

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.199 of 2005****Judgment reserved on :06.01.2020****Judgment delivered on:17.01.2020**

Ramdev Yadav (dead) through his LR's

(a) Smt.Parvati Devi Wd/o Late Shri Ramdev Yadav, aged about 87 years, R/o Village Palagi, P.O. Krishnanagar, Dhamni, P.S. Trikunda, Dist. Balrampur Ramanujganj (CG)

(b) Smt.Saraswati Devi W/o Ram Khelawan Yadav, aged about 58 years, R/o P.S. Krishnanagar Dhamni, P.S. Trikunda, Distt. Balrampur Ramanujganj (CG)

(c) Smt. Shanti Devi W/o Ram Charitra Yadav, aged about 35 years, R/o Village Mamra, P.S. Krishnanagar, Dhamni, P.S. Trikunda, Distt. Balrampur Ramanujganj (CG)

(d) Smt.Chandravati Devi W/o Chandramal Yadav, aged about 53 years, R/o Nawadih, P.O. Krishnanagar, Dhamni, P.S. Trikunda, Distt. Balrampur Ramanujganj (CG)

(e) Santosh Yadav S/o late Shri Ramdev Yadav, aged about 46 years, R/o Village Palgi, P.O. Krishnanagar, Dhamni, P.S. Trikunda, Distt. Balrampur Ramanujganj (CG)

----- LR's of Appellant/Plaintiff

Versus

1.Vidya Prasad S/o Shri Ram Lochan Yadav, Aged about 31 years,

2.Vinod Prasad Yadav, S/o Shri Ram Lochan Yadav, Aged about 21 years,

3.Ram Dular Yadav, S/o Late Chamaru Yadav, aged about 48 years,

All R/o village-Palgi, Tahsil-Pal, Dist.-Surguja (CG)

----- Defendants

4.State of M.P. at present Chhattisgarh, through Collector Surguja at Ambikapur, Dist.-Surguja (CG)

----- Respondents

For LR's of Appellant/Plaintiff:

Mr.Bhupendra Singh, Advocate

For Respondents No.1 to 3/Defendants:

Mr.Rishi Mahobia, Advocate

For Respondent No.4/State: Mr.Sanjeev Kr Agrawal, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal
C.A.V. Judgment

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

“1. Whether the lower Appellate Court was not justified in holding that the suit property vide Schedule 'A' of the plaint is not a joint family property in between the brothers and the finding in relation to partition is perverse ?

2. Whether the lower Appellate Court was not justified in dismissing the suit by holding that the plaintiff has taken a contradictory plea in relation to ownership and possession on the one hand, and right of preemption on the other hand ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and nomenclature in the suit before the trial Court].

2. The suit property was originally held by one Chamru Yadav. He had three sons namely Ramdev, plaintiff herein and Ramdular, defendant No.3 and one

Ramsunder, who was not party to the suit. The plaintiff filed a suit claiming right of pre-emption that transfer made by defendant No.3 in favour of defendants No.1 & 2 on 12.7.90 is void and he had preferential right to purchase the suit land in order to maintain integrity of the family and to avoid induction of third party in the ancestral property of the parties. It was further pleaded that for the sake of convenience, the suit property was partitioned in najri partition and pursuant to the said partition, they are cultivating their lands, but holdings were remained joint as the suit property was never partitioned by metes and bounds and the suit land shown in Schedule 'A' is a joint family property of the brothers, therefore, defendant No.3 could not have a right to alienate the suit land in favour of defendants No.1 & 2 and as such, the plaintiff is deprived of his right of pre-emption provided under section 22 of the Hindu Succession Act, 1956 (hereinafter called as 'the Act of 1956') and therefore, sale deed dated 12.7.90 be declared void and defendant No.3 be directed to execute sale deed in his favour on payment of sale consideration as per market value and also prayed for permanent injunction.

3. Defendants No.1 & 2 have filed their written statement and denied the averments made in the plaint stating inter-alia that the suit property has already been partitioned and it has rightly been sold by defendant No.3 in favour of defendants No.1 & 2 and the plaintiff has no right of preemption to purchase the suit property, as such, the suit deserves to be dismissed.
4. The trial Court after upon evaluation and after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 28.3.98, decreed the suit holding that there is no partition between the parties of the suit land and the plaintiff has a right of preemption to purchase the suit land. On appeal being preferred by defendants No.1 & 2 before the first appellate Court, the said Court set aside that finding and held that partition has already taken place between the parties and defendant No.3 has already transferred the suit property in favour of defendants No.1 & 2 on 12.7.90 and the suit was filed on 30.7.90 and in case of concluded transfer, Section 22(1) of the Act of 1956 would not apply. Questioning legality and validity of the judgment and decree of the first appellate Court, this second

appeal under Section 100 of the CPC has been filed by the appellant/defendant, in which substantial questions of law have been formulated by this Court, which have been set-out in the opening paragraph of this judgment.

5. Mr. Bhupendra Singh, learned counsel for legal representatives of the appellant/plaintiff, would submit that the first appellate Court is absolutely unjustified in holding that partition has already taken place between the parties as there is only najri partition between the parties for the sake of convenience including the name of the plaintiff and that could not confer any right of preemption in the suit land in absence of partition by metes and bounds. He would further submit that the alleged transfer dated 12.7.90 was never informed by defendant No.3 to the plaintiff, as such, finding recorded by the first appellate Court that the suit property is not a joint family property and defendant No.3 has rightly sold the suit land in favour of defendants No.1 & 2 is perverse, which deserves to be set aside.

6. Mr. Rishi Mahobia, learned counsel for respondents No.1 & 2/defendants No.1 & 2, would submit that najri partition, in fact, partition has taken place

for last many years, though holdings are joint, but concluded transfer cannot be reopened in absence of fraud or claim of unequal share, as such, decision of the Madhya Pradesh in the matter of Ghewarwala Jain v. Hanuman Prasad and another¹ would apply and since the property being separate property of defendant No.3 and transfer made by defendant No.3 is concluded transfer, Section 22 (1) of the Act of 1956 would not apply and appeal deserves to be dismissed.

7. I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

8. The original plaintiff in para-6 of the plaint filed before the trial Court clearly averred that for sake of convenience and for agricultural purposes, they have (three brothers) partitioned (nazri batwara) of the suit land and cultivating possession of that land, but holding is joint and there is no written partition deed executed among them. The trial Court held that partition has not taken place among them and decreed the suit, which the first appellate Court did not accept and set aside the decree holding that partition has already

¹ AIR 1981 Madhya Pradesh 259

taken place between them. The first appellate Court relying upon the statement of Vidhya Prasad Yadav (DW-2) has clearly held that fact of partition between three brothers is established and one of the plaintiff's brother Ramsunder had already alienated his part of land and the plaintiff has also alienated his part of land though the holdings are joint in revenue records, but actual partition has already taken place among them and they are residing separately and sold their part of land allotted to them, as such, fact of partition has been found established. The finding recorded by the first appellate Court holding oral partition between the parties is a finding of fact based on material available on record, which is neither perverse nor contrary to record.

9. Defendant No.3 transferred the suit land in favour of defendants No.1 & 2 on 12.7.90 and thereafter, the instant suit was filed claiming right of pre-emption and for declaring that sale deed dated 12.7.90 is not binding on him, as such, the instant suit from which this second appeal has arisen was filed after concluded transfer in favour of defendants No.1 and 2.

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 on execution of sale deed dated 12.7.90 ?

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, 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 (supra) 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 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 another² 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. 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 others³, 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 others⁴ (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

3AIR 2009 Calcutta 8

4AIR 1960 SC 1368

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 "."

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 sought 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 transfer 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."

19. Reverting finally to the facts of the case in hand, it is quite vivid that parties have already

5 AIR 1976 Kerala 19

partitioned the suit land and the impugned transfer was made by sale deed dated 12.7.90 and as per principles of law enunciated by Their Lordships of the Supreme Court in the above-stated judgments (supra), it is quite well settled that preferential right of pre-emption cannot be claimed as the property in question has already been partitioned and there is concluded transfer on 12.7.90 and thereafter, the suit has been filed, as such, Section 22(1) of the Act of 1956 has no application and as such, the first appellate Court is absolutely justified in setting aside the decree granted by the trial Court holding that the plaintiff has preferential right of pre-emption of the suit land. I do not find any perversity or illegality in findings recorded by the first appellate Court in this regard. The substantial questions of law are answered in favour of the defendants and against the plaintiff.

20. Accordingly, the second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

21. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-