

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.44 of 2022

Vijay Kumar Pahwa Son of Late Indra Sen Pahwa, Resident of Mohalla-Purana Chouk Buxar, Ward No. 30, Post-Buxar, Police Station-Buxar Nagar, District-Buxar, Bihar-802101.

... .. Plaintiff-Appellant

Versus

1. Vinod Kumar Son of Late Indra Sen Pahwa, Resident of Mohalla-Jai Mohalla, Yamuna Chouk, Buxar, Post-Buxar, Police Station-Buxar Nagar, District-Buxar, Bihar-802101.

.... ..Defendant 1st Set/Respondent

2. Amit Kumar Chourasia Son of Late Nand Kishor Chourasia, Resident of Mohalla-Jai Mohalla, Namak Gola, Buxar, Post-Buxar, Police Station-Buxar Nagar, District-Buxar, Buxar,-802101.
3. Rahul Kumar Chourasia Son of Late Nand Kishor Chourasia Resident of Mohalla-Jai Mohalla, Namak Gola, Buxar, Post-Buxar, Police Station-Buxar Nagar, District-Buxar, Buxar,-802101.

... .. Defendant 2nd Set/Respondents

Appearance :

For the Appellant/s	:	Mr. Gyanendra Rai, Advocate Mr. Shashank Shekhar Sinha, Advocate
For the Respondent/s	:	Mr.

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

4 30-01-2023 This Miscellaneous Application has been filed for setting aside the order dated 07.01.2022 passed by learned Sub-Judge, III, Buxar in Title Suit no. 431/2021 whereby and whereunder the learned Sub-Judge has been pleased to dismiss the application under Order XXXIX Rule 1 of the Code of Civil Procedure filed on behalf of the plaintiff-appellant.

2. The plaintiff-appellant has filed the Title Suit for declaring that a sale deed executed by Vinod Kumar, son of late Indra Sen Pahwa (defendant 1st set) in favour of defendant 2nd set is forged, fabricated and inoperative being in excess of the



share of the vendor. The plaintiff-appellant has also claimed preferential right to purchase the land pertaining to the said sale deed and it is further prayed that if at all it is found that the sale pertaining to the area of sale deed is genuine in any manner, an order for endorsement of registration of transfer of the subject matter of land of such sale deed in favour of the plaintiff-appellant be made. The appellant has shown his willingness for paying the appropriate/adequate consideration money or whatever amount which may be fixed by the learned court below as consideration money. The plaintiff-appellant also paid for temporary injunction restraining the defendants in causing any change in the status of the property covered under the sale deeds or transfer the same as a whole or in part till the adjudication of the suit.

3. It is the case of the plaintiff-appellant that the property fully described in Schedule I of the plaint is part and parcel of the total area of 4.077 decimal of land appertaining to Khata no. 90, plot no. 2062, area 7 kadi; Khata no. 90, plot no. 2063, area 32 kadi; Khata no. 168, plot no. 2066, area 6 kadi, total being 45 kadi equivalent to 4.077 decimal upon which a house/building is standing. The plaintiff-appellant claimed that this property belonged to one Babu Dayal Singh (grand-father



of the plaintiff-appellant) which was passed on to the father of the plaintiff, Indra Sen Pahwa by way of family partition on 02.11.1976. The property came under the ownership of Indra Sen Pahwa, Dulhin Nirmala Devi (wife of Indra Sen Pahwa), Vinod Kumar Pahwa and Vijay Kumar Pahwa (both are sons of Indra Sen Pahwa) and the same was also mutated in their names. The said Indra Sen Pahwa being karta of the family sold 2.25 decimal from north side to meet his essential necessities to one Rekha Gandhi, wife of Guru Charan Gandhi (daughter of Indra Sen Pahwa) for consideration amount of Rs. 2,34,000/-. He executed a registered sale deed on 29.10.2003 which was registered on 04.11.2003. The plaintiff claims that rest of the properties having an area of 1.827 decimal stands as joint property of the family and after death of Indra Sen Pahwa and his wife Nirmala Devi, the entire property comprising old dwelling house passed on to their sons Vinod Kumar Pahwa and Vijay Kumar Pahwa jointly having unity of right, title, interest and possession.

4. Further case of the plaintiff-appellant is that the house is built in such a manner that any stranger cannot be accommodated due to common wall which cannot be separated and which will cause breach of secrecy of the family. It is stated



that the plaintiff had shown his willingness to defendant no. 1 to purchase his share in the residential house, but defendant no. 1 did not show any intention to sell the same. Later on, the plaintiff-appellant came to know that the said property has been transferred to defendant second set-respondents by defendant no. 1 by way of registered instrument. He applied for certified copy of the sale deed after coming to know about the said transaction and found that the defendant no. 1 made wrong recitals of oral partition between the brothers and had also sold the property in excess of the share /area of defendant no. 1.

5. It is submitted that the defendant no. 1 would be entitled only for 0.913 decimal of land whereas he has sold 1.125 decimal of land out of the said property. The plaintiff claims his preferential right in terms of section 22 of the Hindu Succession Act, 1956 (hereinafter referred to as the “Act of 1956”). He filed an application under Order XXXIX Rule 1 CPC on 04.10.2021 for passing an order of injunction restraining the defendant 2nd set from demolition of the two storeyed house which would amount to dispossessing the plaintiff-appellant from the suit property.

6. Learned Sub-Judge, having heard learned counsel for the parties in the court below, held that the plaintiff has



failed to show a prima-facie case for grant of interim injunction. Accordingly, the application seeking interim injunction has been rejected.

7. Mr. Gyanendra Rai, learned counsel for the appellant has assailed the impugned order. It is submitted that the plaintiff-appellant is enjoying peaceful possession of a part of residential/dwelling house. According to him, the house in question is a part and parcel of the two storeyed dwelling house of the plaintiff and his family where they live and any destruction/breaking/demolition shall infringe the right of the plaintiff-appellant in dwelling and inhabitation peacefully.

8. Learned counsel has further submitted that in this case Section 22 of the Act of 1956 would also be attracted and the plaintiff-appellant has a preferential right to acquire the interest proposed to be transferred. It is submitted that in this case the property was not partitioned between the two brothers, there was an unity of title and possession, therefore, sale of the property that too in excess of the share of defendant no. 1 is null and void. It is his submission that in the circumstances a prima-facie case exists in favour of the plaintiff-appellant, the balance of convenience also lies in his favour and he is likely to suffer irreparable loss and injury which cannot be compensated in



terms of money if the injunction is not granted. Learned counsel has relied upon a judgment of the Hon'ble Supreme Court in the case of **Babu Ram Vs. Santokh Singh (deceased) through his LRs and others [Civil Appeal No. 2553/2019 decided on March 7, 2019]** wherein the Hon'ble Supreme Court has discussed section 22 of the Act of 1956 and applicability thereof in respect of the succession to agricultural lands. Learned counsel has taken this court through paragraph Nos. 17, 18 and 19 of the judgment.

9. This Court has heard learned counsel for the appellant and perused the impugned order. It appears from the impugned order that Indra Sen Pahwa had two sons and one daughter Rekha Gandhi. The disputed property was mutated in the name of Indra Sen, his wife and two sons. During his life-time Indra Sen had sold 2.25 decimal of land out of the disputed property to Rekha Gandhi who was his daughter. In such circumstance, the submission of plaintiff-appellant that there was unity of title and possession cannot be readily accepted. There is no material on record to show that Indra Sen had executed the sale deed as Karta of the family. Further, it appears that Rekha Gandhi had sold the said land to one Suman Pahwa on 07.04.2021. Defendant no. 1 Vinod Kumar Pahwa is said to



be issueless and it was contended in the court below on his behalf that between defendant no. 1 and the plaintiff-appellant there had been regular altercations in respect of the property, therefore, defendant no. 1 had filed case No. 10/2012-13 before the Circle Officer for measurement of his respective share and the Circle Officer vide its letter no. 1806 dated 02.08.2014 had marked the property of defendant no. 1 giving a separate holding number 22 (*ka*) and electricity connection in his name. The house of the plaintiff-appellant was away from the property of the defendant and in such circumstance where a separate holding number had already been created after demarcation of the share of the defendant no. 1, the contention of the plaintiff-appellant, therefore, that there was unity of possession is also liable to fail. Although at first blush one may contend that he has a preferential right to the property but on a careful perusal of section 6 and 22 of the Act of 1956 with some of the judicial pronouncements, it would appear that there must be devolution of interest under the Act of 1956 upon the class I legal heirs to claim preferential right. Sections 6 and 22 of the Act of 1956 reads as under:-



“¹[6. **Devolution of interest in coparcenary property.** — (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005*, in a Joint Hindu Family governed by the Mitakshara law, the daughter of a coparcener shall,--
(a) by birth become a coparcener in her own right in the same manner as the son;
(b) have the same rights in the coparcenary property as she would have had if she had been a son;
(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,
and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.
Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.
(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

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1. Subs. by Act 39 of 2005, sec. 3, for section 6 (w.e.f. 9-9-2005). Section 6, before substitution, stood as under:
“6. Devolution of interest in coparcenary property.- when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a *Mitakshara* coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members, of the coparcenary and not in accordance with this Act:
Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the *Mitakshara* coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
Explanation 1. -For purposes of this section, the interest of a Hindu *Mitakshara* coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
Explanation 2. -- Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.”.

* Date of commencement 9-9-2005.



(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005*, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation. —For the purposes of this subsection, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005*, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005*, nothing

*Date of commencement 9-9-2005



contained in this sub-section shall affect--

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation. —For the purposes of clause (a), the expression “son”, “grandson” or “great-grandson” shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005*.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation. —For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.]

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.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in

*Date of commencement 9-9-2005



this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section, “court” means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.”

10. In the case of **Babu Ram** (supra), the Hon’ble Supreme Court has given three illustrations to throw light on the applicability of Section 22 of the Act of 1956. Paragraph 19 and 20 of the judgment in **Babu Ram** (supra) are being reproduced hereunder for a ready reference:-

“**19.** We may consider the matter with following three illustrations:-

a) Three persons, unrelated to each other, had jointly purchased an agricultural holding, whereafter one of them wished to dispose of his interest. The normal principle of pre-emption may apply in the matter and any of the other joint holders could pre-empt the sale in accordance with rights conferred in that behalf by appropriate State legislation.

b) If those three persons were real brothers or sisters and had jointly purchased an agricultural holding, investing their own funds, again like the above scenario, the right of pre-emption will have to be purely in accordance with the relevant provisions of the State legislation.



c) But, if, the very same three persons in illustration (b) had inherited an agricultural holding and one of them was desirous of disposing of his or her interest in the holding, the principles of Section 22 of the Act would step in.

The reason is clear. The source of title or interest of any of the heirs in the third illustration, is purely through the succession which is recognized in terms of the provisions of the Act. Since the right or interest itself is conferred by the provisions of the Act, the manner in which said right can be exercised has also been specified in the very same legislation.

Therefore, the content of preferential right cannot be disassociated in the present case from the principles of succession. They are both part of the same concept.

20. When the Parliament thought of conferring the rights of succession in respect of various properties including agricultural holdings, it put a qualification on the right to transfer to an outsider and gave preferential rights to the other heirs with a designed object. Under the Shastrik Law, the interest of a coparcener would devolve by principles of survivorship to which an exception was made by virtue of Section 6 of the Act. If the conditions stipulated in Section 6 were satisfied, the devolution of such interest of the deceased would not go by survivorship but in accordance with the provisions of the Act. Since the right itself in certain cases was created for the first time by the provisions of the Act, it was thought fit to put a qualification so that the properties belonging to the family would be held within the family, to the extent possible and no outsider would easily be planted in the family properties. In our view, it is with this objective that a preferential right was conferred upon the remaining heirs, in case any of the heirs was desirous of transferring his interest in the property that he received by way of succession under the Act.”

11. In the case of **Smt. Leela Devi & Anr. v. Bijay**

Prasad & Anr. reported in **AIR 2011 Pat 95**, it has been held that



Right under Section 22 cannot be exercised after partition between the co-heirs. In this regard, the relevant part of paragraph '17' of the judgment may be referred which reads as under:-

“17. In view of the above provision, the only requirement is that if a person dies intestate and his interest in immovable properties devolves upon two or more heirs specified in Class I of the Schedule and if any one of the heir proposes to transfer his or her interest in the property, the other heirs shall have a preferential rights to acquire the interest proposed to be transferred.....”

12. In this case, the case of the plaintiff-appellant is that during his life-time, the father and mother of the plaintiff-appellant had sold 2.25 decimals of land to Rekha Gandhi who had further sold it to Suman Pahwa. The property was mutated in the name of all the four persons i.e. father, mother, plaintiff and defendant no. 1. Therefore, to this Court, it appears that during life-time of their father the plaintiff-appellant and the defendant no. 1—respondent had got their right recognized in the revenue records. Later on the property was demarcated and separate holding number was created for the defendant no. 1. It is not a case of devolution of interest of their father under the Act of 1956.

13. The property had come to the co-heirs in the family partition. The plaintiff is, therefore, unable to demonstrate a prima-facie case of applicability of Section 22 of



the Act of 1956. This Court, therefore, finds no error in the impugned order.

14. This Appeal is dismissed. Let the trial be expedited. The observations made in this order shall not prejudice the case of the plaintiff-appellant in the pending suit.

(Rajeev Ranjan Prasad, J)

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