

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.1140 of 1998Order reserved on: 11-12-2018Order delivered on: 11-1-2019

Vidyanand Soni (Died) Through LRs

1. (a) Ram Kumar Soni, S/o Late Shri Vidyanand Soni, aged about 54 years, R/o Lily Chowk, Purani Basti, Raipur (C.G.)
 - (b) Krishna Kumar Soni, S/o Late Shri Vidyanand Soni, aged about 48 years, R/o Lili Chowk, Purani Basti, Raipur (C.G.)
 - (c) Smt. Purnima Soni, D/o Shri Vidyanand Soni, (w/o Shri Mukund Soni), Behind Shri Kankali Mandir, Soni Bada, Kankali Para, Raipur (C.G.)
 - (d) Smt. Kamla Soni, D/o Vidyanand Soni, (w/o Shri Ashok Soni), R/o Village Beltara, Post Pali, Tah. Pali, Distt. Korba (C.G.)
- (Plaintiffs)
---- Appellants

Versus

1. Smt. Prembati (Died) Through LRs
 - 1A. Shri Mani Shankar Soni, S/o Late Prembati Bai Soni, Tripti Bhojnalaya, in front of Jha Typing Centre, Lili Chowk, Purani Basti, Raipur (Since Dead).
Through Varsha Soni (Pammi), D/o Late Mani Shankar Soni, R/o Tripti Bhojnalaya, in front of Jha Typing Centre, Lili Chowk, Purani Basti, Raipur (C.G.)
 - 1B. Shri Ravi Shankar Soni, S/o Late Prembati Bai Soni, in front of Sangam Aata Chakki Gali, House No. WSI/D 879, Near Grasi Provision Fansi and Gift Shop, Old Dhamtari Road, Krishna Nagar, Raipur (C.G.) (Since Dead).
Through his daughter : - Smt. Sarita Soni, in front of Sangam Aata Chakki WSI/D 879, Near Grasi Provision and Gift Shop, Old Dhamtari Road, Krishna Nagar, Raipur (C.G.)
 - 1C. Shri Anil Kumar Soni, S/o Late Prembati Bai Soni, Near Panchjanya Vidya Mandir, Kushalpur, Raipur (C.G.)
 - 1D. Shri Sanjay Soni, S/o late Prembati Soni, Near Tripti Bhojnalaya, in front of Jha Typing, Lili Chowk, Purani Basti, Raipur (C.G.)
2. Ramesh Giri alias Raghunath Prasad, S/o late Tularam Soni,

Sanyasi, at present, through Shri Ramesh Chandra Sharma, Bhawana Nade, at Basoore Buxur, Post Rajpura, District Merutt, U.P.

---- Respondents

For Appellants:	Mr. Viprasen Agrawal, Advocate.
For Respondents No.1A to 1D: -	Miss Swati Upadhyay, Advocate on behalf of Mr. Kishore Bhaduri, Advocate.
<i>Amicus Curiae:</i>	Mr. Abhijeet Mishra, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial question of law involved, formulated and to be answered in this plaintiff's second appeal is as under: -

“Whether both the Courts below are justified in holding that the plaintiff has no preferential right of pre-emption under Section 22(1) of the Hindu Succession Act, 1956 by holding that he has waived his right of pre-emption by agreement dated 29.10.1980 (Ex.D/1)?”

2. With the consent of parties, the substantial question of law is re-framed as under: -

“Whether both the Courts below are justified in holding that the plaintiff has no preferential right of pre-emption under Section 22(1) of the Hindu Succession Act, 1956 by holding that he has waived his right of pre-emption by agreement dated 20.10.1965 (Ex.P/1)?”

(For the sake of convenience, parties would be referred as per their status and ranking shown in the plaint before the trial Court.)

3. The suit house bearing Corporation No.29/451, Hatripara Ward, Tahsil & District Raipur was held originally by Tularam Soni who died leaving behind him his three sons – Radheshyam, Vidyanand (original plaintiff) and Ramesh alias Raghunath Prasad (defendant No.2). Three sons effected an amicable partition evidenced by agreement Ex.P-1 dated 20-10-1965. Middle portion fell to Raghunath Prasad (defendant No.2) while northern and southern

portions fell to remaining two brothers. It was stipulated between the three brothers that dividing wall shall be constructed after Nistar arrangements are done and thereafter, steps for mutation in the Corporation shall be taken. Raghunath Prasad – defendant No.2 by registered sale deed dated 29-10-1980 sold his share in middle portion to Smt. Prembati Bai (original defendant No.1) giving rise to an action claiming pre-emption by the original plaintiff, the elder brother.

4. The trial Court dismissed the suit finding inter alia that the plaintiff has no right of pre-emption and also negated his claim under Section 22 of the Hindu Succession Act, 1956 and also held that the right of pre-emption was waived by agreement Ex.P-1.
5. In appeal by the plaintiff, the findings and decree dismissing the claim for pre-emption have been upheld by the first appellate Court against which the plaintiff has preferred this second appeal in which substantial question of law has been framed and formulated, which has been set-out in the opening paragraph of this judgment.
6. Mr. Viprasen Agrawal, learned counsel for the appellants/plaintiffs, would submit that both the Courts below are absolutely unjustified in not granting decree in favour of the plaintiff under Section 22(1) of the Hindu Succession Act, 1956. He would further submit that Vidyanand Soni – original plaintiff being the coheir had a right of pre-emption to purchase the suit property in order to maintain integrity of the family and to avoid induction of third party in the ancestral house of the parties. He would rely upon a decision of the Supreme Court in the matter of Radhakishan Laxminarayan

Toshniwal v. Shridhar Ramchandra Alshi and others¹ and as such, the finding recorded by the two courts below in not granting the suit for pre-emption, pre-emptory right in favour of the plaintiff is liable to be set aside and the suit be decreed with cost(s).

7. Miss Swati Upadhyay, learned counsel appearing for LR's of respondent No.1, would support the judgments & decrees of the Courts below and would submit that both the courts below have rightly dismissed the suit in favour of defendant No.1 which is strictly in accordance with law and no interference is warranted and the substantial question of law be answered in favour of defendant No.1.
8. Mr. Abhijeet Mishra, learned *amicus*, has brought out the legal position relating to Section 22(1) of the Hindu Succession Act, 1956 (for short, 'the Act of 1956').
9. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.
10. The question for consideration would be, whether the original plaintiff had a preferential right of pre-emption under Section 22(1) of the Act of 1956 and whether he has waived his right of pre-emption by agreement dated 29-10-1980 vide Ex.D-1?
11. In order to consider the question so raised, it would be appropriate to notice Section 22(1) of the Act of 1956 which reads as under: -

“22. Preferential right to acquire property in certain cases.—(1) Where, after the commencement of this Act,

¹ AIR 1960 SC 1368

an 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, devolves upon 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.”

12. A careful perusal of Section 22(1) of the Act of 1956 would show that Section 22 is concerned about the preferential right to acquire property in certain cases. Sub-section (1) of Section 22 uses the expression “proposes to transfer his or her interest in the property”. Section 22(1) speaks of preferential right to acquire the interest proposed to be transferred and it talks of “contemplated transfer” and not of “concluded transfer” or “transfer already effected”. As such, right to acquire preferential right is conceived as a right exercisable at a stage where one of the heirs of the deceased proposes to transfer his or her interest in the property left by the deceased Hindu dying intestate.

13. The M.P. High Court in a decision rendered in the matter of Ghewarwala Jain v. Hanuman Prasad and another² has held that Section 22(1) of the Act of 1956 can be invoked when any of such heir proposes to transfer his or her interest and it is not applicable in case of concluded transfer or transfer which has already been effected. Paragraphs 7, 8 and 9 of the report state as under: -

“7. The title of this Section indicates that it concerns itself with 'preferential right to acquire property in certain cases. In sub-section (1) the expression used is "proposes to transfer". Accordingly, when the legislature talks of preferential right to acquire the interest "proposed to be transferred" in sub-section (1) of Section 22, it talks of a "contemplated transfer" and not of "concluded

2 AIR 1981 Madhya Pradesh 250

transfer" or "transfer already effected." The right to acquire preferentially the interest is conceived as a right exercisable at a stage where one of the heirs of the deceased proposes to transfer his or her interest in the property or business left by the deceased Hindu dying intestate. Acceptance of the contention that Section 22(1) of the Act creates a preferential right to acquire the interest already transferred will involve re-writing thereof. This is not permissible on any established principle of construction of statutes.

8. Sub-section (2) of [Section 22](#) of the Act provides for a cheap and speedy remedy for determination of 'consideration', for which any interest in the property or business of the deceased "may be transferred under the Section". The sub-section (2) of [Section 22](#) of the Act does not create any right wholly independent of that created by sub-section (1) of [Section 22](#). It is only where the other heirs of the deceased have a preferential right to acquire under sub-section (1) of [Section 22](#) that an application for determination of the consideration has to be moved in the Court specified in the Explanation appended to the section.

9. In view of the aforesaid discussion, an application under [Section 22\(2\)](#) of the Act cannot be regarded to be maintainable after 'transfer' has been effected. It is maintainable only at a stage where transferor heir proposes to transfer his or her interest in the property. ...”

14. This Court also in the matter of [Ghanshyam v. Sanghmitra Datta and another](#)³ while highlighting the object of Section 22 of the Act of 1956 has held that preferential right to acquire property under Section 22(1) is applicable only where the partition of property is incomplete, such a right cannot be claimed where the property has already been partitioned. Paragraph 16 of the report states as under: -

“16. The main object of section 22 of the Act is to prevent the heirs other than transferor from being compelled to be in joint enjoyment of property with stranger or other persons with whom they do not wish to associate themselves. Apparently, Section 22 of the Act envisages the right of preemption in those cases where partition of property is incomplete. Such right cannot be claimed where the property has already been partitioned.

³ AIR 2011 Chhattisgarh 117

Since partition clothes the respective parties with authority to hold their shares independently and absolutely as their separate properties and it could not be the intention of the legislature to put a clog on the power of alienation on the independent owner of the property. An interest in any immovable property of an intestate, would only mean undivided interest. Once partition takes place, application of Section 22 of the Act comes to an end. Therefore, I am unable to accept the arguments advanced by Shri Deoras that provisions contained in Section 22 of the Act are applicable even after partition. In view of above, since the property has already been partitioned, Section 22 of the Act has no application in the facts and circumstances of the case and the trial Court has erred in granting the decree in favour of the plaintiff.”

15. In the matter of **Smt. Arati Das v. Bharati Sarkar and others**⁴,

the Calcutta High Court has held that Section 22(1) of the Act of 1956 deals with a situation where a Hindu Undivided Property is proposed to be transferred by one of the co-heirs.

16. The Supreme Court in the matter of **Radhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi and others**⁵

(Constitution Bench) has held that the right of pre-emption is a weak right and is not looked upon with favour by courts and therefore the courts cannot go out of their way to help the pre-emptor. Paragraph 12 of the report states as follows: -

“(12) ... The right to pre-empt the sale is not exercisable till a pre-emptible transfer has been effected and the right of pre-emption is not one which is looked upon with great favour by the courts presumably for the reason that it is in derogation of the right of the owner to alienate his property. It is neither illegal nor fraudulent for parties to a transfer to avoid and defeat a claim for pre-emption by all legitimate means. In the Punjab where the right of pre-emption is also statutory the courts have not looked with disfavour at the attempts of the vendor and the vendee to avoid the accrual of right of pre-emption by any lawful means and this view has been accepted by this court in [Bishan Singh v. Khazan Singh](#), 1959 SCR 878 at p. 884: (AIR 1958 SC 838 at p. 841), where Subba Rao, J.

4 AIR 2009 Calcutta 8

5 AIR 1960 SC 1368

observed :

"The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place "."

17. Thus, from the aforesaid statutory provision as well as from the judgments of the High Courts and the Supreme Court, it is quite vivid that the applicability of Section 22(1) of the Act of 1956 is limited to a time period when the interest which is ought to be transferred by one of the co-heirs is incomplete i.e. the proposal to transfer is still pending or yet to complete.

18. Once the partition is complete, the preferential right under Section 22(1) of the Act of 1956 is not available and the recourse available to the preferential co-heir is to file application under Section 22(2) of the Act of 1956. Section 22(2) of the Act of 1956 came to be considered by a Division Bench of the Kerala High Court in the matter of **Valliyil Sreedevi Amma v. Subhadra Devi and others**⁶ in which it has been held as under: -

"7. ... In our opinion the object of the legislature in enacting sub-section (2) of Section 22 is only to provide a cheap and speedy remedy in cases where the property is in the hands of the co-heir who proposes to transfer the same and another co-heir is interested in acquiring the rights of the former but the parties are not able to agree about the consideration for which the former's interest in the property should be transferred to the latter. Where the property itself has been already transferred away by the co-heir first mentioned we fail to see what useful purpose will be served by an investigation conducted by the Court under sub-section (2) for determining the price at which the property may be sold by the former to the latter. In such a case an investigation under sub-section (2) may become relevant only after the person who feels aggrieved by the transfer effected by his co-heir in contravention of the provisions of sub-section (1) has by resort to the appropriate legal process obtained a declaration from the competent Civil

⁶ AIR 1976 Kerala 19

Court that the sale effected by the co-heir in favour of strangers is invalid. Even in such a case, unless the co-heir who had effected the impugned alienation again proposes to transfer his interest in the property there can be no occasion for any determination to be made by the Court about the price payable by the other co-sharer under sub-section (2) of Section 22.”

19. Reverting to the facts of the present case in light of the provisions contained in Section 22(1) & (2) of the Act of 1956, it is quite vivid that the suit property was partitioned among the plaintiff and defendant No.2 and his one another brother on 20-12-1965 and they came into possession of their respective shares as per the partition effected on the aforesaid date, thereafter, only on 29-10-1980, defendant No.2 sold his share to defendant No.1 by cash consideration of ₹ 7,000/- as such, it is admitted position as per the plaint averment that the suit property has already been partitioned among the plaintiff and his two brothers much prior to the date of filing of suit, on 20-12-1965 and the registered sale deed was said to be executed on 29-10-1980. Therefore, since the property has already been partitioned way back on 20-12-1965 as per the plaint averment, the preferential right to acquire property under Section 22(1) of the Act of 1956 cannot be claimed by the present plaintiffs. As already held, the property in question has already been transferred and Section 22(1) of the Act of 1956 has no application. As such, both the Courts below are absolutely justified in holding that the original plaintiff (who died during the pendency of appeal) has no preferential right to acquire the suit property and, therefore, the finding of fact recorded by the two Courts below holding that the plaintiff has no preferential right to acquire the interest on account of partition having already been completed, is a finding based on

record and thus, the question of waiver of his right of pre-emption does not arise.

20. The judgment of the Madras High Court in the matter of Kulasekaran Chettiar (decd.) and others v. Meenakshi Aammal and Muppidathi Ammal⁷ cited by Mr. Agrawal, learned counsel appearing for the appellants/plaintiffs, is not applicable to the facts of the present case, as in the instant case, the land in question has already been partitioned and the land has already been transferred on 29-10-1980 and thereafter, the suit has been filed on 19-10-1983.

21. As such, the two Courts below have rightly held that Section 22(1) of the Act of 1956 is not applicable and I do not find any illegality or perversity in the said finding. Consequently, the second appeal is liable to be dismissed and is accordingly dismissed. The substantial question of law is answered accordingly. No order as to cost(s).

22. This Court appreciates the assistance rendered by Mr. Abhijeet Mishra, learned *amicus*.

23. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

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⁷ (2002) 2 LW 294 : (2002) 2 MLJ 95