

CASE NO.:
Appeal (civil) 2893 of 2008

PETITIONER:
Ashutosh Chaturvedi

RESPONDENT:
Prano Devi @ Parani Devi & Ors

DATE OF JUDGMENT: 22/04/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T
REPORTABLE

CIVIL APPEAL NO. 2893 OF 2008
(Arising out of SLP (C) No.6350 of 2006)

S.B. Sinha, J.

1. Leave granted.
2. Appellant is before us aggrieved by and dissatisfied with the judgment and order dated 21.11.2005 passed in CR No.1532 of 2003 by the High Court of Patna whereby and whereunder an order dated 29.8.2003 passed by Subordinate Judge VIII, Ara in Title Suit No.58 of 1990 rejecting an application for amendment of plaint filed by the appellant herein was dismissed
3. Appellant herein is the son of the original plaintiff who filed a suit for declaration of his title and confirmation of possession as also for setting aside a deed of sale executed by the respondent herein. The said suit was filed on or about 21.5.1990. A deed of sale was executed in favour of defendant Nos.1 and 2 on or about 8.3.1990. An application for passing an interim order was filed in the said suit whereupon an order of status quo was passed on 1.6.1990. During the pendency of the said suit, two deeds of sale were executed in favour of third parties on 8.6.1990 and 18.6.1990.
4. The interim order passed by the learned Trial Judge was affirmed by an order dated 9.11.1990. Three Miscellaneous Appeals were filed thereagainst by the respondents. The matters were said to be pending before the District Judge for a long time. However, on or about 11.6.2003, the appellant herein moved an application for amendment to add a new relief in one of the plaints claiming preferential right in respect of the said property on the premise that the plaintiff was a co-sharer of the lands in suit to the following effect :
"1. That after 1 "Ka" of the plaint one new relief 1 "Kha" may be added.
1'Kha'\026That if for any reason if there is any difficulty in granting relief 1 'Ka' then in that situation decree under Section 22 Hindu Succession Act (preferential right to acquire on same terms and conditions) be granted and the purchaser-defendant be directed that they should execute sale deed of the disputed land in favour of the plaintiff as mentioned in schedule 2, 3, 4 of the plaint and get it registered and if for any reason the new purchaser-defendant are not executing the sale deed nor are getting it registered then in that situation through Court the sale deed may be executed and registered."

Respondents herein, in response thereto raised the following contentions :

- a) The application is not maintainable, the same being mala fide moved with the purpose to linger the trial of the case,
- b) The application is frivolous and bogus and the same is barred under law of limitation. Under Article 97 of the Limitation Act, 1963 for enforcement of right of pre-emption the prescribed period of limitation is one year from the date of sale, whereas this suit was filed in the year 1990 and the amendment is sought on this ground in 2003 after about 13 years of the filling of the suit,
- c) The proposed amendment seeks to change the entire nature and scope of the suit and also the cause of action,
- d) The amendment application is barred under Order II of CPC,
- e) The same is barred under law of waiver and acquiescence,
- f) That under the gift deed dated 6.9.49 which has attained finality each donees has got separate and defined title over their separate shares of gift property,
- g) In the past also the plaintiff has moved several amendment applications and now they are in perpetual habit of moving applications seeking amendment in the plaint,
- h) That trial of case has started long back and the application fails to disclosed any reason why the proposed amendment was not carried out in the past."

5. By reason of a judgment and order dated 29.8.2003, the learned Trial Judge dismissed the said application for amendment of the plaint opining that the same, if allowed, would change the nature of the suit. The High Court, by reason of the impugned judgment has affirmed the said view of the learned Trial Judge.

6. Mr. Akhilesh Kumar Pandey, learned counsel appearing on behalf of the appellant, would submit that the learned Trial Judge as also the High Court wrongly proceeded on the basis of Section 22 of the Hindu Succession Act, 1956 was not attracted in the instant case as the deeds of sale have already been executed. It was submitted that the word 'proposed' occurring in the said section must be given a wider meaning so as to bring within its purview a right of a co-sharer to file a civil suit in the event a deed of sale has been executed. Strong reliance in this behalf has been placed on Valliyil Sreedevi Amma v. Subhadra Devi and Ors. [AIR 1976 Kerala 19].

7. Mr. Shishir Pinaki, learned counsel appearing on behalf of the respondent, on the other hand, would submit that this Court, in a case of this nature, need not go into the said question as admittedly the appellant having waited for a period of 13 years to claim his purported preferential right in terms of Section 22 of the Hindu Succession Act, the same was not maintainable being barred by limitation.

Section 22 of the Hindu Succession Act reads, thus :

"Section 22. Preferential right to acquire property in certain cases (1) 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 to 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. \027In 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."

8. A right claiming preference over a property in terms of a statute ordinarily is a weak right.

Limitation Act 1963, by Article 97, provides for one year's limitation for claiming such a right. The suit was filed in the year 1990. The sale deeds, during the pendency of the suit, were executed on 8.6.1990 and 18.6.1990. The application for amendment was filed 13 years after the filing of the suit. A suit claiming preferential right was required to be filed ordinarily within the prescribed period of limitation.

9. Contention of Mr. Pandey that two deeds of sale were executed in violation of the order of injunction and in that view of the matter, the deeds of sale must be held to be invalid in law, in our opinion, cannot be a ground for allowing the amendment of the plaint. If the deeds of sale are held to be bad in law, that would not mean that by reason thereof, the co-sharer of the plaintiff would propose to execute a sale deed giving a cause of action for filing a fresh suit. Plaintiff was required to exercise his right under Section 22 of the Hindu Succession Act within the period prescribed therefor. The said deeds of sale either would be declared valid or invalid. In either way, the appellant cannot take any benefit of the provisions of Section 22 of the Hindu Succession Act.

10. It is also idle to contend that as the matters had been pending in the court of the District Judge for a long period, the appellant could not file an application for amendment of plaint. Even if the records had been called for by the learned District Judge, the same would not have come in the way of the appellant for filing an application for amendment of the plaint. A Trial Court, despite requisitioning of the records by the Appellate Court maintains a supplementary record. There is nothing on record to show that the learned District Judge granted an order of stay.

11. In T.N. Alloy Foundry Co. Ltd. v. T.N. Electricity Board and Ors. [(2004) 3 SCC 392], this Court, upon taking into consideration its earlier decisions in L.J. Leach and Company Ltd. v. Jardine Skinner and Co. [1957 SCR 438], held that as a rule, the Court will decline to allow amendment for a fresh suit on the amended claim if it had become barred by limitation on the date of application. {See also State Bank of Hyderabad v. Town Municipal Council [2006 (13) SCALE 332]}

12. In Bhola Nath Rastogi and Ors. v. Santosh Prakash Arya and Ors. [AIR 1975 Patna 336], L.M. Sharma, J (as the learned Chief Justice of India then was), opined :

"The general rule of survivorship applying to Hindu Mitakshara families still holds good subject

of course to cases which are covered by the provisions of Section 6 of the Act. The provision of proviso to Section 6 will be applicable only to such cases where the deceased left behind him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relatives. It is not suggested by the appellants in the present case that Dhanu Lal died leaving behind any heir other than his two sons. I am, therefore, of the opinion that the proviso to Section 6 does not apply to the present case so as to defeat the rule of survivorship being applied to the parties. When Dhanu Lal died, his two sons took the entire interest by survivorship and as is admittedly the case now there has been separation between the two sons before the sale deed by defendants 25 to 28 was executed. Defendant No.1 or his sons, therefore, cannot be permitted to invoke the benefit of Section 22 of the Act.

9. There appears to be another difficulty in the way of the appellants in raising this question. Sub-section (2) of Section 22 of the Hindu Succession Act indicates that a party can enforce a right of pre-emption by making an application to that effect in a Court which has been explained in the Explanation to this Section. If a party intending to take the benefit of the right given under Section 22(1), files an application, the Court has to determine the amount of consideration for the intended transfer and the party is again given an option to get such a transfer from the co-sharer on such consideration or to refuse the same. If the party declines to purchase the property for the same amount, he has to bear the cost of the proceeding. No such application has ever been filed by any of the parties anywhere. This plea was not even raised in the Court below. It was for the first time in this appeal that the appellants have raised this point. Even in this Court no application has been filed for enforcement of such a right. In these circumstances, the plea has to be rejected."

13. In Muralidhar Das v. Bansidhar Das and Ors. [AIR 1986 Orissa 119], upon taking into consideration the decisions of the Calcutta and Kerala High Court, stated the law in the following terms :

"Sub-section (2) provides for determination of consideration when there is a difference between the parties, namely, the one intending to acquire and the other proposing to transfer. The provision does not go any further. S. 22 does not lay down any other procedure. The scope of the application is limited and hence the jurisdiction of the Court. The section does not lay down the procedure for the enforcement of the right conferred under sub-section (1). Only one aspect of the controversies that might arise pursuant to the right conferred by sub-section (1) has been taken care of and no other. The provision being clear and categorical and there being no ambiguity in it, it is not open to the Court to so interpret the provision which would amount to legislating on its part. Ordinarily the Courts do not make law but interpret it."

14. The decision of the Kerala High Court also provides for a right upon a co-sharer to file a suit for enforcing such a right, stating :
"The object of sub-section (1) as we understand it

is that in cases where by virtue of intestate succession under the Act any interest in immovable property has devolved upon two or more heirs specified in Class I of the Schedule and any one of such heirs proposes to transfer his interest in the property the other heirs should have a preferential right to acquire the interest which is so proposed to be transferred. The said intention of Parliament can be effectuated only if we consider the section as conferring an enforceable right on the heirs other than the one who proposes to transfer his interest. The section confers on such co-heirs a preferential right to acquire the interest which is proposed to be transferred by the other co-heir. 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-s.(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-heirs in enforcement of the right conferred by Section 22(1)."

15. The only remedy which was, thus, available to the appellant might be to file a suit. But as the same itself being barred by limitation, we are of the opinion that the Court would not exercise its discretionary jurisdiction to allow the amendment of the plaint.

16. There is, thus, no infirmity in the impugned judgment. Appeal is dismissed. No costs.