IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

RSA No.120/2001

Reserved on.6.12.2007

Decided on: 11.1.2008

Baldev Parkash and another. **…Appellants.**

Versus

Dhian Singh and others. **…Respondents**

Coram

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting ?[1]*.* *Yes.*

For the appellants : Mr. Bimal Gupta, Advocate.

For the respondents: Mr. Bhupender Gupta, Senior Advocate with Mr. Praneet Gupta, Advocate.

Rajiv Sharma, J.

A challenge has been laid by way of this second appeal to the judgment and decree passed by the learned District Judge, Sirmaur at Nahan dated 28.12.2001 rendered in appeal No.14-CA/13 of 2000.

The brief facts necessary for the adjudication of this second appeal are that the appellants (hereinafter referred to as the plaintiffs for convenience sake) had filed suit for declaration in the Court of Sub Judge, Rajgarh camp at Sarahan on 29.10.1998. The case of the plaintiffs in brief is that they as well as Krishan Lal, defendant No.4 are sons of late Sh. Paras Ram and grand sons of late Sh. Gobind Ram. They have further pleaded that they constitute the joint Hindu Mitakshra family and out of Hindu coparcenary Mitakshra family nucleus, late Shri Paras Ram purchased land comprised in Khata Khatauni No. 29/49 plot 118

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? Yes.

measuring 155-08 bighas situated at Mauza Nohra, Hadbas No. 353, Pargana Giri War, Tehsil Pachhad, District Sirmaur, H.P. and after the demise of late Shri Paras Ram, plaintiffs and defendant No.4 Krishan Lal remained in joint possession of the land as co-owners. It is further averred in the plaint that the property was not partitioned and it remained in joint possession of plaintiffs and defendant No.4 but defendant No.4 without informing the plaintiffs sold the land in favour of defendants No.1 to 3 on 8.9.1998 for a consideration of Rs. 1.50 lakhs. They have further claimed that since their father died intestate and they being heirs of category-I, they have the preferential right under section 22 (1) of the Hindu Succession Act, 1956 and preference to purchase 1/5th share which has been sold by defendant No.4 to defendants No.1 to 3. The defendants contested the suit and filed a detailed written statement. It was also averred in the written statement that the property in question has been purchased by defendants No.1 to 3 for agricultural purposes and they have also sown crop on the land purchased by them from defendant No.4. The averment that the land has been put to agriculture use has not been denied in the replication by the plaintiffs. Defendants No.1 to 3 have specifically pleaded that the defendant No.4 was in possession of the entire land and the defendant No.4 has rightly sold the land to them. The trial court on the basis of the pleadings of the parties had framed the following issues:

1. **Whether the plaintiffs and defendant No.4 constituted a joint Hindu Mitakshra family? OPP**
2. **Whether the defendant No.4 has sold the share out of joint Hindu Mitakshra property without serving a notice. If so, its effect? OPP**
3. **Whether the plaintiffs are in possession of the suit Land? OPP**
4. **Whether the plaintiffs are entitled for declaration and for possession as prayed for? OPP**

5. **Whether the suit is not maintainable in the present form? OPD**
6. **Whether the plaintiffs have not approached the court with clean hands. If so, its effect? OPD**
7. **Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.**
8. **Whether the plaintiffs have locus standi to file the present suit? OPD**
9. **Relief.**

The findings recorded by the learned Sub Judge on the aforesaid issues are as under:

Issue No.1. No.
Issue No.2 No.
Issue No.3 No.
Issue No.4. No.
Issue No.5 No.
Issue No.6 No.
Issue No.7 No.
Issue No.8 No.
Relief The suit is dismissed per operative part of the judgment.

The learned Sub Judge vide judgment dated 20th November, 1999 dismissed the suit. The learned Sub Judge has returned a specific finding that the plaintiffs could not exercise their preferential right in respect of the land which was agricultural land. The learned Sub Judge has also returned the finding that the plaintiffs have failed to prove on record that they constitute a joint Hindu Mitakshra family with defendant No.4. Feeling aggrieved by the judgment and decree passed by the learned Sub Judge dated 20.11.1999, the plaintiffs had filed the appeal before the learned District Judge, Sirmaur at Nahan. The learned District has framed the following points for determination:

1 **Whether the suit land has been joint Hindu family and ancestral property in the hands of Krishan Lal as alleged? If so, its effect?**
2 **Whether the suit in the present form is maintainable? If not its effect?**
3. **Final order.**

The learned District Judge had recorded the following finings on the aforesaid points:

1 **No.**
2 **No.**
3 **Appeal dismissed with costs per operative part of the judgment.**

The learned District Judge dismissed the appeal filed by the appellants on 28th December, 2000. The learned District Judge has upheld the finding recorded by the learned Sub Judge that the property in question was neither joint nor coparcenary property. He has further upheld the sale deed dated 9.8.1998 whereby defendant No.4 has sold the land to defendant No.1 to 3.

This second appeal has been filed assailing the judgment and decree dated 28th December, 2000. The second appeal was admitted by the Court on substantial questions No. 1 and 3 which read thus:

1. **Whether plaintiffs, defendant No.4 and their father late Sh. Paras Ram constituted undivided coparcenary during life time of Sh. Paras Ram and whether the property coming to the plaintiffs and defendant No.4 on the death of their father would be coparcenary property in presence of section 6 and section 8 of the Hindu Succession Act, 1956?**
3. **Whether the plaintiffs by applying section 22 of the Hindu Succession Act, 1956, are entitled to pre-emption of the property sold by defendant No.4 in favour of defendants No.1 to 3 vide sale deed dated 8.9.1998 on payment of Rs. 1,50,000/- to defendants No.1 to 3?**

It will be pertinent to note at this stage that defendant No.4 was proceeded exparte vide order dated 4.6.2001.

Mr. Bimal Gupta, Advocate appearing on behalf of the appellants had strenuously argued that the plaintiffs have filed an application under order 41 rule 27 of the Code of Civil Procedure before the appellate court but the same was not decided by the learned District Judge, Sirmaur. He had further contended that the findings by the courts below with regard to nature of the property are contrary to record and had reiterated that the plaintiffs were entitled to get the preferential right to purchase the property from defendant No.4 in view of section 22 of the Hindu Succession Act, 1956.

Mr. Bhupender Gupta, Senior Advocate had strenuously argued that this Court has admitted the second appeal only on substantial questions No.1 and 3 and Mr. Bimal Gupta is precluded from making the submission that the application under Order 41 Rule 27 of the Code of Civil Procedure was to be decided by the learned District Judge before the pronouncement of the judgment. He had also argued that since the land in question is agriculture land, suit under section 22 of the Hindu Succession Act was not maintainable, more particularly, in view of the specific stand taken in the written statement filed by defendants No.1 to 3.

I have heard the learned counsel for the parties and perused the record.

The Court will consider the first submission made by Mr. Bhupender Gupta with regard to the maintainability of the suit under section 22 of the Hindu Succession Act, 1956 since according to him the land in question is agricultural land. I have carefully gone through the plaint as well as written statement filed by defendants No.1 to 3. A specific averment has been made by defendants No.1 to 3 in paras 4, 7

and that the land in question has been purchased by them for agriculture purposes and they have sown crop on the same. This averment made in the written statement has not been denied at all in the replication filed by the plaintiffs.

Mr. Bhupender Gupta has strongly relied upon ***Jaswant and others versus Basanti Devi***, 1970 PLJ 587 to buttress his submission that section 22 of the Hindu Succession Act, 1956 will not be applicable to the agricultural land. Their Lordships of the Punjab and Haryana High Court have held as under:-

> **"Mr. Roop Chand, the learned counsel for the respondent, stressed that the words 'immovable property' used in section 22 will include agricultural lands. Undoubtedly, they do. But one cannot lose sight of the fact that when the Central Legislature used these words it did so knowing fully well that it had no power to legislate regarding agricultural lands excepting for the purpose of devolution. Section 22 does not provide for devolution of agricultural lands. It merely gives a sort of right of pre-emption. In fact, as already pointed out, entry No.6 in List III, clearly takes out agricultural lands from the ambit of the concurrent list. Agricultural land is specifically dealt with in entry No.18 of List II. The only exception being in the case of devolution. Therefore, it must be held that section 22 does not embrace agricultural lands."**

The Hon'ble High Court of Rajasthan has relied upon the principles laid down by the Hon'ble Punjab and Haryana High Court in ***Jeewanram versus Lichmadev and another*** AIR 1981 Rajasthan 16 that Section 22 of the Hindu Succession Act, 1956 will not be applicable to the agricultural land. The Hon'ble Single Jude has held as under:-

> **"The contention raised by the learned counsel for the appellant is that the learned Additional District Judge has committed a serious error of law when he held that Section 22**

of the Act does not apply to the agricultural lands whereby denying a preferential right which he has under Section 22 of the Act. Undoubtedly this raises an important question regarding its interpretation and scope. In other words, the question that I am called upon to determine in this appeal is whether the words "immoveable property of an intestate" include agricultural land of an intestate or not. To examine this question, it will be useful to read Section 22 (1) of the Act and Entries Nos. 5 and 6 contained in List III (Concurrent List) and Entry No.18 mentioned in List II (State List) of the Seventh Schedule of the Constitution. Section 22 (1) of the Act is as under:-

"22. Preferential right to acquire property in certain cases : (1) Where, after the commencement of this Act, an interest in any immoveable 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) t0 (3) ……..

Explanation:- In this Section, 'court' means the court within the limits of whose jurisdiction the immoveable 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."*

The aforesaid Entries read is under:-

"List III:

Entry No.5: Marriage and divorce; infants and minors; adoption; will, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

Entry No.6: Transfer of property other than agricultural land; registration of deeds and documents.

List II.

Entry No.18: Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collelction of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

Section 22 (1) of the Act occurs in Chapter II dealing with intestate succession which provides for a preferential right to acquire the interest proposed to be transferred. The word 'immoveable property' has not been defined in Section 3 of the Act. The Act was enacted by the Parliament for amending the law relating to intestate succession among Hindus. According to Entry No.5, List III the Parliament and subject to clause (1) of Article 246 of the Constitution, the legislature of the State have power to make laws in respect of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution, subject to their personal law. So also Parliament and subject to clause (1) of Article 246 of the Constitution, the legislature of the State have power to make laws in regard to transfer of property other than agricultural land; registration of deeds and documents. Subject to clauses (1) and (2) of Article 246 of the Constitution, the Legislature of the State has been empowered to make laws in respect of land, that is to say, right or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural lands; colonization.

Mr. Rajendra Mehta, learned counsel for the respondent contended that Entry No.6, List III makes it abundantly clear that the Parliament does not possess jurisdiction to legislate over agricultural lands beyond the power it has under Entry No.5, List III, that is regarding "devolution". He, therefore, submitted that Section 22 of the Act will not over the case of

agricultural lands. On the basis of Sukhdeo Singh's case (1980 WLN 212) (Raj), Mr. M.L. Shreemali, learned counsel for the appellant urged that a Khatedar tenant is not an owner of a holding and, therefore, there cannot be any transfer of his or her interest in the property and when there is no question of transfer of his or her interest in the property, Entry No.5, List III is not attracted.

In Nagammal's case (1970) 1 Mad L.J. 358), it was observed by a learned single Judge of the Madras High Court as follows:

"When interpreting the Section, one can properly assume that Parliament had in mind the practice of pre-emption present in the country and the several pre-emption laws. A Legislature may be deemed to be conversant with the laws, current within its territory. But that will not permit the adoption of the incidents of pre-emption recognised or provided for in other pre-emption laws and in the Muslim law of pre-emption.

Parliament must have had in mind the two-fold aspect of the right n the pre-emption laws current in the country: (1) the primary or substantive right to have an offer made and (2) the secondary or remedial right of the co-heirs if the property is sold without being first offered to them to take it from the purchaser. Thus Parliament has emphasized upon the primary right of pre-emption and left the remedial right to the common law for the Courts to mould it according to the circumstances".

It was held In re Hindu Women's Right to Property Act, AIR 1941 FC 72 while considering Section 3 of the Hindu Women's Rights to Property Act, 1937 as follows:

"No doubt if the Act does affect agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to the word

"property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of Dominion decisions, as well as decisions of the Judicial Committee, were cited in the course of the argument does not seek to divide the Act into two parts' viz.' the part which the Legislature was competent, and the part which it was competent, to enact. It holds that, on the true construction of the 'act and especially of the word "property" as used in it, no part of the Act was beyond the Legislature's powers. There is a general presumption that a Legislature does not intend to exceed its jurisdiction.

The question arose in Jothi Timber Mart v. Calicut Municipality, AIR 1970 SC 264 whether Section 126 of the Calicut City Municipal Act (Kerala Act No. XXX of 1961) is ultra vires. Entry No.52, List II, Schedule VII. It was observed by their Lordships of the Supreme Court as under:

"When the power of the Legislature with limited authority is exercised in respect of a subject-matter, but words of wide and general import are used, it may reasonably be presumed that the Legislature was using the words in regard to that activity in respect of which it is competent to legislate and to no other; and that the Legislature did not intend to transgress the limits imposed by the Constitution".

> **In Joshi Timber Mart's case, their Lordships relied on In re Hindu Women's Rights to Property Act and held that the expression 'brought into the city' as used in Section 126 was, therefore, rightly interpreted by the High Court as meaning brought into the Municipal limits for purposes of consumption, use or sale and not for any other purpose. The principles enunciated in the above mentioned decisions of the Federal Court and the Supreme Court, in my humble opinion, afford useful guide for interpreting the words "immoveable" used in Section 22 of the Act. Entry No.6, List III takes out agricultural land from the ambit of immoveable property."**

In view of the specific stand taken by defendants No.1 to 3 in their written statement coupled with the law laid down by the Rajasthan High Court and Punjab and Haryana High Court, I am of the considered opinion that suit under section 22 of the Hindu Succession Act, 1956 was not maintainable seeking preferential right to purchase the agriculture land.

Now, the Court has to consider the submission made by Mr. Bimal Gupta that the application under order 41 rule 27 of the Code of Civil Procedure was required to be decided by the District Judge before the judgment was pronounced. The application under order 41 rule 27 of the Code of Civil Procedure was filed by the plaintiffs on 19.7.2000 before the District Judge. The District Judge granted time to the defendants to file reply to the CMP on 8.9.2000. Thereafter the matter came before the District Judge on 18.9.2000 and on that day it was ordered that since the reply has been filed to application under order 41 rule 27 of the Code of Civil Procedure, the matter was adjourned to 24.10.2000 for hearing arguments on the application as well as on merits. Thereafter the matter was listed before the District Judge on 24.10.2000 and 28.10.2000 and thereafter the matter was listed for final hearing on 28.12.2000 and the appeal was dismissed vide separate judgment. It appears from the record

that the application under order 41 rule 27 of the Code of Civil Procedure was not decided by the District Judge preferred by the plaintiffs.

I have gone through the contents of the application dated 19.7.2000 preferred by the plaintiffs under order 41 rule 27 of the Code of Civil Procedure for leading additional evidence. What has been prayed in the application was for placing on record the copies of the judgment dated 26.7.1989 titled Kamla Kumari Versus Krishan Lal, judgment dated 11.12.1989 titled Baldev Prakash versus Kamla Kumari, judgment dated 30.9.1993 titled Baldev Parkash versus Kamla Kumari decided in second appeal by this Court in Regular Second Appeal No. 132 of 1990. Mr. Bimal Gupta submitted that these judgments were necessary to be placed on record to substantiate the plea that the property in question was coparcenary and joint Hindu property and could not be alienated by defendant No.4 in favour of defendants No.1 to 3 in view of section 22 of the Hindu Succession Act, 1956. I have gone through the three judgments which are available on the record. The issues raised and decided in these judgments are entirely different and they do not touch the aspect whether the property in question is in any manner coparcenary or joint Hindu property. Since the issues decided in these three judgments are entirely different thus even if the application under section 41 rule 27 of the Code of Civil Procedure has not been decided by the learned District Judge, it will have no bearing on the merits of the case. Consequently the submission made by Mr. Bimal Gupta is rejected.

Though the appeal was not admitted on this substantial question but the same has been dealt with in the interest of justice.

Now, the Court has to consider the substantial questions No.1 and 3 as framed by this Court at the time of admission of the second appeal.

Since both the questions are inter-linked, the same are taken up together for determination.

The plaintiffs have only produced PW-1 Ram Swaroop and have also placed on record documents Ex.PW-1/A to Ex.PW-1/D. The defendants have produced 2 witnesses i.e. DW-1 and DW-2. The trial court after considering the oral as well as documentary evidence has returned the specific finding that the property in question was not a coparcenary property. While giving this finding, the trial court has taken into consideration the statement of PW-1 as well as the status of the sisters of the plaintiffs i.e. Narati and Kamla. There is sufficient evidence on record to suggest that Paras Ram had not inherited the suit land from his father Gobind Ram, but he became owner after getting the same on consideration from Mohan Lal and Om Prakash. Plaintiffs have not disclosed when Shri Paras Ram died. Since defendant No.4 is owner of the property in his individual capacity, section 22 of the Hindu Succession Act, 1956 will not be applicable.

The widow of Shri Paras Ram, Smt. Narati Devi has not been made a party nor has she been examined as a witness. She could definitely have suggested that plaintiffs and defendant No.4 alongwith Narati Devi constituted joint family. There is evidence on record to suggest that the plaintiffs and defendant No.4 are carrying on their business separately. There is no explanation about the manner in which 1/5th share was transferred by Smt. Narati Devi in favour of Shri Baldev Parkash. In view of the over-whelming evidence on record, it cannot be presumed that the plaintiffs and defendant No.4 constitute a joint Hindu Mitakshra Family. The findings recorded by both the Courts below are based on correct appreciation of oral and documentary evidence and need not be interfered by this Court in the second appeal.

In view of the above discussion there is no merit in the second appeal and the same is dismissed with no order as to costs.

CMP NO.208 of 2002:

In view of reply filed by the non-applicant, there is no merit in the application and the same is dismissed. All the CMPs also stand disposed of in view of the judgment. The interim orders passed from time to time also stand vacated.

(Rajiv Sharma), Judge

January 11, 2008
Awasthi