

(1962) 03 KL CK 0010
In the High Court Of Kerala
Case No : C.M.A. No. 18 of 1960

Noor Mohammed Kadir Pillai

APPELLANT

Vs

Sathyabhama Amma

RESPONDENT

Date of Decision : 30-03-1962

Acts Referred:

Specific Relief Act, 1963 — Section 27

Citation : (1963) KLJ 167

Hon'ble Judges : T.K. Joseph, J

Bench : Single Bench

Advocate : G. Viswanatha Iyer, for the Appellant; G. Balagangadharan Nair and K. Sukumaran, for the Respondent

Final Decision : Allowed

Judgement

Joseph, J.—This Civil Miscellaneous Appeal is from an order of remand. The second defendant is the appellant. The plaintiff sued for cancellation of a sale deed executed by the first defendant in favor of the second defendant. The trial court dismissed the suit but on appeal the decision was set aside, and the suit was remanded. The property in dispute belonged to the plaintiff's tarwad. There was a partition in 1124 evidenced by Ext. P. 1 which provided that if any party wanted to sell the property obtained by him in partition the other members would have a right of pre-emption. According to the plaintiff, she was ready to purchase the property but the first defendant sold it to the second defendant, a stranger under Ext. D1 on 23-4-1956. The sale deed having been executed in violation of the provision in the deed of partition, the plaintiff sued for cancellation of Ext. D1. The defense was that the suit in this form was not maintainable and that the clause restricting alienation was void. The trial court held that the clause in the deed of partition was void; and dismissed the suit. The lower appellate court held that the restraint on alienation was only partial and not absolute and that the suit as framed was maintainable. The suit was accordingly remanded for fresh decision as the other questions arising in the suit

had not been decided by the trial court.

2. In view of the decision of the Privy Council in AIR 1932 158 (Privy Council) the finding of the lower appellate court that the restraint on alienation in the deed of partition being a partial restriction is not invalid is correct. However, I am unable to accept the view that the suit in which there is no prayer for specific performance is maintainable. The right that the plaintiff and the other members of the tarwad got under Ext. P. 1 was not an interest in the property allotted to other members but only one for specific performance available u/s 27 of the Specific Relief Act. This is the view held in Ramasami Pattar v. Chinnan Asari (I. L. R. 24 Madras 449) which was followed by the High Court of Travancore in Subbaraya Mudaliar v. Kochuparvathi Amma (27 T. L. J. 935). The High Court of Calcutta has also taken the same view in Ali Hossain v. Rajkumar Haidar (A. I. R. 1943 Cal. 417 FB). The Supreme Court had occasion to consider the nature of the right, and it was held in Bishan Singh and Others Vs. Khazan Singh and Another, as follows:

.....(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-emption 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.

There is no prayer for specific performance. In fact it is clear from the plaint that the plaintiff was not prepared to purchase the property for the price at which it was sold to the second defendant. It is stated in paragraph 8 of the plaint that the price stated in Ext. D1. was not actually paid.

3. Counsel for the plaintiff-respondent made a submission that the plaintiff may be permitted to amend the plaint in case a prayer for specific performance was considered necessary. I am not inclined to allow this belated prayer in view of what is stated above. It follows that the order of remand cannot be supported. Accordingly I set aside the order and direct that A. S. No. 771 of 1958 be heard and disposed of on the merits by the lower appellate court. The civil miscellaneous appeal is allowed with costs.