

(1999) 04 P&H CK 0073
In the Punjab And Haryana At Chandigarh
Case No : Second Appeal No. 3841 of 1997

Kamal Goel

APPELLANT

Vs

Purshotam Dass (deceased by L.Rs.) and Others

RESPONDENT

Date of Decision : 05-04-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Hindu Succession Act, 1956 — Section 22, 22(1)

Citation : AIR 1999 P&H 254

Hon'ble Judges : T.H.B. Chalapathi, J

Bench : Single Bench

Advocate : Rajinder Goyal, for the Appellant; Akash Jain, for the Respondent

Judgement

T.H.B. Chalpathi, J.—This appeal is preferred against the decree and judgment of the learned Additional District Judge, Kaithal dismissing the appeal filed by the present appellant against the decree and judgment of the Senior Sub-Judge, Kaithal dated 17-8-1993 on the ground that the appeal is not maintainable.

2. One Chalti Devi filed the suit for possession of the suit property claiming that she had a preferential right to purchase the suit property u/s 22 of the Hindu Succession Act. The said Chalti Devi had two sons namely Purshotam Dass and Mohinder Parkash Bindlish. The suit shop was owned by her two sons Mohinder Parkash Bindlish and Purshotam Dass. Mohinder Parkash Bindlish died on 17-5-1984. His half share in the suit property has been inherited by his widow, children and the mother Chalti Devi who is the plaintiff as his Class-I heirs. The widow and children of Mohinder Parkash Bindlish sold their interest in the suit property to the defendant Mohan Lal under a regd sale deed dated 21-2-1985 for a consideration of Rs. 35,000/-. Chalti Devi filed the suit on 11-2-1986 claiming that she had a preferential right to purchase the share of the widow and children of Mohinder Parkash Bindlish since she was also a Class-I heir of Mohinder Parkash Bindlish. Therefore, she claimed the suit to enforce her preferential right conferred on her u/s 22 of the Hindu Succession Act against the purchaser. She

did not implead her widowed daughter-in-law and grand-children as parties to the suit.

3. The defendant who purchased the suit property from the widow and children of Mohinder Parkash Bindlish resisted the suit contending that an offer was made to Chalti Devi, but she did not purchase the property and, therefore, the same was sold to him and he cannot be dispossessed.

4. At this stage, it is pertinent to mention that after filing of the suit, the original plaintiff Chalti Devi died and her another son Purshotam Dass was brought on record as plaintiff in place of Chalti Devi. The other legal heirs of Chalti Devi namely her grand children through the predeceased-son have not been impleaded as parties to the suit. The defendant-Madan Lal also died and his legal representatives were brought on record as defendants in his place.

5. On the basis of the pleadings, the Trial Court framed appropriate issues and on the basis of the material placed before him decreed the suit. Against the said decree and judgment, the defendant preferred an appeal. The Appellate Court held that the suit was filed u/s 22 of the Hindu Succession Act. Therefore, the appeal filed by the defendants-appellants is not maintainable. Hence the defendants preferred the present appeal.

6. I am unable to agree with the view taken by the learned Additional District Judge that the appeal is not maintainable. It is true that Section 22 confers a preferential right on Class-I heirs to purchase the interest in the immovable property proposed to be transferred. Sub-section (1) of Section 22 of the Hindu Succession Act confers a substantial preferential right while Sub-section (2) of Section 22 of the Act gives a right to the parties to file an application for determination of the consideration for which any interest in the property of the deceased may be transferred. Sub-section (2) of the Section 22 of the Hindu Succession Act cannot be invoked for the purpose of enforcing the preferential right. If the other heir who proposes to transfer the property refused to transfer the same in favour of Class-I heir who is willing to purchase or transfer the property to the 3rd person, the Class-I heir, who wants to purchase the property has to necessarily file a suit for enforcing of right conferred on the heir under Sub-section (1) of Section 22 of the Hindu Succession Act.

7. In this connection, it is useful to refer to the decision of the Kerala High Court in Valliyil Sreedevi Amma Vs. Subhadra Devi and Others, , wherein it has been held that where Sub-section (1) of Section 22 of the Hindu Succession Act does not provide any special procedure for seeking the 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 civil suit in a competent Court.

8. Thus it is clear that Sub-section (1) of Section 22 confers a right, but does not lay down the procedure to enforce it whereas Sub-section (2) of Section 22 only provides for moving the Court by an application to determine the quantum of

consideration where the willing co-heir is willing to enter the transaction. Thus the scope of Sub-section (2) of Section 22 is limited only in regard to determination of quantum of consideration. It has no application for enforcement of the right when the property has already been sold. To enforce the preferential right conferred under Sub-section (1) of Section 22, the only remedy is by way of a civil suit. Therefore the trial Court has necessarily to pass a decree if it finds that the plaintiff is entitled to enforce the preferential right under Sub-section (1) of Section 22 of the Hindu Succession Act. Against such a decree an appeal will certainly lie u/s 96 of the Code of Civil Procedure. Therefore the view taken by the learned Additional District Judge that no appeal lies is liable to be set aside. Accordingly, I set aside the same.

9. The next question is whether it is necessary to remand the matter to the Lower Appellate Court. The learned Counsel for the appellant argued that Chalti Devi died after filing of the suit and the right conferred on her is personal right and, therefore, Purshotam Dass, who came on record as L.R. of Chalti Devi cannot enforce that right which is personal to Chalti Devi alone. Since this is purely a question of law and since no determination of facts is necessary, I propose to decide this question without remanding the matter to the Lower Appellate Court as the Counsel for the parties argued the matter before me.

10. Chalti Devi filed the suit claiming a preferential right to purchase the property u/s 22 of the Hindu Succession Act which reads as follows :--

"Where, after the commencement of this Act, 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, devolve 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."

11. From a reading of above Section, it is clear that it confers a right on Class-I heir only to seek the transfer of property in his or her name when the other co-heir proposes to sell the property. This Section is also applicable to the interest already transferred, but the intention of enacting the Section is to see that the property will remain in the hands of co-heirs only and to prevent the] strangers from acquiring any interest of the coheir. Further it is clear that the provisions of this Section are confined only to Class-I heirs specified in the Schedule. It is only a personal right given to one or other of the co-heirs. That right is neither transferable nor inheritable. In such cases, the common law maxim *actio personalis moritur-cum persona* (a personal right of action dies with the person).

12. Admittedly, Chalti Devi died during the pendency of the suit. Therefore, the right to have the property transferred in her name and to get the sale deed executed by the defendants in favour of the appellant set aside also ceased to exist. Her other son namely the 1st respondent cannot have any right to continue the suit since he has no right and the right of his mother Chalti Devi

cannot be inherited by him. It is further to be noticed that all other Class-I heirs except Chalti Devi sold their share of the property to the appellant. When Chalti Devi died before a decree was passed in her favour, the right to continue the suit will not survive. Since the right conferred u/s 22 of the Succession Act is a personal one, it is extinguished by the death of Chalti Devi. Therefore, the suit filed by her stands abated as she died before the adjudication of her right.

13. The learned Counsel for the appellant and respondents are not able to draw my attention to any reported decision on the question whether the right conferred u/s 22 of the Hindu Succession Act survives on the death of Class-I heir instituted the suit claiming the said right, but I am able to lay my hands on an analogous principle in Mohummudan Law. The right of pre-emption was available to a Sunni of Hanifi Sect. That right was known as Shaffa. It signifies the becoming of proprietor of lands sold for the price at which the purchaser has purchased them. A person claiming the right of a sort of pre-emption is called Shafee. The right of Shaffa (the right of like preemption) is available to a co-sharer in the property of the land sold. Under the Muslim Law if the Shafee i.e. the person claiming the right of preemption dies, his right of Shaffa becomes extinct. It is an express condition of Shaffa that a man be firmly possessed of the property from which he derives his right of Shaffa at the time when the subject of it is sold, a condition which does not hold on the part of the heirs. It is moreover a condition that the property of the Shafee remains firm until the decree of the Kazeer be passed as this does not hold on the part of the deceased shafee, the shaffa is not established in respect to any of his descendants because of the failure of its conditions. Relying on the passages of Baillie's Mohummudan Law in Hamilton's Hadaya by Grady, 2nd. Edition page 560 and Baillie's Mohummudan Law, 2nd Edition at page 505, Tagore Law Lecturers 1873 (Shama Charan Sarear) page 534, Tagore Law Lecturers 1884 (Ammer Ali) 2nd. Edition, Vol. I, page 603, a Division Bench of the Allahabad High Court in Muhammad Hussain v. Niamat-Un-Nissa ILR (1898) All 88 held as follows :--

The short point which we have to decide is did the right of pre-emption determine upon the death of Muhammad Hasan? All the authorities of which we are aware show that it did; that the right of pre-emption is gone when the pre-emptor is a Sunni of the Hanifi sect and has not obtained his decree during his lifetime and that the right to sue does not survive to his heirs."

14. The decision of the Full Bench of the Allahabad High Court in Mohd. Ismail Vs. Abdul Rashid and Others, , is also to the same effect.

15. A reference may also be made to another decision of Allahabad High Court in Puri Ram v. Durga (1907) ILR All 49. In that case an unmarried daughter claimed to redeem a mortgage of her father's property making a surviving married sister and the minor children of the deceased sister as plaintiffs. During the pendency of the suit, the plaintiff died. On the application, the married sister and the children of the deceased were sought to be brought on record as plaintiffs. It was held that the claim of the original plaintiff being personal to her, the suit abated

and that the surviving sister could not be permitted to carry on the litigation. These authorities support my view that the preferential right conferred u/s 22 of the Hindu Succession Act does not survive on the death of the plaintiff and that the suit abates and, therefore, the surviving son of Chalti Devi, the respondent herein has no right to come on record and claim a decree to be passed in his favour in respect of the preferential right that was conferred on Chalti Devi u/s 22 of the Hindu Succession Act.

16. Even assuming for argument's sake that the preferential right conferred u/s 22 of the Hindu Succession Act is heritable and the legal heirs of Chalti Devi can claim that right, that preferential right, the 1st respondent Purshottam Dass, and children of Mohinder Parkash Bindlish are entitled to succeed to the estate of Chalti Devi. Section 15 of the Hindu Succession Act provides that the property of a female Hindu dying intestate will devolve upon the sons and daughters including the children of pre-deceased son or the daughters and the husband. There is no dispute of the fact that Mohinder Parkash pre-deceased Chalti Devi leaving behind him his children. Therefore, the children of Mohinder Parkash will also inherit the estate of Chalti Devi including the preferential right conferred on Chalti Devi u/s 22 of the Hindu Succession Act along with Purshottam Dass. Therefore, all of them are entitled to enforce the preferential right in accordance with their share in the estate of Chalti Devi. Admittedly, after the death of Chalti Devi, Purshottam Dass alone came on record as the legal representative of Chalti Devi without impleading the children of Mohinder Parkash Bindlish. Therefore in the absence of children of Mohinder Parkash, who are also entitled to inherit the estate and interests of the Chalti Devi alongwith Purshottam Dass, no decree can be passed in his favour. On this ground also, the claim of Purshottam Dass cannot be sustained.

17. In this view of the matter, I am of the opinion that the suit is liable to be dismissed as abated on the death of Chalti Devi.

18. Accordingly, I allow the appeal, set aside the decree and judgments of the Courts below and dismiss the suit. However there will be no order as to costs.