

(2006) 11 GAU CK 0093
In the Gauhati High Court

Haren Sarma

APPELLANT

Vs

Smt. Renu Borthakur and Others etc.

RESPONDENT

Date of Decision : 16-11-2006

Acts Referred:

Hindu Succession Act, 1956 — Section 22
Transfer of Property Act, 1882 — Section 54

Citation : AIR 2007 Guw 70

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

H.N. Sarma, J.—Aggrieved by the decree of reversal passed in Title Appeal No. 12/ 1992, dated 23-8-1995, by the learned Assistant District Judge, Jorhat, reversing the decree passed in Title Suit No. 25/1992, decreeing the suit, the aggrieved defendant/ appellant has filed this second appeal.

2. I have heard Mr. D.C. Mahanta, the learned senior counsel, assisted by Ms. P. Battacharjee for the defendant/appellant and Mr. Rajiv Baruah, the learned Counsel for the plaintiff/respondents.

3. The plaintiff filed the aforesaid Title Suit No. 25/82 praying for a decree claiming preferential right to purchase a plot of land measuring 3 Bighas. 3 Kathas, 3 Lechas covered by Periodic Patta No. 22, Bhagatdheuni Gaon, Charaibari Mouza in the district of Jorhat. The plaintiff based his claim on the pleaded facts that the suit land originally belonged to their father late Korgeswar Borthakur who died intestate leaving both the plaintiff and the defendant No. 1 and pro forma defendant Nos. 3, 4 and 5 as his heirs to inherit the properties left by him. That on the death of their father, the landed property including the suit land, devolved" in equal shares upon the heirs and legal representative and accordingly they are enjoying their respective shares of properties separately on amicable settlement/division, but the patta still remains as a joint one. It is further alleged that defendant No. 1 sold the suit property to defendant No. 2

ignoring the preferential claim of right to purchase by the plaintiff, in spite of such offer made by him. Accordingly, after selling of the suit land to defendant No. 2, the suit was filed for declaration of preferential right of purchase in favour of the plaintiff and allow him to pay the price of the suit land and thereafter to declare right, title and interest over the suit property in his favour. However, although the suit land was purchased by the defendant No. 2, no prayer for cancellation of the sale deed for alleged violation of the right of the plaintiff u/s 22 of the Hindu Succession Act, has been made in the suit.

4. The defendant No. 2 contested the suit by filing written statement, wherein a specific plea was taken that after the death of their father there was amicable family settlement and partition of the properties left by their father, between the plaintiff and other heirs and on such settlement suit land having fallen upon the defendant No. 1, he in turn sold the same to defendant No. 2 by a registered Sale Deed. It is also alleged that prior to such purchase the plaintiff was intimated about the proposed sale but he refused to purchase. The learned trial Court vide judgment and Order 30-4-1985 having dismissed the suit, the same was carried into the Title Appeal No. 12/92, and the said appeal was allowed vide Judgment and order dated 31-7-1992.

5. The appeal was admitted to be heard on the following two substantial questions of law.

1. Whether the learned Court below is justified in holding the decree of preferential right of the plaintiff/respondents over the suit land.?

2. Whether the learned Court below erred in law in considering that the land was in exclusive possession of the defendant No. 3.?

6. The basic claim of the plaintiff is that he has a preferential right over the suit property which was a joint property inherited by the brothers after the death of their father, but the defendant No. 2 refusing to recognize the said right, surreptitiously sold the suit land to defendant No. 2. The defendant No. 1 refused to recognize the right of the plaintiff, he having claimed such right u/s 22 of the Hindu Succession Act.

7. There is no dispute that the suit land originally belonged to late Korgeshwar Borthakur, the father of the plaintiff and defendant Nos.1, 3, 4 & 5 and the same is their ancestral property. Section 22 of the Hindu Succession Act, on the basis of which the plaintiff has claimed his right is quoted hereinbelow for our ready reference -

1. Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in 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 their who offers the highest consideration for the transfer shall be preferred.

8. Section 22(1) discloses that one of the condition precedent for applicability of Section 22 is that when an interest in immovable property of intestate devolves on two or more heirs classified in class-I heirs and any one of such heirs proposes to transfer his/ her interest in the property, the other heirs shall have preference over the interest so proposed to be transferred. Thus in order to attract the provision of Section 22, it is one of the condition precedent that there must be an existing interest over the immovable property which devolves upon two or more heirs as specified in the class-I of the Schedule of the Hindu Succession Act. Admittedly the parties inherited the suit property and remained as co-owners having interest thereon. But it is the pleaded case of the plaintiff himself that the landed property including the suit land were enjoyed separately on amicable settlement/division amongst the co-sharers. Although the patta remains joint the basic criteria for applicability of the provisions u/s 22, is the element of jointness of the property and if that jointness is severed then such right to claim such preferential right will also fall through. This must be for the reason that in a joint property no one, except on certain specified circumstances, can claim exclusive ownership over any portion of the property, unless it is specified by certain acts of the parties. In the instant case as disclosed from the averments made in the plaint that the suit land was a joint property which was later on separated and the respective owners are occupying their shares separately. The evidences of the plaintiff himself goes to show that the suit properties did not remain as a joint property and it was amicably partitioned by the parties, may be by way of family settlement, which is also another mode of partition enabling the parties to occupy their respective shares separately.

As indicated above the basis to claim preferential right u/s 22 of the Hindu Succession Act is available to a co-sharer to get such property transferred in favour of such shares is the existence of the element of jointness. The section is silent to deal with a situation that may arise after a transfer is affected in favour of a third party. It is contended that since the co-sharer has got a preferential right to purchase such joint property, in the event of any transfer made in violation of the same, such co-sharers whose rights are adversely affected, may claim property again in the suit. In such a contingency, it is the bounden duty of the plaintiff to challenge the sale deed by which his such right has been adversely affected. Admittedly Section 22 provides a clog to exercise right of

transfer as available u/s 54 of the Transfer of Property Act and in the event of the violation of the rights, such co-sharers are entitled to take appropriate action before completion of the transfer of the property to a third party, it is the duty of the plaintiff to take necessary steps to protect his rights and interest.

In the instant case the plaintiff neither approached the Court prior to the transfer nor challenged the sale deed executed in favour of the defendant No. 2. In this connection we may recall the ratio of the Division Bench of Valliyil Sreedevi Amma Vs. Subhadra Devi and Others, wherein Justice Bala Krishan (as his Lordship) then was speaking for the Court, held as follows:

Whether the property itself has been transferred away by the co-heir is mentioned. He failed to see what useful purpose will be served by the investigation conducted by the Court, u/s 2 for determining the price at which the property may be sold by a former to the latter. In such case an investigation u/s 2 may be relevant to only after the person who feels aggrieved by the transfer affected by his coheir under provision contravention of the proposed suspension as by the source of legal process obtained a declaration from the competent Court that this fact by the coheir in favour of a stranger is invalid.

9. In the present suit no declaration has been sought for that the sale in favour of defendant No. 2 is invalid for violation of Section 22 of the Hindu Succession Act.

10. Mr. Mahanta also pressed into service a decision of the Orissa High Court reported in Bhagirathi Chhatoi Vs. Adikanda Chhatoi and Others, which goes to show that Sections 20-A, 2(i) is not available to be exercised for partition of properties of co-heirs since partition owes to respective parties that the authorities who hold shares independently and exclusively as their separated property and it could not be the intention of the Legislature to put a clog to power of reunion of independent property. The ratio of aforesaid decision was relied on by a learned single Judge of this Court in the case of Krishnapada Roy alias Saha and Another Vs. Parimal Chandra Saha and Another, which is also referred to by Mr. Baruah.

11. In fact such consideration is one of the vital aspects regarding the applicability of the provisions of Section 22 of the Hindu Succession Act, which goes against the plaintiff/respondent.

12. In the fact and circumstances of the case, more particularly on the face of the admission made in the plaint the learned appellate Court was not justified in reversing the decree passed by the learned trial Court. As disclosed above, it is found that the suit property had fallen upon the share of defendant No. 1 after the usual family partition division and he having such independent right over the suit property, transferred the interest thereon in favour of defendant No. 2. On the basis of the proved facts which is writ large on the face of the record, the plaintiff is not entitled to lay his support to claim his preferential right over the

suit land u/s 22 of the Hindu Succession Act.

13. In view of the aforesaid facts and circumstances, I answer the substantial questions of law as framed in the suit in negative and in favour of the appellant.

14. Mr. Mahanta however not having pressed the other substantial questions of law, the same does not call for any adjudication.

15. In view of the aforesaid decision, the impugned judgment and decree passed by the then Assistant District Judge, Jorhat in Title Appeal No. 12/92 stands set aside and the suit of the plaintiff is dismissed.

16. No costs.