

(2002) 02 MAD CK 0193
In the Madras High Court
Case No : S.A. No. 203 of 1992

Kulasekaran Chettiar (decd.), Gomathi Ammal, K.
Muppudathi, K. Gurusami, K. Sankaran, Guruvammal, K.
Paramu and K. Parvathi

APPELLANT

Vs

Meenakshi Ammal and Muppudathi Ammal

RESPONDENT

Date of Decision : 26-02-2002

Acts Referred:

Evidence Act, 1872 — Section 115
Limitation Act, 1963 — Article 97
Succession Act, 1925 — Section 22

Citation : (2002) 2 LW 294 : (2002) 2 MLJ 95

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : T.M. Hariharan, for the Appellant; P. Peppin Fernando, for the Respondent

Final Decision : Dismissed

Judgement

K. Govindarajan, J.—The unsuccessful 3rd defendant before the courts below has filed this Second Appeal.

2. The plaintiff filed the suit in O.S.No.106/87 to enforce her right of specific performance by directing the defendants to execute the sale deed in respect of 2/3 share in the suit properties in favour of the plaintiff.

3. The suit properties originally belonged to one Madasami Chettiar who died in 1963 and he purchased the same under the sale deed dated 3.7.1944, marked as Ex.A1. He died leaving his wife Sankarammal (1st defendant), and daughters, Meenakshi ammal (plaintiff) and Muppudathi ammal(2nd defendant). The 1st defendant/mother conveyed the entire suit properties to the 3rd defendant who is none other than the brother of her husband Madasami Chettiar under the sale deed Ex.B1 (marked as Ex.A2 also), dated 6.10.86. According to the plaintiff, she claimed 1/3 share in the suit properties by issuing notice to defendants 1 and 2

under Ex.A4, dated 29.9.86. Thereafter she filed O.S.No.112/86 for partition of her 1/3 share and a preliminary decree for partition and separate possession of the plaintiff's 1/3 share in the suit properties was passed on 18.11.1987 on the basis of the endorsement made by the 3rd defendant to the effect that he has no objection to decree the suit in respect of the 1/3 share of the plaintiff. The 2nd defendant had also executed a release deed under Ex.B2 dated 4.2.87 (also marked as Ex.A3) in favour of 3rd defendant and on 24.8.87, plaintiff filed the present suit claiming right of pre-emption recognised under Sec. 22 of the Hindu Succession Act 1926, hereinafter called "The Act".

4. The 3rd defendant filed written statement stating that since plaintiff had filed a suit for partition of her 1/3 share alone, the suit claiming right of pre-emption was hit under the provisions of Or.II, Rule 2 C.P.C., and the claim is time barred.

5. The trial court which dealt with both the suit filed by the plaintiff in O.S.No.106/87 and the Application in I.A.No.136/88 filed by the 3rd defendant to pass final decree as per the preliminary decree passed in O.S.No.112/86, accepting the case of the plaintiff decreed the suit holding that plaintiff is entitled to get the sale deed in respect of her 2/3 share and rejected the application filed by the 3rd defendant in I.A.No.136/88. Aggrieved, 3rd defendant filed appeal in A.S.No.31/90 against the decree in O.S.No.106/87. The learned District Judge also concurred with the findings of the trial court and dismissed the Appeal. Hence this Second Appeal.

6. The substantial questions of law that were framed in this Second Appeal are:-

1)Whether the 1st respondent is not by her conduct, estopped from enforcing her alleged pre-emptive right?

(2)Whether the 1st respondent can get over the decree in O.S.No.112 of 1986, sub Court, Tenkasi, made during the pendency of the present suit, in her presence?

(3)Whether the present suit is not barred by res judicata?

(4)Whether the present suit is not barred under the provisions of Order II, Rule 2, C.P.C.?

(5)Whether, in any event, the Courts below were right in adopting the plaintiff's valuation for fixing the market value of the suit properties, especially in the light of the valuation of the present properties in O.S.No.112 of 1986, Sub Court, Tenkasi?

7.It is not in dispute that plaintiff has got statutory right of pre-emption under Sec. 22 of the Act. The only defence to deny such a right of the plaintiff, defendants have come forward with the plea that plaintiff did not come forward with such a claim immediately and she filed the suit for partition in O.S.112/86 without claiming such a right and thereby she waived her right and so she is estopped from claiming the said right in the present suit, though plaintiff knew

about the sale in favour of 3rd defendant under Ex.B1.

8.To appreciate the said issue, it is beneficial to extract Sec. 22 of the Act which 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.

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".

9.The abovesaid provision was inserted in the statute book only to keep out the strangers from the family property and to maintain integrity of the property and so such a preferential right being a statutory incident of property inherited by Class I heirs, it could be concluded that it runs with the land and binds the stranger purchaser.

10.The legal conclusion that could be reached on the said provision as held in the decided cases is that the non-transferee co-sharers would get a right of preference to acquire such interest proposed to be transferred in preference to other third parties, though such a right may be given up by the said co-sharers, and the intending transferor is having a legal obligation not to transfer the interest in violation of the preferential right of the other class-I heirs and that he has to inform to all intending transferees that class-I co-sharers have preferential right and, until that is exhausted either by its exercise or by its non-exercise, in spite of such information, they are not free to take the transfer. Even where it is shown that the transferee has purchased the property without notice having been given to the remaining class-I co-sharers, the transfer could still be impugned after it was completed. Such an interpretation is necessary not only to keep up the true legislative intention, but also to safeguard the interest of the

transferees. Thereby the preferential right would be kept up, and the transferor would not have an undue impediment or his right to transfer, after being satisfied that the Class I co-sharers have, in spite of notice, failed to exercise their preferential right of acquisition, purchased the property and obtained the same free from liability under Sec. 22 of the Act.

11.The non-transferee co-sharer who wants to exercise the said right of preference can always approach the civil court,even if the properties had already been alienated in favour of the third party transferor, as the said provision does not provide any special procedure for seeking remedy if the same is violated. In such a suit the question of invalidity of the sale effected by the co-sharer has to be incidentally investigated and decided.

12.While approaching the civil court claiming right of preference after the transfer, the plaintiff is bound to show not only that her right is as good as that of the vendee, as the right of pre-emption being only a right of substitution, but that it is superior as that of the vendee and so if the vendee took nothing under the sale, the pre-emptor can claim nothing either. she has also to establish that the said superior right subsisted at the time the pre-emptor exercises his right.

13.While considering the nature of right of pre-emption, Courts have held that the rights to pre-empt is not exercisable, till a pre-emptible transfer has been effected,and the right of pre-emption is not one which is looked upon with the great favour by the Courts presumably for the reason that it is in derogation of the right of the owner to alienate his property and it is neither illegal nor fraudulent, for parties to a transfer, to avoid and defeat a claim for pre-emption by all legitimate means.

14.The Apex Court in the decision in Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others, : while considering the nature of the said right 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 the way to help the pre-emptor.

15. Though the vendor has to give notice on persons having right of pre-emption to validate the transfer, and though a co-sharer can sell his interest to a person of his own choice, if only non-transferee co-sharer did not avail of the preferential right, the failure to serve notice as required under the said provision does not render the sale made by the vendor in favour of the third party vendee void, (if the right which is renunciated on the individual alone, and not of the public) as the Act does not provide that in case no notice is given, the transaction shall be void.

16.Since the non-transferee co-sharer who is having right of pre-emption, can waive such a right by conduct,the vendor and third party vendee can defend the claim against their interest on the basis that the non-transferee co-sharer had waived his right by conduct and so he is estopped from exercising that right and thereby the said right of pre-emption could not be exercised.

17. On the basis of the above discussion regarding the scope of Sec. 22 of the Act, now we have to decide the issue raised in this Second Appeal on the basis of the facts available.

18. As stated already, plaintiff was conferred with the said right of pre-emption to purchase the shares of defendants 1 and 2. It is also not in dispute that before the properties were transferred in favour of 3rd defendant by the 1st defendant under Ex.B1 dated 6.10.86, no notice was given to the plaintiff. On the other hand, the plaintiff made paper publication asserting her 1/3 share in the suit properties under Ex.A7 and issued notice to defendants 1 and 2 claiming 1/3 share under Ex.A4 dated 29.9.86 in view of the fact that the 1st defendant sold the entire properties to the 3rd defendant. To defeat the right of pre-emption of the plaintiff, the defendants have come forward with the plea that though the plaintiff had knowledge about the sale under Ex.B1, she, not only did not exercise her right immediately, but also estopped from claiming such a right in the present suit as she filed the suit in O.S.No.112/86 on 28.10.86 impleading the purchaser, the 3rd defendant, only for partition of her 1/3 share in the suit properties without claiming pre-emptive right on the 2/3 share in the property sold in favour of the 3rd defendant even though she alleged that the sale in favour of the 3rd defendant does not bind on her. She had filed the present suit claiming pre-emptive right on 24.8.87.

19. It is the case of the defendants 1 and 2, as found in the pleadings and documents, that there was an oral partition in 1967 and the suit properties were allotted to the 1st defendant and she had been enjoying the properties by paying kist and so she sold the entire properties to the 3rd defendant. Since the 2nd defendant claimed right in the properties at the instance of certain panchayatdars, a release deed was obtained under Ex.A3 after receipt of a sum of Rs.1,000/- from the 3rd defendant. The 2nd defendant, under Ex.A3 has stated that the said properties were allotted to her mother under an oral partition effected in 1966. The defendants 1 and 2 did not admit the claim of the plaintiff regarding her share in the suit properties.

20. On the basis of these facts, learned counsel for the appellants submitted that the 1st respondent/plaintiff had lost her right of pre-emption and so she cannot sustain the suit. Learned counsel relying on the findings given by the lower appellate court that the plaintiff came to know of the sale of the properties only through the written statement filed in O.S.No.112/86 on 4.3.87, has rightly submitted that the said finding cannot be sustained as the 1st respondent/plaintiff had averred in the plaint itself regarding the sale in favour of the 3rd defendant and as a matter of fact, the plaintiff impleaded the 3rd defendant, the vendee as a party to the said partition suit.

21. Learned counsel appearing for the respondent submitted that the said suit was filed only to enforce the right of the 1st respondent/plaintiff of her 1/3 share in the suit properties and that does not mean that the plaintiff had waived her right of pre-emption conferred under Sec. 22 of the Act. He has also pointed out

that under Ex.B1, the 1st defendant immediately after receipt of notice under Ex.A4 issued by the plaintiff, conveyed the entire suit properties to the 3rd defendant, though she had only 1/3 right, and after filing the suit for partition in O.S.No.112/86, the 2nd defendant executed a release deed under Ex.B2 in favour of the 3rd defendant with respect to her share. According to the learned counsel, the said proceedings cannot be construed as a waiver of her right of pre-emption. He had also submitted that though the right of pre-emption is a weak right and can be defeated by legitimate means that does not mean that the said right is not there to be enforced. The plaintiff had approached the court within the period of limitation of one year from the date of sale as contemplated under Art.97 of the Indian Limitation Act and on that basis the learned counsel has submitted that since the plaintiff approached the civil court within the stipulated period, the appellants cannot raise the defence as if the plaintiff has come to court belatedly and so the suit is barred by limitation.

22.When it is admitted that the plaintiff is having pre-emptive right to purchase the shares of the defendants 1 and 2, the burden is on the defendants to establish that the plaintiff had lost such a right to file the present suit.

23.The only incident relied on by the defendants in support of their submission and to discharge their burden is, the suit filed by the plaintiff in O.S.NO.112/86. The defendants want to take advantage of the fact that when the plaintiff has filed the suit only for partition of her share without claiming pre-emptive right with respect to other shares, though the plaintiff had knowledge about the sale and had an opportunity to exercise the said right.

24.Now, we have to decide whether failure to claim pre-emptive right in O.S.No.112/86 would amount to waiver of her right under Sec. 22 of the Act as contended by the appellants' counsel.

25."Waiver" is contractual one and an agreement to release a right. Such an agreement may be expressed or implied. Such a release or relinquishment should be knowing the right of the party who relinquishes such right. The Apex Court had an occasion to deal with the scope of "Waiver", in the decision in Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh, , holding as follows:-

"A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights."

26.Even in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, , the Apex Court has held as follows:-

"Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be "an intentional act with knowledge" per Lord Cheimsford, L.C. In Earl of Darnley v. London, Chatham and

Dover Rly. Co. (1867) 2 HL 43 . There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. It is pointed out in Halsbury's Laws of England (4rth ed) Vol.16 in para 1472 at p.994 that for a "waiver to be effectual it is essential that the person granting it should be fully informed as to his rights" and Isaacs, J, delivering the judgment of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd. (1920) 28 CLR 305 has also emphasised that waiver "must be with knowledge, an essential supported by many authorities."

27."Waiver" is an agreement to release a right but not to assert the right. It is distinguishable from estoppel. While considering the scope of Sec. 115 of the Indian Evidence Act, in the decision in The Metal Press Works Ltd. Vs. Guntur Merchants Cotton Press Co. Ltd., , it has been held as follows:-

"32... There is no estoppel by waiver. Waiver is distinct and different from estoppel, waiver is contractual whereas estoppel is governed by Section 115 of the Evidence Act. Estoppel is not a cause of action whereas waiver may constitute a cause of action. Waiver is an agreement to release or not to assert a right whereas estoppel is a rule of evidence which comes into operation if a statement as to the existence of a fact has been made by a party or his authorised agent to another party or some one on his behalf, with the object or intention, that the other party should act upon the faith of the statement. Where an agent with authority to make an agreement on behalf of his principal agrees to waive his principal's right, the principal will be bound. The distinction between estoppel and waiver had been succinctly drawn by the Judicial Committee in AIR 1935 79 (Privy Council) . As ruled by Lord Russell of Killowen, speaking for the Privy Council.

"The question of estoppel is governed by Sec.115, Evidence Act....Estoppel is not a cause of action. It may...assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of same fact essential to establish the cause of action or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff of some one on his behalf; (b) with the intention that the plaintiff should act upon the faith of the statement and (c)the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with an authority to make such an agreement on behalf of his principal agrees to waive his principal's rights then (subject to any other question such as consideration)the principal will be bound, but he will be bound by contract, not by esoppel. There is no such thing as estoppel by waiver."

28.In the decision reported in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of

Uttar Pradesh and Others, , the Hon"ble Judges had dealt with the presumption of the knowledge of a person regarding his rights conferred under law and held as follows:-

"In fact in the petition as originally filed, the right to claim total exemption from sales tax was not based on the plea of promissory estoppel which was introduced only by way of amendment. Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that every one is presumed to know the law, but that is not a correct statement; there is no such maxim known to the law. Over a hundred and thirty years ago, Maule J. Pointed out in *Martindale v. Falkner*, (1846) 2 CB 706, "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so". Scrutton, L.J., also once said: "It is impossible to know all the statutory law, and, not very possible to know all the common law." But it was Lord Atkin, who, as in so many other spheres, put the point in its proper context when he said in *Evans v. Bartlam*, 1937 AC 473"... the fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application." it is, therefore, not possible to presume, in the absence of any material placed before the Court, that the appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dtd. 25th June, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government".

29. In the present case, it is not the case of the defendants before the trial court that the plaintiff had impliedly waived the right, that too, after knowing her right under Sec.22 of the Act. As mentioned already, the burden is on the defendants to establish that the plaintiff had waived her right of pre-emption. Unfortunately, defendants did not raise any such plea in the written statement. In the written statement it is only stated that the plaintiff is estopped from claiming right conferred under Sec.22 of the Act, as the plaintiff had filed the earlier suit only for partition and so she is barred under Order II, Rule 2 of C.P.C., and her claim was barred by *res judicata*. Even in the Memorandum of Grounds filed in this Second appeal, no such plea regarding waiver has been raised. The defendants have to not only plead and establish such implied relinquishment, but also the said relinquishment was made knowing the plaintiff's right conferred under Sec.22 of the Act at the time of making such relinquishment, though the plaintiff knew about the sale by the 1st defendant. Merely because the plaintiff filed O.S.No.112/86 only for partition, it cannot be said that she had relinquished her right conferred under Sec.22 of the Act. As held by the Apex Court, it cannot be presumed that plaintiff knew her right conferred under Sec.22 of the Act. The defendants have not discharged their burden to establish that the plaintiff had waived her right, that too, knowing the same, and so, the courts below are correct in accepting the case of the plaintiff and decree the same.

30. For the foregoing reasons, I do not find any reason to interfere with the

judgments and decrees of the courts below, and they are confirmed. Consequently, this Second Appeal is dismissed. No costs.