

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 241 of 2010**

John Henray (since deceased) through LRs:-

1. S. Henry, widow of John Henry, aged about 85 years,
2. Smt. S.D. Lal, D/o Late John Henry, aged about 50 years, W/o D.P. Lal, R/o Khetrari Nagar, Rajasthan, Through the Power of Attorney holder Neeraj D. Lal, S/o D.P. Lal, R/o Jyotipur, Pendra Road, District Bilaspur (C.G.)
3. Smt. S.S. Dhan, D/o Late John Henry, W/o Satish Kumar Dhan, aged about 57 years, R/o Shanti Nagar, aged about 57 years, R/o Shanti Nagar, Bhilai, District Durg (C.G.)

----Appellant/plaintiff

Versus

1. Smt. Shyamli Ash, W/o Late Ashim Ash, aged about 55 years, Caste Kayasth, R/o Jyotipur Pendra Road, Distt. Bilaspur (C.G.)
2. Benjamin William, S/o Late John William Christian, Motor Mechanic, R/o Ramsagar Para Korba, District Korba (C.G.)
3. Smt. Deji Bai, D/o late John William, aged about 80 years, Caste Christian, R/o Raja Talab, Raipur (C.G.)
4. Smt. Leena Bai @ A.C. David, D/o Late John William, aged about 77 years, Caste Christian, R/o Tajganj Agra (U.P.)

----Respondents/defendants.

For Appellants

: Shri Rakesh Pandey, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

27/8/2020

- (1) Proceedings of the matter have been taken up through video conferencing.
- (2) Heard on the question of admission and formulation of substantial question of law in a second appeal preferred by the appellants/plaintiffs.

(3) By the impugned judgment, first appellate Court dismissed the appeal preferred by the appellants/plaintiffs affirming the judgment and decree of the trial Court dismissing the suit of the plaintiffs based on right of pre-emption.

(4) Learned counsel appearing for the appellants/plaintiffs would submit that both the courts below have concurrently erred in not granting decree based on right of pre-emption in favour of the plaintiffs by recording a finding which is perverse to the record whereas in light of deed of partition dated 7.11.1964 (Ex. P-1) ought to have been granted decree in favour of the plaintiffs based on right of pre-emption, as such, the appeal deserves to be admitted for hearing by formulating substantial question of law for determination.

(5) The suit property was earlier held by Yunus Baksh. During his life time, he partitioned the suit property between his four sons namely John William, John Henry, John Alfrid & John Robert. Defendants No. 2 to 4, being the legal heirs of John William alienated the suit property in favour of defendant No. 1. They (defendants No. 2 to 4) firstly entered into agreement to sell with defendant No. 1 on 10.11.1999 and thereafter ultimately sold the suit property in favour of defendant No. 1 vide registered sale deed dated 16.5.1995 (Ex.P-4). Thereafter, the present suit was filed by the plaintiff on 30.7.1996 claiming right of pre-emption over the suit land, which has been dismissed by the trial Court. First appeal preferred thereagainst was also dismissed by the first appellate Court affirming the judgment & decree of the trial Court dismissing the suit. Against which the second appeal has been preferred.

(6) 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, 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.”

(7) 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.

(8) The M.P. High Court in a decision rendered in the matter of **Ghewarwala Jain v. Hanuman Prasad and another**¹ 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 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

¹ AIR 1981 Madhya Pradesh 250

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. ...”

(9) This Court also in the matter of **Ghanshyam v. Sanghmitra Datta and another**² 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:

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“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. 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.”

(10) In the matter of **Smt. Arati Das v. Bharati Sarkar and others**³, 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.

(11) The Supreme Court in the matter of **Radhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi and others**⁴ (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. 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 ”.

3 AIR 2009 Calcutta 8

4 AIR 1960 SC 1368

(12) 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.

(13) 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 others⁵ 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 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.”

(14) Reverting to the facts of the present case in light of the principles of law laid

5 AIR 1976 Kerala 19

down by the Supreme Court in above-cited judgments, it is quite vivid that the suit property was partitioned among the plaintiff and defendants No. 2 to 4 by their father Yunus Bakash during his life time and they came into possession of their respective shares as per the partition, thereafter, defendants No. 2 to 4, being the legal heirs of John William, alienated the suit property in favour of defendant No. 1. They firstly entered into agreement to sell on 10.11.1999 (Ex.D-1) with defendant No. 1 and thereafter ultimately sold the suit property in favour of defendant No. 1 vide registered sale deed dated 16.5.1995 (Ex.P-4). Thereafter, the present suit was filed by the plaintiff on 30.7.1996 claiming right of pre-emption over the suit land. As such, both the courts below were absolutely justified in holding that the plaintiff has no preferential right to acquire the suit property and, therefore, the finding 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 of fact based on material available on record and I do not find it either perverse or contrary to record and no question of law much less substantial question of law is involved in this appeal.

(6) Accordingly, the second appeal, being devoid of merit, is liable to be and is hereby dismissed in *limine* without notice to the other side. No costs.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-