
(2013) 03 KL CK 0051
In the High Court Of Kerala
Case No : S.A. No. 481 of 1996

C.M. Govindan Nair and Others	Vs	APPELLANT
M. Ramachandran Nair and Others		RESPONDENT

Date of Decision : 08-03-2013

Acts Referred:

Hindu Succession Act, 1956 — Section 22, 22(1)

Citation : (2013) 2 ILR (Ker) 468 : (2013) 2 KHC 229 : (2013) 2 KLJ 186

Hon'ble Judges : N.K. Balakrishnan, J

Bench : Single Bench

Advocate : T.A. Ramadasan, A.K. Alex and Cibi Thomas, for the Appellant; N.L. Krishnamoorthy, K. Lakshminarayanan and K. Praveen Kumar, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Balakrishnan, J.—This Second Appeal was filed by defendants 1 to 3. The first defendant died during the pendency of this appeal. 3rd appellant and respondents 8 to 13 are the legal representatives of the deceased first defendant. 8th respondent died subsequently. 3rd appellant and respondents 9 to 13 are the legal representatives of deceased 8th respondent. The suit for declaration of right of pre-emption filed by the plaintiff was dismissed by the learned Munsiff. In the appeal, the learned Sub Judge reversed the finding entered by the trial court and granted a decree as prayed for by the plaintiff.

2. The gist of the plaintiff's case can be stated thus:-

The plaint schedule property belonged to deceased Lakshmi Amma: She died. The plaintiff, D2, D4 and D5 are the legal representatives of deceased Lakshmi Amma. It was contended by both sides before the courts below that the husband of Lakshmi Amma is also one of the legal representatives. However, Sankaran Adiyodi, the father of the plaintiff and defendants 2, 4 and 5 died subsequently and as such it is not disputed that the plaint schedule property belonged to the plaintiff and defendants 2, 4 and 5 and as such, each of them had 1/4 share in

the property. According to the plaintiff, all the other co-sharers had agreed to sell their respective undivided shares to the plaintiff. The 2nd defendant executed Ext.B1 sale deed in favour of D1. D1 is the father of the 3rd defendant. 3rd defendant is the wife of the 2nd defendant. The plaintiff contended that since he was one of the co-sharers and since the property was jointly held by the plaintiff and defendants 2, 4 and 5, the plaintiff was having a preferential right to get assignment of the share of the 2nd defendant by virtue of the provision contained in Sec. 22 of the Hindu Succession Act. Hence, the suit was filed for enforcement of that right.

3. Defendants 1 to 3 filed joint written statement admitting the fact that the right over the property devolved upon four persons; the plaintiff and defendants 2, 4 and 5. It was admitted that Sankaran Adiyodi, the father of the plaintiff in fact wanted other sharers to sell their share to the 2nd defendant, who was the youngest son. The allegation made in the plaint that the 2nd defendant had given Rs. 5,000/- out of Rs. 10,000/-, which was fixed as value of his share was denied. The right of pre-emption claimed by the plaintiff was also denied. It was contended that the first defendant had effected repairs to the house spending more than Rs. 15,000/-. The allegation that there was an agreement to sell the share was also denied.

4. Ext.B1 was marked before the trial court. No other evidence was adduced by the parties. The trial court found that the plaintiff did not mount the witness box to give evidence in support of the claim made in the plaint. It was also found that Sec. 22 of the Hindu Succession Act is not applicable to the case on hand and thus the suit was dismissed.

5. The appellate court reversed the finding and concluded that the plaintiff is entitled to get a right of pre-emption and so, the plaintiff was directed to deposit Rs. 12,000/- before the trial court and the 2nd defendant was directed to execute the sale deed within two months from the date of judgment. This Second Appeal is filed by defendants 2, 4 and 5 contending that the property in question is an agricultural land and so, Sec. 22 of the Hindu Succession Act has no application. It is also contended that the plaintiff is not entitled to get any preferential right since Ext.B1 was already executed. Unless the said document is declared void and inoperative and unless the 2nd defendant is also directed to execute a deed of conveyance, no decree as granted by the lower appellate court can be sustained, it is further contended.

6. The substantial questions of law framed for consideration are:-

(a) Whether the lower appellate court is justified in holding that the plaint schedule property is not an agricultural land?

(b) Has not the lower appellate court gone wrong in allowing the preferential claim put forward by the plaintiff under Sec. 22 of the Hindu Succession Act?

(c) Was the lower appellate court justified in directing the 2nd defendant to

execute the sale deed in favour of the plaintiff?

7. Heard both sides.

8. It is vehemently argued by the learned counsel for the appellants that the lower appellate court failed to consider the fact that the plaint schedule property is only an agricultural land and so, Sec. 22 of the Hindu Succession Act has no application. But the learned counsel for the respondent/plaintiff would point out the description of the plaint schedule property in the plaint that it is a residential compound. That is not properly controverted by the appellant. There is no evidence to hold that the property in question is an agricultural land. Therefore, the contention that the plaint schedule property is an agricultural land and so, Sec. 22 has no application is devoid of any merit.

9. Admittedly after the death of Lakshmi Amma and Sankaran Adiyodi, the property devolved upon four persons; the plaintiff and defendants 2, 4 and 5, each having 1/4 share in the said property. It is also not disputed that as per Ext.B1 sale deed dated 12.9.1990, the 2nd defendant assigned his undivided 1/4 share to the first defendant. The consideration shown therein is Rs. 12,000/-.

10. Learned counsel for the appellant submits that it is notorious that the sale deed does not often reflect the actual value/consideration paid by the vendee to the vendor and as such, the fact that in Ext.B1 the total consideration shown is Rs. 12,000/- should not persuade the court to hold that the consideration for the said property at the relevant time was only Rs. 12,000/-.

11. Learned counsel for the appellant would submit that a reading of the plaint would make it clear that the case actually projected by the plaintiff was to enforce the agreement entered into between the plaintiff and the 2nd defendant. It was stated in the plaint that the 2nd defendant had agreed to sell his share for Rs. 10,000/- and that a sum of Rs. 5,000/- was given as consideration on 26.8.1990.

12. It was contended that after the death of the plaintiff's father the first defendant who is the father-in-law of the second defendant persuaded the second defendant and thus got the deed of assignment in respect of the share of the second defendant assigned in favour of the 1st defendant on 12-09-1990 and that it was done with intent to defeat the right of the plaintiff. It is further contended that the plaintiff had sold his house believing the representation made by the defendants and other co-heirs that they will relinquish their right over their share in the plaint schedule property. It is also contended that none of the defendants are residing in the house situated in the plaint schedule property.

13. According to the defendants the attempt of the plaintiff is to oust the second defendant. The contention that the brothers of the second defendant had decided to release their shares to the plaintiff was denied. The contention that the plaintiff had paid Rs. 5,000/- to the second defendant for the purpose of assigning his share in favour plaintiff was also denied.

14. It is vehemently argued by the learned counsel for the appellant that the case that was projected by the plaintiff before the court below was that the 2nd defendant had agreed to sell his share of property to the plaintiff for a consideration of Rs. 10,000/- and that a sum of Rs. 5,000/- was already paid and that he was ready to pay the balance sum of Rs. 5,000/-. According to the appellant actually the case of the plaintiff was to get a decree for specific performance of the oral agreement but since that plea could not be substantiated the plaintiff came forward with a new case that he is entitled to get preferential right under Sec. 22 of the Hindu Succession Act, The contention that the claim made by the plaintiff was for specific performance of the agreement and that it was not the preferential claim under Sec. 22 that was projected is devoid of any merit. A reading of the entire plaint would make it clear that the plaintiff offered a sum of Rs. 10,000/- to the second defendant to sell his share of property because the plaintiff was entitled to pre-emption, to purchase the undivided 1/4 share of the second defendant. In other words, the contention that the preferential claim available to the plaintiff under Sec. 22 of the Act was not pressed into service before the trial Court is palpably unsound.

15. Now the crucial question that arises for consideration whether the plaintiff is entitled to sustain his claim for pre-emption and whether Ext.B1 executed by the second defendant in favour of the first defendant is to be treated as null and void and whether the first defendant has to be directed to execute the sale deed in respect of the plaint schedule property in favour of the plaintiff after receiving the valuable consideration.

16. Sri. Lakshmi Narayan, the learned counsel appearing for the plaintiff/respondent submits that the main object of Sec. 22 of the Hindu Succession Act is to prevent the heirs other than the transferor from being compelled to be in joint enjoyment of the property with stranger or other persons with whom they do not wish to associate themselves. Section 22 of the Act envisages the right of pre-emption of those cases where partition of the property is not complete. Such a right cannot be claimed where the property had already been partitioned. Here admittedly, the property was not partitioned. It is the undivided 1/4 share that was sold by the second defendant to his father-in-law the first defendant. If the parties had already entered into a partition the respective parties would have the authority to hold the respective shares independently and absolutely as their separate properties and so once partition takes place the application of Sec, 22 of the Act may not be available but so far as the case on hand is concerned the property remained in co-ownership and it is only one of the co-owners (the second defendant) who assigned his share to the first defendant.

17. Sec. 22 of the Hindu Succession Act, 1956 reads:-

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 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.

18. The fact that Lakshmi Amma died intestate is not in dispute. It is also not disputed that the plaintiff and defendants 2, 4 and 5 are the heirs specified in class I of the Schedule to the Hindu Succession Act. It is the admitted case that 2nd defendant transferred his undivided share to his father-in-law (D1) as per Ext.B1 sale deed. One contention that was advanced by the learned counsel for the appellants is that before effecting transfer of the property by the 2nd defendant in favour of first defendant, the plaintiff should have filed a petition or suit before the court expressing his intention to purchase the share of the 2nd defendant. Once the share has been transferred to a stranger, the other co-sharers cannot exercise their preferential rights under Sec. 22 of the Act, the learned counsel for the appellants submits. Unlike other pre-emption laws, Sec. 22 of the Hindu Succession Act does not say when the preferential right or right of pre-emption can be exercised; whether, before the transfer of the shares or whether that right can be exercised after the transfer of the shares also, it is pointed out by the learned counsel. The plea that once the share has been transferred to a stranger, the right of the other co-sharer under Sec. 22 of the Act is lost, is palpably unsound. That would enable a sharer to clandestinely or secretly or with dubious design transfer his undivided share to a stranger and if that is permitted the very object of Sec. 22 of the Act would get frustrated.

19. The other contention that was vehemently advanced by the learned counsel for the appellants is that Ext.B1, the document executed by the 2nd defendant in favour of first defendant should have been got set aside, but no such prayer is there in the plaint. I cannot agree with that submission. The suit was filed for a declaration that Ext.B1 assignment deed dated 12.9.2000 executed by the 2nd defendant in favour of the first defendant is void and inoperative in view of the right of pre-emption available to the plaintiff. The consequential relief claimed

seeking a direction to the 2nd defendant to execute a deed of conveyance to the plaintiff for a consideration as may be determined by the court and in case of his refusal such an assignment deed should be executed by the court in favour of the plaintiff would negative the plea raised by the appellants. What have been mentioned above would make it clear that the suit was properly laid and that there is a prayer to declare Ext.B1 null and void. Plaintiff's father died on 29.8.1990. Ext.B1 was executed within a few months from the date of death of plaintiff's father. That would also depict the dubious design of D2 in assigning his share in favour of his father-in-law, that too, under the pretext of salvaging the property as the 2nd defendant was stated to have incurred some debts. So far as the sharers to the property are concerned, the first defendant is a stranger. The very object of Sec. 22 of the Act would be stultified if the first defendant is allowed to exercise his right over the property got assigned as per Ext.B1. There is evidence to show and is not seriously controverted also that the plaintiff is residing in the house situated in the plaint schedule property. There is also evidence to show that the plaintiff had shifted his residence to the house situated in the plaint schedule property after selling his another property.

20. It is submitted by the learned counsel for the appellants that the Apex Court in the decision in Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others, 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 could not go out of their way to help the pre-emptor. It was also held by the Apex Court in the very same decision:-

There are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means.

21. Learned counsel for the respondent/plaintiff would submit that the suit has been filed only to enforce the right under Sec. 22 of the Act and not on any equitable consideration and therefore, the respondents could not deny the right which the plaintiff is otherwise entitled to get, in the facts and circumstances of the case delineated earlier.

22. The decision of the Division Bench of Calcutta High Court in Smt. Arati Das Vs. Smt. Bharati Sarkar and Others, has also been referred to by the learned counsel for the respondents, where it was held:-

A distinguishing feature of S. 22 of the Act is that whereas in ease of pre-emption provided in the other Statutes, the right to apply for pre-emption generally accrues only on the registration of the deed of transfer, but in this provision, such right has been conferred upon the pre-emptor even before the actual transfer, if any of the heirs of Class-I proposes to transfer his undivided share. Another peculiar element present is that here, the value of the

consideration of the proposed transfer should be decided by the Court unless otherwise agreed to by the parties, i.e. The transferor and the pre-emptor.

It was held by the Division Bench in Arati Das's case that even if the transfer has taken place, the right of the pre-emptor under Sec. 22 of the Act is not lost and that it would be absurd to suggest that the right conferred upon a heir as provided under sub section (1) of Sec. 22 can be frustrated by merely completing the transfer without disclosing the intention of the transfer to the persons who have the right of pre-emption.

23. It is not the case of the appellants that the intention to transfer was intimated or disclosed to the plaintiff and that despite such intention or disclosure the plaintiff did not come forward to exercise the right of pre-emption so as to Contend that the plaintiff had waived his right. Therefore, the argument vehemently advanced by the appellants that since the 2nd defendant had already assigned his share as per Ext.B1. the plaintiff is not entitled to seek the relief of declaration that Ext.B1 is null and void is bereft of any merit. But, on the other hand, if the transfer has not been effected but on coming to know of the fact that one of the co-sharers proposes to transfer his share to a stranger then the other co-sharer should propose to exercise his right under Sec. 22 of the Act it may be possible for him to file a suit before the court having jurisdiction under sub-section (2) of Sec. 22 of the Act for enforcing his right under Sec. 22(1) of the Act. Any way, those are not questions germane for consideration in this case.

24. It was held by the Division Bench of this Court in Valliyil Sreedevi Amma Vs. Subhadra Devi and Others, :

The object of sub-section (1) as we understand it 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. The said intention of Parliament can be effectuated only if we consider the section as conferring an enforceable right on the heirs other than the one who proposes to transfer his interest. The Section confers on such co-heirs a preferential right to acquire the interest which is proposed to be transferred by the other co-heir. In case the proposed transfer is effected by one of the co-heirs in violation of the right conferred on his co-heirs by sub-s. (1) the latter 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, in such circumstances, will, in our opinion, 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. In as much as the section does not provide any special procedure for seeking the said remedy the ordinary procedure for enforcement of any civil right has to be resorted to by the co-heirs who wish to enforce their rights u/s 22(1); in other words the remedy is by way of a regular civil suit before the competent

court. Where the properties have been already alienated in favour of strangers there is all the more reason why there should be a 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 right conferred by Section 22(1) of the Act. The question of invalidity of the transfer effected by the other coheir 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-heir in enforcement of the right conferred by Section 22(1).

Here the suit was filed by the plaintiff to enforce his right under Sec. 22(1) of the Act. The nature of the declaration and the consequential relief sought for by the plaintiff would make it indubitably clear that the suit is for enforcement of the right of pre-emption under Sec. 22(1) of the Hindu Succession Act and to get Ext.B1 declared as null and void.

25. In the light of what have been stated above, I hold that the lower appellate court was perfectly justified in holding that the suit for enforcement of the right of preemption under Sec. 22(1) of the Hindu Succession Act is perfectly maintainable and that the plaintiff is entitled to get the right of pre-emption enforced.

26. The only other objection that has been raised by the learned counsel for the respondents is that as per Sec. 22 the consideration, for which the interest in the property of the deceased may be transferred, in the absence of any agreement between the parties be determined by the court. Here, the consideration was not fixed by the court but the court below directed the plaintiff to deposit Rs. 12,000/- since that was the consideration shown in Ext.B1. Learned counsel for the appellants submits that the amount shown in Ext.B1 may not reflect the actual consideration. The court should have considered and decided what should be the consideration fixed in respect of the undivided 1/4 share of the 2nd defendant in the plaint schedule property. It is submitted that in the light of the judgment of the appellate court, the plaintiff had already deposited that amount before the trial court. However, since Ext.B1 may not reflect the actual consideration and since there is a duty cast on the court to fix consideration, I find that the consideration is to be refixed. But for that purpose, I do not think that the matter should be remanded to the trial court, for, it will only delay the final disposal of the case. Hence, taking into consideration of all the aspects, I find that over and above Rs. 12,000/- mentioned in Ext.B1, the plaintiff shall deposit a further sum of Rs. 15,000/- before the trial court. The said amount shall be deposited by the plaintiff/respondent before the trial court within one month from this date under intimation to D2. D2 shall execute the assignment deed assigning the right over the plaint schedule property in favour of the

plaintiff/1st respondent within one month after the deposit of Rs. 15,000/- mentioned earlier. The expense of execution and registration of the document shall be borne by the plaintiff/1st respondent. Ext.B1 stands declared as void. If D2 fails to execute the amount, the plaintiff can get the degree executed through court.

Except to the extent of the aforesaid modification in all other respects, this second appeal stands dismissed.