of the Act have resulted in discrimination on the basis of religion between the Hindus and the non-Hindus in the country. The law of succession applicable to the communities other than the Hindus is based on their personal law. The Hindu Succession Act governs only the Hindus. The non Hindus are not readily agreeable to any change in their personal law. The classification, therefore, was quite rational and the provisions of Section 22 would not be open to challenge on the ground of discrimination between Hindus and non-Hindus.”

Noticing the classification amongst Hindu and Non-Hindu, Hon'ble Supreme Court did not strike down the provision of Section 22. As far as the judgment rendered in Harbir's case, relied upon by both the Courts below, I am of the view that judgment would be per-incuriam, for, with all humility at my command and respect to finding, the question of applicability of provision of Section 22 of 1956 Act has been kept open i.e. not decided. The view expressed is only prima but not on merits as the appeal was dismissed in default, therefore, it cannot apply to the facts and circumstances of the case as indicated above, much less, did not discuss in extenso the pith and substance in Atam Prakash's case. Since the appellant-

plaintiff does not have any love and affection or any deep seated concern over the property and intention is only to open the computer Centre, I am of the view that they can easily be compensated in terms of money qua 1/6th share after determination of the same, through the assistance of the Executing Court, by ascertaining the Collector rates/market price.

Accordingly, I do not intend to decree the suit by applying provision of Section 22 of 1956 Act as setting aside the sale deed would be tantamount to putting the clock back as sale deed was affected wayback in 2007. I would not like to uproot the persons already settled who are in running their business to dislodge equally but cannot remain oblivious that the appellant has 1/6th share.

Accordingly, suit of the appellant-plaintiff is decreed in part by determining the share of 1/6th. The plaintiff shall be entitled to seek the execution of the same in competent court of law by taking the assistance of the Court in ascertaining the value/current market price and on determination, defendant No.1 shall deposit the same within a period or timeline given by the Executing Court.

Appeal, holding that provision of Section 22 of Hindu Succession Act would be applicable, is disposed of in aforementioned terms.

22.09.2016

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**(AMIT RAWAL)
JUDGE**

Whether speaking/reasoned:-

Yes/No

Whether reportable:-

Yes/No