IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 22.07.2022

PRONOUNCED ON: 18.10.2022

CORAM

THE HON'BLE Ms.JUSTICE P.T.ASHA

S.A.No.386 of 2020
and
C.M.P.No.7643 of 2020

Mrs. H.Uma Maheswari
...3rd Defendants/3rd Respondents// Appellant

Vs.

1.K.Govindaswamy
... Plaintiff/Plaintiff/1st Respondent
2.Mr.K.Lakshmanan
...1st Respondent/1st Respondent/ 2nd Respondent
3.Mr.K.Shanmugham
...2nd Respondent/2nd Respondent/ 3rd Respondent

PRAYER : This Second Appeal is filed under Section 100 of the C.P.C, against the judgment and decree dated 31.01.2018 passed in A.S.No.341 of 2015 on the file of the VI Additional City Civil Court at Chennai, reversing the judgment and decree dated 01.07.2015 and made in O.S.No.8469 of 2008 on the file of the II Assistant City Civil Court at Chennai.

For Appellant : M/s.K.Subhashini

For Respondents : Mr.N.Nagusah [R.1]
: Mr.R.S.Shakthivel [R.2]
: M/s Chennai law Associates [R.3]

J U D G M E N T

The 3rd defendant in the suit OS.No.8469 of 2008 on the file of the II Assistant City Civil Court, Chennai is the appellant before this Court. The 1st respondent herein is the plaintiff and respondents 2 and 3 herein are defendants 1 and 2 respectively in the suit O.S.No.8469 of 2008. The facts in brief which has culminated in the filing of the above Second Appeal is herein below narrated. The parties are referred to in the same ranking as before the Trial Court.

Plaintiff's Case-

2. The plaintiff had originally filed the suit for the following reliefs:-

a. For partition and separate possession of the *plaintiff's 1/3rd share in the suit Schedule property by metes and bounds.*

b. To Declare the plaintiff's pre emptive right to purchase the 1st and the 2nd Defendant's respective 1/3 share in the suit property in case they offer to sell the same.

c. For mandatory injunction directing the 1st and the 2nd Defendants to sell their respective 1/3rd share in the suit property in case they intended to sell the same.

d. To appoint an advocate commissioner to divide the Schedule property by metes and bounds and allot the Plaintiff's 1/3 share in the Schedule property.

Thereafter the plaintiff has given up the relief 'b' and amended relief 'c' as follows:-

"For mandatory injunction directing the defendants to sell their undivided share in the suit property to the plaintiff as the case may be for sale price to be determined by the Hon'ble Court."

3. It is the case of the plaintiff that the suit schedule property belonged to one R.Kanniappa Mudaliar, he having purchased the same under a sale deed dated 28.06.1944. The said R.Kanniappa Mudaliar was married to one K.Padmavathi and had 3 children the plaintiff and the defendants 1 & 2. R.Kanniappa Mudaliar died intestate on 06.01.1966 and K.Padmavathi followed on 03.02.2003.

4. It is the case of the plaintiff that three of them have not been able to enjoy the property and therefore, he had requested the defendants to partition the property. However the request was not acceded to and the defendants 1 & 2 had let out the premises to a tenant Mr.Thirumalai Raja without the knowledge of the plaintiff. The plaintiff had issued a legal notice to the said tenant on 11.07.2008 with copies marked to the defendants 1 and 2. By reply notice dated 14.08.2008, the said Mr.Thirumalai Raja had informed the plaintiff that his wife had purchased an undivided 1/3rd share from the 1st defendant. On coming to

know about the same the plaintiff had applied for an encumbrance certificate which however did not reflect the sale. It is the case of the plaintiff that being a co-owner he has a pre emptive right to purchase the share of the others. By a legal notice dated 25.10.2008, the plaintiff had called upon the defendants 1 and 2 to partition the suit properties. The 1st defendant evaded receipt of the notice and the 2nd defendant despite receipt of the same had not come forward to partition the property. Hence the suit.

Written Statement of the Defendants;-

5. The 2nd defendant has filed a written statement inter alia contending that the 1st and the 2nd defendants were always ready and willing for a partition and it was the plaintiff who was not coming forward to partition the property but has insisted on creating confusion. The 2nd defendant would further submit that the 1st defendant had patiently waited for a long time for the partition to happen and since he

had an urgent need, he had to sell his properties to the 3rd defendant.

6. The 1st defendant had filed a written statement more or less on the same lines as that of the 2nd defendant and also contending that the sale in favour of the 3rd defendant was very much within the knowledge of both the plaintiff and the 2nd defendant. Therefore, the 1st defendant would contend that the suit is bad for non joinder of the necessary parties, namely, the purchaser of the property from the 1st defendant. Thereafter the plaintiff had amended the plaint by impleading the 3rd defendant and deleting the prayer 'b' and amending relief 'c'.

7. In the additional written statement filed after the amendment, the 2nd defendant would contend that the right of pre-emption was never exercised by the plaintiff and further the right has to be exercised in a fair manner. The plaintiff is coming forward with the suit only after the property has been sold to the 3rd defendant. The 3rd defendant had filed a

written statement inter alia contending that she has purchased the 1/3rd share from the 1st defendant and that the plaintiff who is residing in the same property is very much aware about the same. She would submit that even in the rejoinder dated 20.09.2008 the sale in favour of the 3rd defendant had been set out, however, the plaintiff deliberately chose not to implead the 3rd defendant. The plaintiff has therefore come to Court with unclean hands. The 3rd defendant would further submit that the 1st defendant had to sell the suit property as the plaintiff was not coming forward to purchase the same and was attempting to arm twist the 1st defendant to get the property at a rock bottom price. The 3rd defendant would further contend that a right of pre-emption can be exercised if there is a bonafide intent to purchase. However in the instant case, the suit has been filed many months after the sale therefore, it is clear that the intention is not bonafide.

8. The Trial Court had decreed the suit only for partition and dismissed the suit with reference to the other reliefs. Aggrieved by the

same the plaintiff had filed A.S.No.341 of 2015 on the file of the VI Additional City Civil Court Chennai. The Appellate Court proceeded to set aside the judgment and decree of the Trial court and partly allowed the appeal confirming the decree for partition and declaring the plaintiff's pre-emptive right but relegating the 3rd prayer to the final decree proceedings and stating that the plaintiff will not be entitled to insist that he shall only pay the consideration received by the 1st defendant from the 3rd defendant. The lower Appellate Court also directed the 2nd defendant to approach the plaintiff and the 1st defendant if he proposes to sell the suit schedule property. Aggrieved by the said judgement the 3rd defendant is before this Court.

Substantial Question of Law:-

9. The Second Appeal has been admitted on the following substantial question of law:-

> *" Whether the suit in OS.No.8486 of 2008 is barred by limitation, in respect of the relief of*

mandatory injunction sought for based on the pre-emptive right conferred on the plaintiff under Section 22 of the Hindu Succession Act."

After hearing the arguments on either side and based on the same the following additional Substantial question of law is framed;

" Whether the plaintiff looses his preemptive right to purchase the undivided share of the 1st defendant on account of the sale in favour of the 3rd defendant, a stranger to the family"?

Submissions:-

10. Mrs. K.Subhashni, learned counsel appearing on behalf of the 3rd defendant would make a preliminary argument that the non-application of mind on the part of the Lower Appellate Court stands out as the learned Judge has granted the decree in respect of a relief given up by the plaintiff themselves, namely, relief 'b'. With reference to this, it is her contention that having given up the right to have the same declared, the Lower Appellate Court committed a grave error in granting that relief

as also the relief of mandatory injunction. She would further submit that the suit is also barred by limitation. She would submit the pre-emptive right conferred upon a co-sharer under Section 22 of the Hindu Succession Act is subject also to the provisions of Article 97 of the Limitation Act which contemplates that the suit should be instituted within a period of 1 year from the date of sale. She would submit that the 3rd defendant had purchased the 1/3rd undivided share of the 1st defendant under a registered sale deed dated 23.11.2007. However, the suit is filed only on 01.12.2008 beyond the period of 1 year. She would submit that the plaintiff cannot feign ignorance about the sale since he is living in the very same property. She would submit that a pre-emptive right can be exercised against co-sharers but not against a stranger. In the instant case, the property has been sold even prior to the institution of the suit. Therefore, Section 22 of the Hindu Succession Act does not confer a right upon the plaintiff to institute the suit against the stranger who has purchased the property from the family member. The relief of mandatory injunction also is not maintainable since the property had been sold much prior to the institution of the suit and the relief of mandatory injunction is only against the defendants 1 and 2. She would submit that the Lower Appellate Court has failed to consider the evidence both oral as well as documentary from the correct perspective and this erroneous approach has resulted in an erroneous order. She would therefore pray that the Judgement and Decree of the Lower Appellate Court be set aside and the Judgement and Decree of the Trial Court be confirmed. She would rely upon the following Judgments in support of her arguments:-

1. *2012 (2) CTC 417 - E.Subbammal Vs. R.Rajendran.*
2. *MANU/DE/1897/2018 - Sunil Gupta Vs. Nargis Khanna.*
3. *AIR 2020 Supreme Court 5026 - Ragunath (D) By Lrs. Vs. Radha Mohan (D) thr. Lrs and Ors.*
4. *2022(1) ICC 620 - Abhijit Agarwal Vs. Md. Badiruddin.*

11. Per contra, Mr. N.Nagusah, learned counsel appearing on behalf of the plaintiff would submit that there is no pleading regarding the 3rd defendant taking possession of the property and further no plea of limitation has been made out in the grounds of appeal. He would further submit that the arguments regarding limitation is a mixed question of fact

and law and evidence has to be let in by both the sides to prove that the suit is barred by limitation. He would further submit that Section 44 of the Transfer of Property Act would clearly show that the 3rd defendant cannot claim joint possession of the property. He would rely on the judgment reported in ***2000 (2) MLJ 275 - P.Srinivasamurthy Vs. P.Leelavathy & Ors..***

12. In response to the arguments adduced by Mr.Nagusah, M/s.Subhashni, learned counsel appearing for the appellant would submit that the possession is in the hands of several strangers and therefore, the provision of Section 44 of the Transfer of Property Act cannot be invoked. That apart, the suit is clearly barred by limitation as per Article 97 of the Limitation Act. She would therefore reiterate that the appeal be allowed and the Judgement and Decree of the Trial Court be confirmed.

Discussion:-

13. Considering the substantial question of law that has been framed at the time of admission in the above matter it would suffice if the facts of the case and the ingredients necessary for answering the same is set out herein below.

14. The Subject matter in issue is the right of plaintiff to exercise his pre-emptive right to purchase the suit schedule property. What is pre emption? In the Judgement reported in *1885 7 ALL 729 – Govind Dayal Vs. Inayatullah*, Justice Mahmood defined pre-emption as follows :-

> *'Pre-emption is a right which the owner of immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as those on which such latter immovable property is sold to another person.'*

15. In the judgement in *Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others (AIR 1954 SC 417)* the Hon'ble Supreme Court has traced the origin of the concept of preemption and its assimilation into the statute book :-

> *" The Privy Council has said in more cases than one, that the law of pre-emption was introduced in this country by the Muhammadans. There is no indication of any such conception in the Hindu Law and the subject has not been noticed or discussed either in the writings of the Smriti writers or in those of later commentators. Sir William Macnaghten in his Principles and Precedents of Mahomedan Law has referred to a passage in the Makanirvana Tantra which, according to the learned author, implies that pre-emption was recognised as a legal provision according to the notions of the Hindus."*

> *"During the period of the Mughal emperors the law of pre- emption was administered as a rule of common law of the land in those parts of the country which came under the domination of the Muhammadan rulers, and it was applied alike to*

Muhammadans and Zimmees (within which Christians and Hindus were included), no distinction being made in this respect between persons of different races and creeds. In course of time the Hindus came to adopt pre-emption as a custom for reasons of convenience and the custom is largely to be found in provinces like Bihar and Gujarat which had once been integral parts of the Muhammadan empire. Opinions differ as to whether the custom of preemption amongst village communities in Punjab and other parts of India was borrowed from the Muhammadans or arose independently of the Muhammadan Law, having its origin in the doctrine of "limited right" which has always been the characteristic feature of village communities."

"Since the establishment of British rule in India the Muhammadan Law ceased to be the general law of the land and as pre-emption is not one of the matters respecting which Muhammadan Law is expressly declared to be the rule of decision where the parties to a suit are Muhammadans, the Courts in British India administered the Muhammadan Law of pre-emption

as between Muhammadans entirely on grounds of justice, equity and good conscience' Here again there was no uniformity of views expressed by the different High Courts in India and the High Court of Madras definitely held that the law of pre-emption, by reason of its placing restrictions upon the liberty of transfer of property, could not be regarded to be in consonance with the principles of justice, equity and good conscience. Hence the right of pre-emption is not recognised in the Madras Presidency at all even amongst Muhammadans except on the footing of a custom. Rights of preemption have in some provinces like Punjab, Agra and Oudh been embodied in statutes passed by the Indian Legislature and where the law has been thus codified it undoubtedly becomes the territorial law of the place and is applicable to persons other than Muhammadans by reason of their property being situated therein. In other parts of India its operation depends upon custom and when the law is customary the right is enforceable irrespective of the religious persuasion of the parties concerned. Where the law is neither territorial nor customary, it is applicable only between Muhammadans as part of their personal law provided the judiciary of the place *where the property is; situated does not consider such law to be opposed to the principles of justice, equity and good conscience. Apart from these a right of pre-emption can be created by contract and as has been observed by the Judicial Committee in the case referred to above, such contracts are usually found amongst sharers in a village."*

16. The right of pre emption has now come to stay. Section 22(1) of the Hindu Succession Act would read as follows:-

> *"**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 to be transferred."*

The law of pre emption imposes limitation/disability upon the ownership of property of a co-owners in as much as it curtails his right of unfettered sale. Therefore, the right has to be strictly enforced within the time frame provided and the question of exercising equity or extending the period of limitation will not arise. The substantial question of law framed while admitting the Second Appeal relates to the question of Limitation. The sale in favour of the 3rd defendant had taken place on 23.11.2007 and the suit is filed on 01.12.2008. The contention of the defendants is that the suit is barred by limitation in view of the provisions of Article 97 of the Limitation Act. Article 97 of the Limitation Act is herein below extracted.;-

Description of Suit	***Period of limitation***	***Time from which the period begins to run***
Article-97:- To enforce a right of preemption whether the right is founded on law or general usage or on special contract.	one year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject matter of the sale does not admit of physical possession of the whole or

Description of Suit	*Period of limitation*	*Time from which the period begins to run*
		part of the property, when the instrument of sale is registered.

Therefore, a reading of Article 97 of the Limitation Act would indicate that the Limitation for filing a suit for pre-emption is one year (a) from the date on which physical possession of a whole or part of the property sold is taken by purchaser or (b) where the subject matter of sale does not admit a physical possession then the date on which the sale is registered. In the case on hand, the registration has taken place on 23.11.2007 and the sale deed recites that possession has been taken on the date of the sale. Therefore, we have to examine whether the suit is barred by limitation by considering the various judicial pronouncements on Article 97 of the Limitation Act and its application to a pre emption suit.

17. The Hon'ble Supreme Court in a Judgement reported in ***(2004) 4 SCC 252 - Gopal Sardar Vs. Karuna Sardar*** was dealing with the issue of limitation for filing a pre-emption suit applying the provisions of the West Bengal Land Reforms Act, qua the Limitation Act. The learned

Judges were considering the issue of pre-emption in respect of the West Bengal Land Reforms Act, 1955. The learned Judges had discussed the provisions of Section 2, 3, 6, 8 and 29 and Article 97 of the Limitation Act. The learned Judges have discussed the application of Section 5 of the Limitation Act with regard to the suit that was filed for enforcing a pre-emption right. The application under Section 5 was made in the light of the West Bengal Land Reforms Act. The learned Judge observed that in the absence of the saving clause in the Special Act, Section 5 of the Limitation Act cannot be invoked. The Bench after holding that the benefit of Section 5 would not be applicable to pre emption suits have observed why the right of pre emption had to be exercised within the time frame provided as follows:-

> *" The right of pre-emption conferred under Section 8 is a statutory right besides being weak, it has to be exercised strictly in terms of the said Section and consideration of equity has no place"*

18. In a recent Judgement of the Hon'ble Supreme Court reported in ***2020 SCC Online SC 828 - Raghunath (D) by Lrs Vs. Radha Mohan (D) thr. Lrs and Others***, the Hon'ble Supreme Court was considering the question as to whether limitation would commence from the first sale deed after the coming into force of the Rajasthan Pre-emption Act, 1966 or from any other subsequent sale on the basis of Article 97 of the Limitation Act. The Bench had traced the history of pre-emption and the judicial approach to this right by extracting from the Judgement in the case reported in ***Barasat Eye Hospital Vs. Kaustabh Mondal - 2019 SCC Online SC 1351,*** where the Bench had opined as follows:-

> *"11. In view of the aforesaid elucidation, it was opined that the preemptor has two rights: first, the inherent or primary right, i.e., right for the offer of a thing about to be sold; and second, the secondary or remedial right to follow the thing sold. The secondary right of preemption is simply a right of substitution, in place of an original vendee and the pre-emptor is bound to show not only that his right is as good as that of that vendee, but that it is superior to that of the vendee. Such superior right has to subsist at the time*

when the pre-emptor exercises his right. The position is thereafter summarized in the following terms:

"11. .....(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase i. e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that 4 AIR 1958 SC 838 5 136 P.R. 1894 6 (1885) ILR 7 All 775, 809 7 (1930) ILR 11 Lahore (F.B.) 258, 273 of the vendee or the person substituted in his place. (6) 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."

19. In answering the query, the learned Judges in ***Raghunath (D) by Lrs Vs. Radha Mohan (D) thr. Lrs and Others***, supra had referred to Article 97 of the Limitation Act and on a conjoint reading of Section 21 and Article 97 of the first schedule to the Limitation Act observed that in Section 21 of the Limitation Act the right of pre-emption has to be exercised in case of a sale within one year from the date of sale and if the sale is not by a registered deed then on the purchaser taking physical possession of any part of the property sold. Since the language of Article 97 of the Limitation Act, is peremptory and clearly mandates that action has to been taken to enforce the pre-emptive right within a year from the date on which the sale is registered there is no question of the limitation getting extended from the date of knowledge. Following the dicta laid in the above case, the Bench went on to hold that it would be the first sale that had taken place after the coming into effect of the aforesaid Act which would be the starting point of limitation and ultimately concluded as follows:-

"*28. We suppose that the aforesaid answers the dilemma, i.e. whether the right of pre-emption can be* *enforced for an indefinite number of transactions or it is exercisable only the first time. We opine that it is only exercisable for the first time when the cause of such a right arises, in a situation where the plaintiff-pre-emptor chooses to waive such right after the 1966 Act becoming operational. Section 9of the said Act operates as a bar on his exercising such right on a subsequent transaction relating to the same immovable property. We also wonder what really remains of this right of pre-emption after so many years in the facts of this case when the purchaser has been enjoying it for more than four decades!"*

"29. The result is the impugned order is set aside and the order of the trial court dated 01.02.1988 and the first appellate court dated 30.03.1989 are upheld. As the original plaintiff has not challenged the sale effected by him on 5th November, 1966, the suit of respondent No. 1 (original plaintiff, now represented by his legal representatives) is thus barred by limitation. This puts an end to the legal battle which began 45 years ago! "

Therefore, on a reading of the above judicial pronouncements, the instant suit has been filed beyond the period contemplated under Article 97 of the Limitation Act. The argument that the question of limitation being a mixed question of law which warrants evidence being let in will not apply to the instant case as there are only two dates that has to be taken note of while considering Article 97 of the Limitation Act: (a) the date of sale and (b) date of the institution of the suit. In the instant case the date of sale is 23.11.2007 and the suit is instituted on 01.12.2008

20. The additional question of law relates to the right of the preemptor to question a sale in favour of a 3rd party and whether a binding judgement could be propounded against such 3rd party. In ***Barasat Eye Hospital Vs. Kaustabh Mondal*** extracted supra the Hon'ble Supreme Court had held that since the right of pre emption is to the offer of the thing about to be sold the pre emptor has a right to follow the thing sold.

21. A Single Judge of this Court in a case reported in ***1970 (1) MLJ 358 - Nagammal and Ors. Vs. Nanjammal and Ors.*** discussed the effect of Section 22 of the Hindu Succession Act to a sale effected by one of the co-heirs to the preferential right available to the other co-heirs. The learned Judge while discussing the question observed as follows:-

> *"The next question is to define the legal basis on which, the right could be enforced against the stranger purchaser. When interpreting the section, one can properly assume that Parliament had in mind the practice of" pre-emption present in the country and the several pre-emption laws. A Legislature may be deemed to be conversant with the laws current within its territory. But that will not permit the adoption of the incidents of pre-emption recognised or provided for in other pre-emption laws, and in the Muslim law of pre-emption."*

> *"8. The right conferred under Section 22(1) of the Hindu Succession Act cannot be enforced and a transfer secured if the alienating co-heir only intends to make a transfer. He or she could, at any time,*

abandon the proposal for transfer. It will be perfectly open to a person who is negotiating for a sale to a stranger, to withdraw from the negotiations and abandon the proposal for sale or his co-heir intervening to enforce his preferential right purely out of feelings of animosity towards the co-heir.. Such conduct is not unknown. A proposal to transfer may become manifest only on an irrevocable act of transfer. It is the sale against the right of the co-heirs that would constitute an infringement of the right conferred under Section 22(1). To-repeat the cause of action is a sale to a third party, without reference to the other co-heirs who might have purchased the property for the proper price, if it had been offered. Shall we say that a firm proposal comes into existence vis-a-vis the other coheirs, when execution of the deed of transfer in favour of the stranger is taken up, and eo instanti the statutory right of purchase by the other co-heirs attaches itself to the property. Being a statutory incident of property inherited by Class I heirs it could be said that it runs with the land and binds the stranger purchaser. As I read Section 22, Parliament must have had in mind the two fold aspect of the right in the pre-emption laws current in the

> *country : (1) the primary or substantive right to have an offer made and (2) the secondary or remedial right of the co-heirs-if the property is sold without being first offered to them to take it from the purchaser.. In my opinion, Parliament has emphasised upon the primary right of pre-emption and left the remedial right to the common law for the Courts to mould it according to the circumstances."*

The learned Judge has enunciated the legal principle on the basis of the observation of the Hon'ble Supreme Court in the judgement reported in (***1959) 1 SCR 878 Bishan Singh Vs Khazan Singh*** where the learned Judges had held that the right of pre-emption is not to the the thing sold but a right to the offer of the thing about to be sold. The Bench observed that the pre-emptor has a secondary right or a remedial right to follow the thing that is sold and it is a right of substitution and not a right of re-purchase by the pre-emptor stepping into the shoes of the original vendee. An argument was raised in that case that the right of pre-emption is a weak right which could be defeated by legitimate methods. The learned Judge observed as follows:-

" that does not mean that the right is not there to be enforced. The observation in the various decisions that it is open to a stranger vendee of property liable to pre-emption to defeat the pre-emptor's claim by all legitimate means, is consistent with the enforcement of the pre-emptor's claim according to law. What is said is that, as the right of pre-emption is a restriction on the normal right of conveyance, it must be exercised with utmost vigilance by the person who avails himself of it, complying strictly with the conditions in regard to its exercise.. "

Therefore, the right of pre-emption available against a subsequent purchaser was upheld.

22. A Division Bench of this Court in the judgement reported in ***2000 (II) CTC 325 - P.Srinivasamurthy Vs. P.Leelavathy and 9 Others*** has succinctly discussed the object of sub-Section 1 of Section 22 as follows;-

"The object of sub-section (1) of Section 22 is that in cases where by virtue of intestate succession

under the Act any interest in immovable property has devolved upon two or more heirs specified in Class I of the Schedule and any one of such heirs proposes to transfer his interest in the property, the other heirs should have a preferential right to acquire the interest which is so proposed to be transferred. It has to be construed that Section 22 (1) confers an incidental right on the heirs other than the one who proposed to transfer his interest. It is no doubt true that sub-section (1) of Section 22 confers on such co-heirs a preferential right to acquire the interest which is proposed to be transferred by the other co-heir. When the transfer is in violation of the provisions of Section 22 (1) of the Act, it goes without saying that the other co-sharer cannot certainly be without a remedy because every legal right must necessarily carry with it a remedy for enforcing the same. The remedy of the non-alienating co-heirs, insuch circumstances, will be to seek the intervention of the court to enable them to acquire the right which has been transferred away by the other co-heir in violation of sub-section (1) of Section 22. As the Section does not provide for any special procedure for seeking the said remedy, a co-sharer has to seek enforcement of such right under

Section 22 (1) by way of a regular civil suit before the competent court. Where the property has been alienated in favour of strangers, there is all the more reason why there should be full and fair adjudication of the entire matter in a suit tried before a competent Civil Court because various factual questions are bound to arise for determination in such a suit wherein the principal issue would be whether the transfer complained of was effected in violation of sub-section (1) of section 22. The main purpose of such a suit instituted by the co-heir will necessarily be the enforcement of the rights conferred by section 22 (1) of the Act. The question of invalidity of the transfer effected by the other co-heir in favour of strangers becomes relevant in such an action as an incidental matter which has necessarily to be gone into for the purpose of determining whether the plaintiff is entitled to the relief sought by him against his co-heirs in enforcement of the right conferred by Section 22 (1) of the Act."

23. In another judgment reported in ***2012 2 law weekly page 739 - N.Manickam Vs. Kanagaran & Others*** a Single Judge of this Court had clearly and categorically held that the right to exercise pre-emption is available even if the property has been sold to a third party. The learned Judge observed as follows:-

> *"the right under section 22 can be exercised even after the sale by one of the co-sharers to a stranger and therefore, the findings of the court below that after the sale of undivided share by the co-sharer, the other co-sharer cannot exercise the right is not correct and the right conferred under section 22 is not depending upon the divisibility of the property and even if the property is of division, the co-sharer, who has not sold his share, can exercise his right of pre-emption."*

24. Therefore from the above discussion, it is clear that the plaintiff's right to exercise his pre-emtptive right is not curtailed by the sale in favour of the 3rd defendant, as the 3rd defendant only steps into the shoes of the plaintiff. However, this pre-emptive right has to be

strictly exercised within the stipulated time as prescribed in the first schedule of the Limitation Act. By virtue of Article 97 of the Limitation Act, the limitation for a suit for pre-emption starts from the transfer of physical possession of the property under the sale and where the sale does not admit the physical possession then from the date on which the instrument of sale is registered. In the instant case, as observed supra, the sale has been executed and registered on 23.11.2007 and the document Ex.B.2 clearly states that possession has been handed over on the very same date. However, the suit has been filed only on 01.12.2008, therefore, it is clearly barred by limitation.

25. The Judgement of the Hon'ble Supreme Court in the case of ***Gopal Sardar Vs. Karuna Sardar*** referred supra has clearly stated that Section 5 of the Limitation Act would not apply and the right has to be exercised strictly within the contours of the Limitation Act. Therefore, in the light of the above discussion, the Substantial question of law is answered in favour of the defendant and the additional substantial question of law is answered in favour of the plaintiff. Consequently, the

Second Appeal is allowed. The Judgement and decree in A.S.No.341 of 2015 on the file of the VI Additional City Civil Judge at Chennai is set aside and the judgement and decree in OS.No.8469 of 2008 on the file of the II Assistant City Civil Judge Chennai is confirmed. Consequently, the connected Miscellaneous Petition is closed.

18.10.2022

Index : Yes / No
speaking Order : Yes / No
shr

To,

1.The VI Additional City Civil Court at Chennai,

2. The II Assistant City Civil Court at Chennai.

3.The Section Officer,
V.R.Section,
High Court, Madras -104.

P.T.ASHA, J.,

shr

Pre-delivery Judgment in
S.A.No.386 of 2020
and C.M.P.No.7643 of 2020

18.10.2022