

(2024) 06 KL CK 0144

In the High Court Of Kerala

Case No : Regular Second Appeal No. 363 Of 2013

Kulangara Abdul Khader

APPELLANT

Vs

Dhashayani

RESPONDENT

Date of Decision : 12-06-2024

Acts Referred:

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

Citation : (2024) 06 KL CK 0144

Hon'ble Judges : C.Pratheep Kumar, J

Bench : Single Bench

Advocate : B.Krishnan, R.Parthasarathy, Seema, B.Rajesh, T.K.Ajan

Final Decision : Dismissed

Judgement

C.Pratheep Kumar, J

1. This Second Appeal has been preferred by the 5th defendant in the suit, O.S.No.143/2008 on the file of the Munsiff's Court, Vatakara, who is also the 5th respondent in A.S.38/2009 on the file of the Subordinate Judge's Court, Vatakara against the judgment and decree dated 31.1.2013 allowing the appeal. For the purpose of convenience, the parties are hereafter referred to as per their rank before the trial Court.

2. The plaintiff who is the 1st respondent in the Second Appeal filed the Suit for pre-emption for enforcing preferential right available under Section 22(1) of the Hindu Succession Act, 1956. The plaintiff is the widow and defendants 1 to 4 are the children of deceased Sankaran. The plaintiff schedule property originally belonged to Sankaran, and on his death, the property devolved upon the plaintiff and defendants 1 to 4. The defendants 1 to 4 assigned their 1/5 share each in the schedule property in favour of the 5th defendant as per Ext.A3 (Ext.B1) sale deed dated 2.6.2008, for a consideration of Rs.40,000/-. According to the plaintiff, by virtue of Section 22(1) of the Hindu Succession Act, she is entitled to preferential right to purchase the shares of defendants 1 to 4, she being one of

the co-heirs.

3. The defendants 1, 2, 4 and 5 filed written statement opposing the plaintiff's claim. According to them, the plaintiff along with defendants 1 to 4 together decided to sell the plaint schedule property to the 5th defendant for a consideration of Rs.40,000/- during June-2008. The plaintiff was also willing to assign her 1/5 share in favour of the 5th defendant. Defendants 1 to 4 assigned their share in favour of the 5th defendant with the consent of the plaintiff. It was contended that the plaintiff agreed to assign her share in favour of defendants 1 to 4 later on. It was also contended that the plaintiff has no preferential right, as claimed.

4. The trial Court after considering the oral testimony of the plaintiff as PW1, Dws 1 to 3, Exts.A1 to A3 and Exts.B1 and B2 found that the plaintiff has preferential right to purchase the share of defendants 1 to 4. However, the plaintiff was non-suited on the ground that there was no separate prayer for declaration of the invalidity of the document in question, namely Ext.A3, or to set aside or cancel the same. However, the 1st Appellate Court held that in a suit for pre-emption, separate prayer for declaration is not necessary and accordingly allowed the appeal and decreed the Suit. Aggrieved by the above finding of the 1st Appellate Court, the 5th defendant preferred this second appeal.

5. At the time of admission, the following substantial questions of law were formulated :

- i. Whether Ext.B1 is void or is it only voidable ?
- ii. Whether the lower appellate court was justified in allowing the plea of pre-emption put forward by the plaintiff under Section 22 of the Hindu Succession Act ?
- iii. In the event of allowing the claim under Section 22 of Hindu Succession Act, is not the court bound to enquire into the value of the property ?

6. Both sides were heard in detail on the above questions of law.

7. The plaintiff filed the suit claiming preferential right to purchase the shares of defendants 1 to 4 recognized under Section 22(1) of the Hindu Succession Act. In the impugned judgment, the trial court also found that the plaintiff is entitled to preferential right to purchase the shares of defendants 1 to 4, by virtue of sub-section (1) of Section 22 of the Hindu Succession Act. The trial Court denied relief of pre-emption to the plaintiff on the ground that since the defendants 1 to 4 had already assigned their share in the plaint schedule property in favour of the 5th defendant as per Ext.A3 sale deed, the plaintiff ought to have prayed for setting aside the said document. The trial court found that Ext.A3 sale deed is only a voidable document and hence, unless and until it is set aside, it will continue to be a valid document. Therefore, it was held that, in order to enforce the right of pre-emption, the sale deed is to be set aside.

8. On the other hand, the 1st Appellate Court while reversing the finding of the trial court observed that the question of transfer effected by the other co-heirs in favour of stranger becomes relevant in a suit for pre-emption, 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 for by him against his co-heir, in enforcement of the right. Thereafter, the learned 1st Appellate Court proceeded to hold that even though the transfer effected by defendants 1 to 4 in favour of the 5th defendant is a voidable one, the plaintiff can very well exercise the pre-emption right without a separate prayer to set aside the document already executed. Accordingly, the 1st Appellate Court reversed the judgment and decree of the trial Court and decreed the suit.

9. In the decision in Valliyil Sreedevai Amma v. Subhadra Devi and Ors., AIR 1976 Ker. 19, relied upon by the learned counsel for the plaintiff, a Division Bench of this Court, had occasion to consider the remedy of a co-heir, once the other co-heir transferred his share to a stranger. In paragraph 6, the Division Bench held that :

"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-section (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 under Section 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 co-heir 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).

10. In paragraph 9, the Division Bench further observed that :

"Such an alienation will, at best, be only voidable at the instance of the sharer who institutes the suit for enforcement of his right under Subsection (1) and subject to the said limited contingency the sale will be operative and binding."

11. In paragraph 10, the Division Bench further held that :

"The remedy as we have already indicated, is only to file a suit for enforcement of the limited right of purchase conferred by Sub-section (1) of Section 22 and in such a suit the question of invalidity of the sale already effected by the co-sharer will be incidentally investigated and decided."

12. In order to canvass the argument that Ext.A3 is a voidable document, the learned counsel for the 5th defendant relied upon the decision of the Hon'ble Supreme Court in Bishan Singh and others v. Khazan Singh and another, AIR 1958 SC 838. In the above decision, after analyzing various decisions, the Hon'ble Supreme Court reiterated that :

" It therefore follows that where a suit is brought it is on payment of the purchase-money on the specified date that the plaintiff obtains possession of the property, and until that time the original purchaser retains possession and is entitled to the rents and profits."

13. In paragraph 23, the Hon'ble Supreme Court further observed that :

"This judgment is, therefore, a, clear authority for the position that the pre-emptor is not substituted in the place of the original vendee till conditions laid down in the decree are fulfilled."

14. In the light of the decision of the Hon'ble Supreme Court in Bishan Singh (supra) and the Division Bench of this Court in Valliyil Sreedevai Amma (supra) it can be safely concluded that the document executed by defendants 1 to 4 in favour of the 5th defendant ignoring the right of pre-emption of the plaintiff under Section 22(1) of the Hindu Succession Act (Ext.B1) is a voidable document. Therefore, the learned counsel for the 5th defendant would argue that in the absence of a prayer for declaration that Ext.A3 is to be set aside as null and void, the 1st Appellate Court was not justified in reversing the finding of the trial Court.

15. The learned counsel for the 5th defendant relied upon the decision of the Constitutional Bench of the Hon'ble Supreme Court in Atam Prakash v. State of Haryana and Others, AIR 1986 SC 859 also, in support of his argument. In the above decision, the Constitution Bench held that the provisions of the Punjab Pre-emption Act to the extent it granted pre-emption right to kinsfolk on the basis of consanguinity is ultra vires the constitution. The learned counsel prayed for applying the above principle in the instant case also, wherein pre-emption right is given to heirs specified in clause I of the schedule.

16. The Punjab Pre-emption Act (1 of 1913) confers pre-emption right to various groups of persons including co-sharers, tenants and kinsfolk. As per the judgment in Atam Prakash (supra), the Constitution Bench set aside the pre-emption right granted to kinsfolk on the basis of consanguinity alone, and upheld similar right granted to co-sharers and tenants. While upholding the pre-emption right granted in favour of co-sharers and tenants, in paragraph 10, the

Constitution Bench held thus :

"In the first case, Bhau Ram v. B.Baijnath Singh, AIR 1962 SC 1476, the right of pre-emption given to co-sharers was held to be a reasonable restriction on the right to hold, acquire or dispose of property conferred by Art.19(1)(f) of the Constitution. What has been said there to uphold the right of pre-emption granted to a co-sharer as a reasonable restriction on the right to property applies with the same force to justify the classification of co-sharers as a class by themselves for the purpose of vesting in them the right of pre-emption."

17. Pre-emption right to kinsfolk on the basis of consanguinity was justified by the Court on the ground that -

"The classifications has been made on reasonable basis in the interests of the public :-(i) to preserve integrity of village community;(ii) to avoid fragmentation of holdings;(iii) to implement the agnatic theory of succession;(iv) to promote public and private decency;(v) to facilitate tenants to acquire ownership rights;(vi) to reduce litigation consequent to introduction of an outsider on family property or jointly owned property."

18. The Constitution Bench noticed certain glaring facts which appear to detract from the theory of preservation of the integrity of the family and the theory of agnatic right of succession. In paragraph 12 of *Atam Prakash* (supra), the Constitution Bench observed that :

"A scrutiny of the list of persons in whose favour the right of pre-emption is vested under S.15 reveals certain glaring facts which appear to detract from the theory of preservation of the integrity of the family and the theory of agnatic right of succession. First we notice that neither the father nor the mother figures in the list though the father's brother does. The son's daughter and the daughter's daughter do not appear though the son's son and daughter's son do. The sister and the sister's son are excluded, though the brother and the brother's son are included. Thus relatives of the same degree are excluded either because they are women or because they are related through women. It is not as if women and those related through women are altogether excluded because the daughter and daughter's son are included. If the daughter is to be treated on a par with the son and the daughter's son is treated on a par with the son's son it does not appear logical why the father's son (brother) should be included and not the father's daughter (sister). These are but a few of the intrinsic contradictions that appear in the list of relatives mentioned in S.15 as entitled to the right of pre-emption. It is ununderstandable why a son's daughter, a daughter's daughter, a sister or a sister's son should have no right of pre-emption whereas a father's brother's son has that right. As S.15 stands, if the sole owner of a property sells it to his own father, mother, sister, sister's son, daughter's daughter or son's daughter, the sale can be defeated by the vendor's father's brother's son claiming a right of pre-emption."

19. It was in the light of the above glaring facts, the Hon'ble Supreme Court set

aside the right of pre-emption granted to kinsfolk on the basis of consanguinity while upholding the pre-emption right granted to sharers and tenants.

20. Sub-section (1) of Section 22 of the Hindu Succession Act, 1956 states that :

"(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."

21. On a perusal of the above provision it can be seen that sub-section (1) of Section 22 grants right to all the heirs specified in class-I of the Schedule to Hindu Succession Act, without any discrimination. In *Atam Prakash* (supra), the Constitution Bench upheld the right of pre-emption to co-sharers as it found that classification of co-sharers as a class by themselves for the purpose of vesting in them the right of pre-emption is a reasonable one. The very same reasoning was given by the Constitution Bench for upholding the pre-emption right to the tenants, as it was intended to protect the interest of the tenants.

22. In the case of pre-emption right granted to kinsfolk, there was no such reasonable classification. Some relatives of the same degree were excluded either because they are women or because they are related through women. The Court found intrinsic contradictions that appear in the list of relatives mentioned in Section 15 as entitled to the right of pre-emption. It was in the above context that the right of pre-emption granted to kinsfolk on the basis of consanguinity was held ultra vires the constitution.

23. Since all the heirs specified in list I of the Schedule are granted preferential right under sub-section (1) of Section 22 of Hindu Succession Act, without any discrimination, it is to be held that such a classification is also a reasonable one. I do not find any similarity to the above classification to that of the kinsfolk covered under the Punjab Pre-emption Act. Therefore, the prayer for applying the dictum laid down by the Constitution Bench in *Atam Prakash* (supra) relating to pre-emption right of kinsfolk, to the heirs specified in sub-section (1) of Section 22 of the Hindu Succession Act is unreasonable and liable to be rejected.

24. On the other hand, the reasons and justifications given by the Hon'ble Supreme court in *Atam Prakash* (supra) to uphold the right of pre-emption granted to a co-sharer as a reasonable restriction on the right to property applies with the same force to justify the classification of the heirs specified in list I of the Schedule to Hindu Succession Act, 1956 also.

25. The learned counsel for the 5th defendant invited my attention to a subsequent decision of a two-Judges Bench of the Hon'ble Supreme Court in *Babu Ram v. Santokh Singh* (deceased) through his Lrs and others (Civil Appeal No.2553 of 2019), in which the Supreme Court held that the preferential right

given to an heir of a Hindu under Section 22 of the Hindu Succession is applicable even if the property in question is an agricultural land. The above decision pronounced long after the decision of the Constitutional Bench in *Atam Prakash* (supra) also substantiates my above conclusion.

26. The learned counsel for the plaintiff relied upon the decisions in *Reghunath (D)* by *Lrs v. Radha Mohan (D)* through *Lrs and Others*, AIR 2020 SC 5026, *Govindan Nair C.M and Others v. M.Ramachandran Nair and Others*, 2013 (2) KHC 229 and *Ram Tari and Others v. Rattan Chand and Others*, 2019 KHC 2282, in support of his argument that even without a prayer for declaration, the right of pre-emption can be enforced. In *Ram Tari* (supra), the Himachal Pradesh High court held that the sale deed executed by the co-heir ignoring Section 22 (1) of the Hindu Succession Act and any other consequential action are illegal, null and void and hence quashed.

27. In *Govindan Nair C.M and Others* (supra), the suit was for declaration of right of pre-emption. In that case also, the sale deed was executed by the 2nd defendant in favour of the 1st defendant ignoring the preferential right of the plaintiff. In the suit there was no specific prayer for setting aside the above sale deed (Ext.B1). The defendants have taken a contention that absence of the prayer to set aside Ext.B1 is fatal. However, the learned Single Judge rejected the above contention of the defendants and held that :

"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."

28. In the decision in *Bishan Singh* (supra), a four-Judges bench of the Hon'ble Supreme Court has defined the material incidents of the right of pre-emption, after referring to certain earlier decisions, in the following words :

"Before attempting to give a satisfactory answer to the question raised, it would be convenient at the outset to notice and define the material incidents of the right of pre-emption. A concise but lucid statement of the law is given by *Plowden J.* in *Dhani Nath v. Budhu* 136 Pun Re 1894 (A), at page 511, thus :

"A preferential right to acquire land, belonging to another person upon the occasion of a transfer by the latter, does not appear to me to be either a right to or a right in that land. It is, *jus ad rem alienum acquirendum* and not a *jus in re aliena*..... A right to the offer of a thing about to be sold is not identical with a

right to the thing itself, and that is the primary right of the pre-emptor. The secondary right is to follow the thing sold, when sold without the proper offer to the pre-emptor, and to acquire it, if he thinks fit, in spite of the sale, made in disregard of his preferential right."

The aforesaid passage indicates that a pre-emptor has two rights: (1) inherent or primary right, i.e., a right to the offer of a thing about to be sold and (2) secondary or remedial right to follow the thing sold."

29. In paragraph 11, the Hon'ble Supreme Court summarized the right of pre-emption as follows :-

"To summarize: (1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase, i. e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold.

(5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place."

30. The above decision of the Hon'ble Supreme Court in Bishan Singh (supra) was referred to by the three-Judges Bench in Reghunath (supra) relied upon by the appellant. On a perusal of the above dictum laid down by the Apex Court in Bishan Singh (supra) and Reghunath (supra), it can be seen that a pre-emptor has an inherent or primary right, which is a right to the offer of a thing about to be sold and a secondary or remedial right to follow the thing sold. It is a right of substitution in which the pre-emptor steps into the shoes of the original vendee which is, in effect, as if in a sale deed the vendee's name were rubbed out and pre-emptor's name inserted in its place.

31. As held by the Division Bench of this Court in Valliyil Sreedevai Amma (supra) the remedy of the pre-emptor is only to file a suit for enforcement of the limited right of purchase conferred by sub-section (1) of Section 22. In such a suit, the question of invalidity of the sale already effected by the co-sharers will be incidentally investigated and decided. As held in Govindan Nair (supra), the absence of a specific prayer for setting aside Ext.B1 sale deed or for a declaration that Ext.B1 is null and void, is also not necessary in a suit for pre-emption filed under sub-section (1) of Section 22.

32. In the instant case, the reliefs sought for in the plaint are the following :-

"(a) directing the defendants 1 to 4 to convey the 4/5 shares in the plaint schedule property avoiding and ignoring the transfers made by the defendants 1

to 4 in enforcement of the plaintiff's preferential right to acquire it in favour of the plaintiff.

(b) directing the plaintiff to deposit consideration of Rs.40,000/- (rupees forty thousand only) by the court as consideration within a time to be specified.

(c) On failure of the defendants 1 to 4 executing and registering the conveyance in the specified time, the Hon'ble court to execute and register the conveyance in favour of the plaintiff."

33. In paragraph 5 of the plaint there is specific pleading to the effect that Ext.B1 sale deed is invalid, inoperative and void so far as the plaintiff is concerned. In paragraph 5 she had further pleaded that she had repudiated and avoided Ext.A3 when she came to know about it. Relief (a) prays for directing the defendants 1 to 4 to convey the 4/5 share in the plaint schedule property after avoiding and ignoring the transfers made by the defendants 1 to 4 in enforcement of the plaintiff's preferential right to acquire it. From the above pleadings and reliefs in the plaint it can be seen that the plaintiff has specific case that Ext.B1 sale deed executed by defendants 1 to 4 in favour of the 5th defendant is null and void as against the plaintiff's preferential right under Section 22(1) of the Hindu Succession Act. She also prayed for avoiding and ignoring Ext.A3, though there is no separate prayer for declaration or setting aside the same.

34. Section 32 of the Kerala Court fees and Suit Valuation Act provides separate court fee for pre-emption suits. As per the above provision :-

"In a suit to enforce a right of pre-emption, fee shall be computed on the amount of the consideration for the sale which the pre-emptor seeks to avoid or on the market value, whichever is less"

35. The above provision makes it clear that a suit for pre-emption is an independent suit and there is only a single and common provision for payment of court fee, for such a suit. It is also an indication that no separate/ additional court fee is required even in case, the property is assigned in favour of any stranger, ignoring the right of pre-emption.

36. Therefore, in the light of the above discussions it can be seen that once the plaintiff files a suit for enforcement of right of pre-emption under sub-section (1) of Section 22 of the Hindu Succession Act, invalidity of the sale already effected by the co-sharers will be considered, investigated and decided incidentally and as such a separate prayer for declaration that the said document is null and void or for setting aside the said document is not mandatory. For the very same reasons, it is to be further held that absence of such a separate prayer for declaration that Ext.A1 is null and void or for setting aside the said document is not a ground for non-suiting the plaintiff. Therefore, the impugned judgment of the first appellate court reversing the judgment of the trial court and upholding the right of pre-emption of the plaintiff is liable to be sustained.

37. In this case the plaintiff and defendants 1 to 4 have not entered into any agreement with regard to the consideration to be paid by the plaintiff towards the 4/5 share of defendants 1 to 4 over the schedule property. In the above circumstance, it is the duty of the court to determine the amount of consideration to be paid to defendants 1 to 4, after conducting necessary enquiry as contemplated under sub-section (2) of Section 22 of the Hindu Succession Act.

38. In Ext.A1 sale deed executed by defendants 1 to 4 in favour of the 5th defendant, the consideration shown is Rs.40,000/-. The 1st Appellate Court accepted the consideration shown in Ext.A1 and directed the plaintiff to deposit Rs.40,000/- before the Court within a period of one month with intimation to the defendants, which the plaintiff complied. At the time of arguments, the learned counsel for the plaintiff would argue that the consideration fixed by the 1st Appellate Court at a sum of Rs.40,000/- was not arrived at after conducting any enquiry as contemplated under sub-section (2) of Section 22 of the Hindu Succession Act.

39. It appears that no specific issue was framed either by the trial Court or by the 1st Appellate Court regarding the consideration to be paid to defendants 1 to 4 under sub-section (2) of Section 22. In the written statement, the defendants have taken a contention that the plaintiff also agreed to sell the entire plaintiff schedule property in favour of the 5th defendant for a total consideration of Rs.40,000/-. However, subsequently she agreed to assign her share at a later point of time. From the available evidence it appears that the 1st Appellate Court fixed the consideration at a sum of Rs.40,000/- solely based on the consideration shown in Ext.A1. At the same time, there was no specific issue for adjudication of the consideration payable by the plaintiff under sub-section (2) of Section 22.

40. The learned counsel for the plaintiff would argue that, at this belated stage, it is not just and proper to remand the matter for enquiry under sub-section (2) of S.22 to the trial Court and that this Court can fix a reasonable consideration as decided by the learned Single Judge in the decision in Govindan Nair (supra). In the above decision, the consideration shown in Ext.B1, the assignment deed was Rs.12,000/-. In addition to the same, the plaintiff was directed to deposit a further sum of Rs.15,000/- before the trial court towards the consideration of the property involved therein. In the instant case, the defendants 1 to 4 have not raised any serious dispute regarding the consideration of Rs.40,000/- mentioned in Ext.A1. In spite of that, considering the entire facts including the dictum laid down in Govindan Nair (supra), I hold that a direction to the plaintiff to deposit a further sum of Rs.25,000/- will be sufficient to meet the ends of justice. Subject to the above condition, this second appeal is liable to be dismissed. The substantial questions of law are answered accordingly. No other substantial questions of law were raised at the time of hearing.

41. In the result, this second appeal is dismissed, subject to the condition that the plaintiff shall deposit a further sum of Rs.25,000/-(twenty five thousand rupees only), before the trial Court, as part of the consideration payable to

defendants 1 to 4, within a period of two months from today. Considering the facts, I order no costs.

All pending interlocutory applications stand closed.