

(2015) 08 GAU CK 0045
In the Gauhati High Court
Case No : RSA No. 10 of 2005

Hazi Abdul Jalil and Others

APPELLANT

Vs

Kalipada Das and Others

RESPONDENT

Date of Decision : 27-08-2015

Acts Referred:

Hindu Succession Act, 1956 — Section 22

Citation : (2016) 1 GLT 332

Hon'ble Judges : Suman Shyam, J.

Bench : Single Bench

Advocate : M.H. Rajbarbhuiya, Advocate, for the Appellant; B.R. Dey, Senior Advocate and S. Dey, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Suman Shyam, J.—Heard Mr. M.H. Rajbarbhuiya, learned counsel for the appellants. Mr. B.R. Dey, learned senior counsel appearing for the respondents had addressed this Court on the previous date on which the matter was heard in part, but there is no representation on behalf of the respondents today before this Court when the matter was called up for hearing.

2. This Second Appeal has been filed challenging the concurrent judgment and decree dated 13.07.2004 passed by the learned Civil Judge (Senior Division), Karimganj in Title Appeal No. 5/2003 dismissing the same, thereby affirming the judgment and decree dated 30.09.2002 passed by the learned Civil Judge (Junior Division) No. 1, Karimganj in Title Suit No. 46/1999.

3. The plaintiff's case in brief is that the land described in Schedule-I to the plaint originally belonged to his father Late Surendra Kumar Das. Surendra Kumar Das died leaving behind his widow i.e. Lakshmi Rani Das, one son i.e. plaintiff and three daughters including the defendant No. 3 as his surviving legal heirs. The father of the plaintiff, during his lifetime, had transferred the Schedule-I property in favour of Lakshmi Rani Das. However, since the plaintiff had

become owner of 1/5th share in the Schedule-I land left behind by his father, hence, he had filed Title Suit No. 8/1996 in the Court of Civil Judge (Senior Division), Karimganj against his mother Lakshmi Rani Das and sister i.e. the defendant No. 3, inter alia, seeking a declaration that the plaintiff is the owner of 1/5th share in the property left behind by Late Surendra Kumar Das and therefore, he had preferential right to purchase the share of the mother and the sister who were the defendants in the said Title Suit. The Title Suit No. 8/1996 was decreed ex parte on 12.05.1997. However, the defendant No. 3 had acted in violation of the ex parte decree dated 12.05.1997 passed in Title Suit No. 8/1996 and executed a registered deed of sale bearing No. 2301 dated 11.11.1998 transferring the Schedule-II land in favour of defendant No. 1. Since the plaintiff was entitled to a preferential right to purchase the said plot of land from the defendant No. 3 being one of the legal heirs of Surendra Kumar Das and in view of the fact that the registered deed of sale had been executed by the defendant No. 3 in violation of the judgment and decree dated 12.05.1997, the plaintiff had filed Title Suit No. 46/1999 in the Court of Civil Judge (Junior Division) No. 1, Karimganj against the present defendants, inter- alia, praying for a decree declaring the registered deed of sale dated 11.11.1998 as void and for other consequential reliefs

4. On receipt of summons the defendant Nos. 1 and 2 appeared and contested the suit by filing joint written statement, inter alia, questioning the maintainability of the suit in the present form for want of cause of action and also on the ground of the suit being barred under the principles of waiver, estoppels and acquiescence as well as the law of limitation. The contesting defendants have stated that the father of the plaintiff had transferred his entire property in favour of the mother of the plaintiff i.e. Lakshmi Rani Das vide registered deed of sale dated 12.05.1982 which fact was well within the knowledge of the plaintiff. After having enjoyed the property for more than 13 years the mother of the plaintiff had executed a "baina nama" (agreement for sale) dated 16.12.1995 in favour of the contesting defendants agreeing to sell a plot of land measuring 1 1/2 kedar for a price of Rs. 24,000/- out of which Lakshmi Rani Das had also received a sum of Rs. 18,000/- at the time of execution of the "baina nama" pursuant where to the possession of the said land had also been delivered to the defendants. However, on account of failure on the part of the mother of the plaintiff to execute a registered deed of sale in favour of the defendant Nos. 1 and 2, they had filed a suit bearing No. 160/1996 in the Court of Civil Judge (Junior Division) No. 1, Karimganj for execution of a sale deed in terms of the "baina nama" dated 16.12.1995. After the death of Lakshmi Rani Das the property left by her including the suit land had been inherited by her son and daughters including the defendant No. 3 as a result of which the said defendant No. 3 had become owner of land measuring 1 1/2 kedar being her share on the basis of an amicable partition amongst the brothers and sisters. The defendant No. 3 got the suit land along with other land measuring 1 1/2 kedar. Thereafter, the defendant No. 3 had executed the registered deed of sale dated

11.11.1998 in favour of the defendant Nos. 1 and 2 in respect of the Schedule-II land for valuable consideration. In the above manner, the defendant Nos. 1 and 2 have been in possession of the suit land and enjoying the same. It is also the case of the contesting defendants that although the plaintiff does not have any semblance of right, title and interest over the suit land purchased by the defendant Nos. 1 and 2 and notwithstanding the fact that neither the defendant Nos. 1 and 2 were parties to the Title Suit No. 8/1996 nor were they aware of the ex- parte decree, yet, only to harass the defendants the plaintiff has instituted the instant suit. The defendants have, therefore, prayed for dismissal of the suit.

5. Based on the pleadings of the parties, the learned trial Court had framed the following issues:--

"1. Whether there is any cause of action for the suit?

2. Whether the suit is maintainable in its present form and manner?

3. Whether the plaintiff is entitled to the decree as prayed for?

4. To what relief or reliefs if any the plaintiff is entitled to?"

6. The plaintiff had examined one witness and exhibited some documents in support of his case whereas the defendant side had examined as many as three witnesses and submitted documentary evidence. After examination of the evidence available on record and on hearing the learned counsels for the parties the learned trial Court had decreed the suit filed by the plaintiff by holding that the plaintiff was entitled preferential right of purchase of the suit land as the heir of the original owner Surendra Kumar Das.

7. Being aggrieved by the judgment and decree dated 30.09.2002 passed by the learned Civil Judge (Junior Division) No. 1 in Title Suit No. 46/1999 the defendant Nos. 1 and 2 as appellants had preferred Title Appeal No. 5/2003 before the Court of Civil Judge (Senior Division), Karimganj. After hearing the learned counsels for the parties and on re-appraisal of the evidence on record, the learned Lower Appellate Court had passed the judgment and decree dated 13.07.2004 in Title Appeal No. 5/2003 dismissing the appeal, thereby affirming the judgment and decree passed by the trial Court.

8. Being aggrieved by the concurrent judgment and decree dated 13.07.2004 passed in Title Appeal No. 5/2003, the defendant Nos. 1 and 2 as appellants had approached this Court by filing the instant Second Appeal which was admitted to formal hearing by framing the following substantial questions of law:--

"1. Whether the finding of the learned trial court below are sustainable in law as per Section 22 of the Hindu Succession Act, 1956 which is not at all applicable in the present suit.

2. Whether the learned courts below are right and correct in giving benefit to the respondents/plaintiff under Section 22 of the Hindu Succession Act inasmuch as

it does not apply in case of Agricultural land in question Exbt. A is being the Agricultural plot of land."

9. Mr. M.H. Rajbarbhuiya, learned counsel for the appellants submits that the only claim made by the plaintiff in the suit is based on his alleged right under Section 22 of the Hindu Succession Act on the ground that the suit land forms part of his ancestral land and therefore, the plaintiff, being a class-I legal heir of Surendra Kumar Das, was entitled to preferential right to acquire the property sold by the defendant No. 3 in favour of the defendants Nos. 1 and 2. However, submits Mr. Rajbarbhuiya, from the testimony of PW 1 i.e. wife of the plaintiff it is evident that the plaintiff has himself sold away his portion of the ancestral property without making any offer of sale to the other legal heirs and has moved out to village Moina wherein he has been residing with his family. Since the plaintiff has himself acted in violation of Section 22 of the Hindu Succession Act, 1956 by denying the right that was available to the other legal heirs of Surendra Kumar Das, hence, he cannot now turn back and exercise such right only to defeat the interest of the defendant Nos. 1 and 2.

10. Mr. Rajbarbhuiya further submits that the ex- parte decree passed in Title Suit No. 8/1996 was evidently obtained by the plaintiff behind the back of the defendant No. 3 as well as the other two sisters who are the legal heirs of Surendra Kumar Das. That apart, the defendant Nos. 1 and 2 were also not made party to the said proceeding all though they were necessary parties. It is also not the case of the plaintiff that the contesting defendants/appellants had purchased the suit land being aware of the judgment and decree dated 12.05.1997 passed in Title Suit No. 8/1996. He, therefore, submits that the appellants/defendant Nos. 1 and 2 are bona fide purchasers of the suit land without notice and therefore, their rights and interest are liable to be protected under the law. In such view of the matter, the judgment and decree passed by the Lower Appellate Court is vitiated by illegality and hence, is liable to be declared so by this Court.

11. Per contra, Mr. B.R. Dey, learned senior counsel appearing for the respondent/plaintiff, submits that the plaintiff's basic case rests on his entitlement under the law i.e. under Section 22 of the Hindu Succession Act, 1956. He submits that there can be no denial of the fact that as a legal heir of Surendra Kumar Das, the plaintiff/respondent did have a preferential right to acquire the property of the other co-sharers including the Schedule-II land. Mr. Dey, however, admits that the respondent/plaintiff has alienated his share of the ancestral property without making any offer to the other legal heirs.

12. Having regard to the peculiar facts and circumstances of the case, on the last occasion when the matter was heard in part, this court had requested Mr. Dey to obtain instructions from his clients as to whether he has any surviving interest or claim in respect of the ancestral property after disposing of his share. Today, when the matter was taken up for further hearing, there is no representation on behalf of the respondents. Be that as it may, I have perused the materials on

record and have also considered the arguments made by the learned counsels for the parties. A scrutiny of the record goes to show that the case of the plaintiff is based on the claim of preferential right under Section 22 of the Hindu Succession Act, 1956 to acquire the property belonging to the other heir viz. defendant No. 3. The respondent/plaintiff is also trying to draw support from the ex- parte decree dated 12.05.1997 which had restrained the mother and the defendant No. 3 sister from alienating any portion of the ancestral land without making an offer to the plaintiff.

13. It is the admitted position of fact that the entire land belonging to Surendra Kumar Das had been transferred by him to his wife Lakshmi Rani Das i.e. the mother of the plaintiff by virtue of a registered deed of sale dated 12.05.1982. Therefore, with effect from 12.05.1982 Surendra Kumar Das ceased to have any interest in the Schedule-I land and as such after the death of Surendra Kumar Das the plaintiff could not have acquired 1/5th share in the property as claimed by him. Since the registered deed of sale dated 12.05.1982 is not under challenge, hence, it would not be necessary for this Court to go into the question of validity of the said sale deed.

14. It also appears from the record that on 16.12.1995 the mother of the plaintiff i.e. Lakshmi Rani Das had executed a "baina nama" in favour of defendant Nos. 1 and 2 for sale of the suit land for a consideration of Rs. 24,000/- pursuant whereunto the possession of the land had also been allegedly delivered to the contesting defendants. On 16.12.1995 Lakshmi Rani Das was evidently the owner of the entire Schedule-I land by virtue of the registered deed of sale dated 12.05.1982 and the plaintiff did not have any right, title or interest over the said plot of land during the lifetime of Lakshmi Rani Das.

15. Apparently, the plaintiff had obtained an ex- parte decree dated 12.05.1997 against his mother and sister i.e. the defendant No. 3 enforcing his preferential right to purchase the shares of the other co-sharers. However, it appears that the property had not devolved upon the plaintiff after the death of his father as the entire land had been transferred to his mother who was alive on the date of filing the aforesaid suit. Consequently, there was no question of making any declaration under section 22 of the Hindu Succession Act, 1956 in favour of the plaintiff during the life time of Lakshmi Rani Das who had become the sole owner of the land on the strength of the registered deed of sale dated 12.05.1982.

16. Since it is the pleaded case of the defendant Nos. 1 and 2 that Lakshmi Rani Das had executed a "baina nama" dated 16.12.1995 creating a right in favour of the defendant Nos. 1 and 2 in respect of the suit land and the possession was also delivered to them, hence, the defendant Nos. 1 and 2 were necessary parties in Title Suit No. 8 of 1996. However, the defendant Nos. 1 and 2 were not impleaded as party in Title Suit No. 8/1996 nor was the "baina nama" dated 16.12.1995 put to challenge.

17. Section 22 of the Hindu Succession Act, 1956 reads 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 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."

From a bare reading of the aforesaid provision, it is apparent that the co- sharers would have a preferential right to acquire the interest of other legal heirs in the ancestral property in preference over a stranger. The purpose and intent of the Section 22 of the Hindu Succession Act appears to be to preserve and protect the preferential right of a class-I heir to acquire the interest in an undivided ancestral property. Such right of pre-emption would be available to a class-I heir against the other class-I heir(s) who proposes to transfer his or her share to a stranger.

18. In the present case, the learned court below did not record any finding as to when and in what manner the suit property had devolved upon the legal heirs of Surendra Kumar Das. Even assuming that the property had devolved upon the plaintiff after the death of his father even then it is evident that the plaintiff had himself alienated his share in the ancestral property situated at Khalorpar and thereafter, moved on to village Moina. It has been admitted by the PW-1 that the share of the respondent/plaintiff in the ancestral property including the homestead land measuring about 2 1/2 kedars had been purchased by Hayur Uddin and Samar Uddin who are outside the family. In a case where the plaintiff himself has alienated his share in the ancestral property in violation of the conditions of Section 22 of the Hindu Succession Act, 1956 he cannot be permitted to claim any benefit under Section 22 of the Hindu Succession Act, 1956 against the other heirs.

19. A sale deed executed in violation of a decree passed by a competent court would ordinarily be void. However, as can be seen from the record, the plaintiff had not impleaded the defendant Nos. 1 and 2 in Title Suit No. 8/1996 where an ex- parte decree had been obtained. Since the appellants/defendant Nos. 1 and 2 claimed to have been put in possession of the suit land prior to the institution of Title Suit No. 8/1996 they were necessary parties to the said suit as no effective

decree could have been passed in their absence. On the face of the pleaded stand taken by the defendants in the written statement, the plaintiff ought to have pleaded and established the fact that the possession of the suit land had been taken over by the defendants subsequent to the filing of Title Suit No. 8/1996 or that the defendant Nos. 1 and 2 had purchased the suit land despite being aware of the ex-parte decree dated 12.05.1997 in order to claim any benefit under the ex-parte decree. However, no such attempt had apparently been made by the plaintiff. The ex-parte decree, therefore, cannot be said to have any binding effect upon the Appellants/Defendants Nos. 1 and 2.

20. Taking note of all the aforementioned aspects of the matter, there is no hesitation for this court to hold that in the facts and circumstances of the present case, the plaintiff cannot claim to be entitled to preferential right of purchase in respect of the suit land under Section 22 of the Hindu Succession Act, 1956. The learned Court below has also not recorded any finding as regards the right of the plaintiff over the suit land but has merely gone on to decree the suit on the basis of an erroneous observation made to the effect that the defendants did not have any right to acquire the suit land in view of the provision of section 22 of the Hindu Succession Act. As such, the impugned judgment and decree is not sustainable in law and the same is liable to be interfered by this court.

21. In view of what has been discussed here-in before, the first substantial questions of law framed by this Court stands answered in favour of the appellants and against the respondents. Consequently, this Second Appeal must succeed and is hereby allowed. The judgment and decree passed by the learned Lower Appellate Court is hereby set aside. The suit of the plaintiff shall stand dismissed. However, having regard to the facts and circumstances of the case, there would be no order as to cost.

The LCR be sent back.