IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE KAUSIK CHANDA

C.A.N 11623 OF 2017
IN
F.A.T 661 OF 2017

Sri Pabitra Kumar Maity

Vs.
Smt. Shyamali Manna & Ors

Mr. Suman Kumar Dutt.
Mr. Suvasish Sengupta.
Mr. Sarosij Dasgupta.
Mr. Subhra Das.
For the Appellant

Mr. Probal Mukherjee
For the respondent No.1

Mr. Sounak Bhattacharya.
For the Respondent No. 2

Judgment On: **08.04.2021**

Harish Tandon, J.:

An interesting, important and significant point is raised in the instant appeal as to whether the gift of a immovable property to a stranger to the exclusion of the other heirs of Class-I can be regarded as a transfer under Section 22 of the Hindu Succession Act, 1956.

Though the instant appeal is at the nebulous stage but aimed at the aforementioned legal point to which we digress from the ordinary rule of procedure applicable to get the first appeal ready for hearing and invited the respective counsels to argue on the said point so that the instant appeal can be decided on merit.

In order to determine the aforesaid legal point, the undisputed and controverted facts are adumbrated hereinafter. The plaintiff/appellant filed suit for declaration, permanent injunction and preferential right to acquire the property in the 2nd Court of the Civil Judge (Senior Division), Tamluk, Purba Medinipur being Title Suit no. 89 of 2015. Originally, the larger property comprised in Schedule 'Kha' belong to Subhendu Kumar Maity , Joykrishna Maity and Ajay Krishna Maity. On the death of the respective owners, the heirs and legal representatives inherited the said "Kha" Schedule Property and subsequently executed a partition deed being no. 7515 on 19.7.2002. By virtue of the said partition deed the "Kha" Schedule Property fall into the share of the Subhendu Kumar Maity and the plaintiff and defendant no. 2-6 being heirs and legal representative of the said predecessor inherited the property described in Schedule "Ka" to the plaint.

Thereafter, the Defendant no. 2 transferred his 8 decimals of land situated in suit dag nos 186, 189 and 192, to

Defendant no 1 and her husband which constrained the plaintiff to file a pre-emption application before the Civil Judge, (Junior Division), 2nd Court, Tamluk being Judicial Miscellaneous Case no. 10 of 2014 which was allowed on contest and the plaintiff acquired the said property upon deposit of the value thereof determined by the court. Subsequently, a deed of gift bearing no 2118 was executed and registered on 16.4.2015 by the Defendant no. 2 in favour of the Defendant no. 1 bequeathing some other properties, described in Schedule 'Ka/1' to the plaint with an intent to avoid the right of pre-emption. Thus the composite suit is filed not only for declaration of the right, title, interest and respect of the "Kha" Schedule property by virtue of an inheritance as also the pre-emption right recognised in the earlier proceeding but further asserted the preferential right under Section 22 of the said Act in respect of the properties included in "Ka/1" Schedule. The other defendants did not contest the suit except the Defendant no. 1 and 2. It is a collective stand of the Defendant no. 1 and 2 that by virtue of a deed of gift the property described in Schedule Ka/1 to the plaint was gifted by the Defendant no. 2 in favour of the Defendant no. 1 whose mother was a 'Dharmabhogini'(sister) of the Defendant no. 2 without any consideration and out of sheer love and affection.

The Trial Court held the nature of the transfer contemplated under Section 22 of the said Act is not

applicable to the transaction of gift which is without consideration and negatived the claim of the plaintiff in this regard. To put the record straight, the Trial Court declared the right of the plaintiff in respect of “Kha” Schedule property and also passed a permanent injunction against the disturbance of possession of the plaintiff therein but refused to pass an order or a decree on preferential right.

All the respective counsels vociferously argued on a solitary point whether the concept of gift comes within the ambit of Section 22 of the said Act. Mr. Suman Dutt, the learned Advocate appearing for the appellant submits that the decision of the Trial Court in holding that the gift does not attract the provision of Section 22(1) of the said Act is misconceived. According to Mr. Dutt, Section 122 of the Transfer of Property Act, defining the gift clearly stipulates that it is a mode of transfer having two essential characteristics namely that it is made voluntarily and without consideration. Mr. Dutt, arduously submits that the Transfer of Property Act defining Section 5 of Transfer of Property Act means an Act by which a living person conveys property in present or future to one or more living person or to himself or to one or more other living person and , therefore, the gift cannot be excluded from the purview of the transfer contemplated under Section 22(1) of the Hindu Succession Act. By relying upon the judgment of the Madras High Court

in case of ***Bharat Machindra Parekar and others Vs Anjanabai and Others reported in 2007(6), Maharashtra Law Journal 706,*** Mr. Dutt submits that the expression "one of such heir proposes to transfer his or her interest" has to be construed conjointly with the object underlying the incorporation of the said section. According to Mr. Dutt, the gift being an incident of transfer would also fall within the conceivable incident of transfer even it is made without consideration. Mr. Dutt vehemently submits that the object of Section 22 of the said Act is to keep away the stranger not associated with the heirs of Class-I in order to maintain the integrity of the property and placed relying upon the judgment of the Orissa High Court in case of ***Ganesh Chandra Pradhan Vs. Rukmani Mohanty and others reported in AIR 1961 Orissa, 65***. Mr. Dutt would further contend that the expression "proposes to transfer" should not be given a restrictive meaning as "intended transfer" but includes the transfer already taken effect to, to attract the provision contained under Section 22 of the said Act and placed reliance upon the Division Bench of this court in case of ***Arati Das Vs. Bharati Sarkar reported in AIR 2009, Calcutta 8.*** According to Mr. Dutta if the section is silent on the incident of transfer, borrowing other incident of transfer which is prohibited in a different statute, cannot be mischievously incorporated when the legislature have conspicuously omitted the same and therefore, each provision has to be construed in

the perspective of the legislative intent and the interpretation must be assigned to make it workable and not to frustrate it. Mr. Dutt ardently submits that the object of Section 22 is to keep the properties belonging to the family within the family and not to the outsider as held in a recent judgment of the Supreme Court in case of **Baburam Vs. Santokh Singh(deceased)through alias and others reported in 2019 SCC Online SC 376.** To sum up, Mr. Dutt submits that the gift being an incident of transfer, may be without consideration, comes within the ambit of Section 22(1) of the Act and, therefore, the finding of the Trial Court that it does not come under the aforesaid Section is palpably wrong, infirm and illegal cannot be sustained.

Mr. Probal Mukherjee, the learned Senior Advocate appearing for the Defendant no. 1/Respondent no. 1 submits that the harmonious interpretation of the language employed in sub-Section (1), (2) and (3) of Section 22 of the Hindu Succession Act, 1956 leads to a clear stipulation that the quantification of consideration is the essential element to attract others provisions and any other incident of transfer like gift which admittedly lacks consideration is outside the purview of the said mischief provision. Mr. Mukherjee further submits that the expression 'proposes to transfer his or her interest in the property' has to be understood to proper mean and include an intended transfer and not otherwise. According

to him, the aforesaid expression conveys a clear legislative intention that before the transfer actually takes place the intention to transfer should be manifested which includes an agreement for transfer which is conspicuously absent in the parlance of a gift. Mr. Mukherjee further submits that the intention can be borrowed from the other provision relating to the right of pre-emption and by referring the provision contained in Section 8 of the West Bengal Land Reforms Act, He further submits that the gift has been excluded from the purview of transfer and therefore, the legislative intent can be gathered from harmonising the other provision as well in juxtaposition with the Section 22 of the Act. Mr. Mukherjee arduously submits that the gift is nothing but a gratuitous transfer out of love, affection, affinity and on the emotional quotient without quantifying the consideration, therefore, does not come within the purview of Section 22 of the Act. Mr.Mukherjee heavily relies upon a judgment of the Karnataka High Court in case of ***Amma Jamma vs. Mahadevamma reported in ILR 1996 Karnataka 3499*** and contends that the identical question fell for consideration and it has been held that Section 22(1) of the Act does not recognise the incident of transfer by way of a gift. Mr. Mukherjee further relies upon a judgment of the Supreme Court in case of ***Kumari Sonia Bhatia Vs. State of UP and Ors*** reported *in* **1981 *SCC 585*** in support of his contention that the gift has been aptly described as gratitude and an act of generosity and

if there is any consideration involved therein it would cease to be a gift. He thus submits that the word "consideration" appearing in sub-Section (2) of Section 22 of the Act cannot be ignored and to be given its true and proper meaning and the gift being an incident of transfer without consideration cannot be brought within the ambit of Section 22 of the Act. Mr. Mukherjee lastly submits that there is no infirmity in impugned judgment and decree and the instant appeal should be dismissed.

Mr. Sounak Bhattacharya, learned Advocate appearing for the Defendant no 2/Respondent no. 2 adopted the submission of Mr. Mukherjee and submits that the incident of gift does not come within the word 'transfer' under Section 22(1) of the said Act. Additionally, it is submitted that sub-Section (2) of Section 22 of the Act contemplates an agreement between the parties which necessarily implies that there must be an agreement of sale otherwise the consideration involved in the said agreement will lose its importance. He submits that the said provision is applicable only in case of "intended transfer" and not to "concluded transfer"; therefore, the suit at the instance of the plaintiff/Appellant is not maintainable since the property has already been transferred upon execution and registration of the deed of gift and right has already been created in favour of the Defendant no. 1.

Before we proceed to deal with the point involved from the respective submissions of the parties and narrated hereinbefore, it would be axiomatic to quote the relevant provisions which runs thus: Section 2 of Hindu Succession Act

"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 more heirs specified in class-IL of the Schedule proposing to acquire any interest under this

section, that heir who offers the highest consideration for the transfer shall be preferred.

Section 122 of Transfer of Property Act

"Gift" defined- "Gift" is the transfer to certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made- Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void."

Upon the meaningful reading of the provision contained in Section 22 of the Act, the preferential right is confined to the heirs specified in Class-I of the Schedule and not to other class of heirs. Such right is restricted to an immovable property and the Parliament in his wisdom has not made any differentiation into the categories of the properties. Apart from the same such preferential right is also extended to any business carried on by the owner who upon his death devolves upon the heirs specified in Class-I of the Schedule. It is an additional right to the other well recognised right of pre-emption envisaged under Section 4 of the Partition Act and Section 8 of the West Bengal Land Reforms Act, 1956. It is more expansive provision in comparison to the other right of

pre-emption recognised in the sections or the Act. Section 4 of the Partition Act is restricted to a dwelling house belonging to an undivided family but Section 22 stretches its horizon to any property or business carried on by the Hindu dying intestate either solely or in conjunction with others. The only restriction or reservation one can see from the Section 22 is that it is available to the heirs specified in Class-I of the schedule. The plain and meaningful reading of the language employed in Section 22 of the Act leaves no ambiguity that if a person dies intestate and his interest in the immovable property devolves upon his heirs specified in Class-I of the schedule and if anyone of the heirs proposes to transfer his or her interest in the property, the other heirs within the said class have a preferential right to acquire such interests under the aforesaid provision which immediately gets activated the moment one of the heir specified in Class-I of the Schedule proposes to transfer his share in the immovable property or a business carried on by the predecessor other than the person specified in the Class I of the schedule. This leads to another question; what meaning can be assigned to the expression "proposes to transfer his or her interest in the immovable property". There are divergent views on the above. Karnataka High Court in ***Amma Jamma(Supra)*** has laid much stress to the aforesaid expression and held that the concluded transfer or in other words transfer already effected would not come within the peripheral of the aforesaid provision. It is held that

the plain and simple meaning must be attributed to such expression appearing in the section and no additional or an extra words can be attached or incorporated which would otherwise frustrate the legislative intent. It would be profitable to quote the relevant observations made in the aforesaid judgment which read thus:

"The expression 'proposes to transfer' and the expression 'proposes to be transferred' have got their material importance and significance in the context of preferential right to acquire the property by a co-heir, as Sub-section(1) of Section 22 indicates that it is prospective in its operation, confers a preferential right to a co-owner and provides that if any immovable property or interest in immovable property of an intestate or any interest in the business carried on by an intestate either solely or in conjunction with others, devolves upon two or more heirs as specified in Class-I of the Schedule of the intestate and then, any one of such heirs proposes to transfer his or her interest in the property or business, then, in those cases, the, other heirs will have a preferential right to acquire the interest proposed to be transferred. The use of expression 'proposes to transfer' or 'interest proposed to be transferred' indicate that the intention of the legislature is that the preferential right to acquire such interest would arise or would accrue to

other heirs in case of transfers, where, the transfer is in the nature of a contract in the form of proposal and acceptance and at the stage when there is a proposal to transfer. The use of these expressions indicate that there should be concept of proposal to transfer from one of the vendors. Proposal as per provisions of the Contract Act means, when one person signifies to another his willingness to do or to abstain from doing anything with the view of obtaining the assent of that another to such actor abstinence, he may be said to make the proposal and when a person to whom the proposal is made, signifies and assents thereto, the proposal is said to be accepted and on acceptance, the proposal becomes a promise, the promise means an accepted proposal and in case of promise or proposal, at the desire of the promissor, a promisee or any other person has done or abstains or abstained from doing or promises to do something, such act or abstinence or promise is called consideration for the promise and every promise or set of promises which form consideration from each other is called to be an agreement and an agreement enforceable by law is termed to be a contract and all agreements which are made by free consent of the parties competent to contract for a lawful consideration with a lawful object and which are not declared under the provisions of the Contract Act to be void, it means, all agreements in

which there are two parties, who enter into the contract with free consent provided those competent to contract and they have to contract for lawful consideration and object; they are said to enter into a contract. A contract is an agreement between the promissor and the promisee. A contract without consideration is said to be void and is not enforceable under Section 25 of the Contract Act, except, the cases mentioned under Clause 1, 2 and 3 of the Contract Act."

However, the Bombay High Court in case of ***Bharat Machindra Parikar(Supra)*** held that sub-Section (1) of Section 22 of the Act though contemplated a preferential right but akin to a right of pre-emption and include the concluded transfer by way of sale and gift in this words:

"It is manifest that Sub-section (1) confers upon one co-heir a preferential right to purchase the property of the other co-heirs. The right is akin to the right of pre-emption. The expression "one of such heirs proposed to transfer his or her interest' also include the final transfer of such interest by way of sale, gift or any other mode. The right of pre-emption is not obliterated after the transfer of the interest is completed through an instrument like sale deed or gift deed. There is no provision in either of the sub-clauses to take away right

of the other heirs, who are not party to such transfer of interest, to acquire the interest of the heir/heirs who proposed to transfer their interest or actually transferred the same."

In case of ***Ganesh Chandra Pradhan(Supra),*** the Orissa High Court has an occasion to deal with the similar situation and the true meaning of the expression 'proposes to transfer' appearing in Section 22(1) of the Act fell for consideration. It is held that the said expression should not be unreasonable squeezed to a restrictive meaning to include the stage of proposal to transfer but should be given a wider meaning to include the transfer having taken place. It is further held that the co-sharer transferring without consent of the other heirs within the Class-I of the Schedule should not be permitted to get away with the recovery of the said possession nor can defeat the right accrued to the other heirs and, therefore, the preferential right can be asserted by such other heirs even in case of a concluded transfer in the following words:

"But in the words "proposes to transfer" appearing in sub-section(1) of the section, to my mind, there indeed appears to be a requirement that the transferor-heirs and it is only when they do not exercise their preferential right conferred under the section that he would be free to make the transfer to strangers not coming within the fold of the section. Once it is held that such a statutory duty

is cast on the transferor heir, where it is shown that the transferee has purchased the property without notice having been given to the remaining class-I co-heirs, the transfer could still be impugned after it was completed. Such an interpretation would not only be in keeping with the true legislative intention, but it would also not work inequitably. Thereby the preferential right would be kept up, the transferor would not have an undue impediment on his right to transfer and the transferee should after being satisfied that the class I co-heirs have in spite of notice failed to exercise their preferential right of acquisition purchase the property and obtain the same free from the liability under Section 22 of the Act.

Expressed in other words, it would mean, when an heir proposed to transfer his or her interest in the property inherited the legal consequences which would necessarily emerge would be thus:

- ***(a) In the remaining co-heirs a right of preference to acquire such interest proposed to be transferred in preference to any other person accrues. Such right may be availed of or may be given up.***
- ***(b) A corresponding legal obligation on the intending transferor would stand imposed not to transfer the interest in violation of the preferential right of the other Class-I co-heirs.***

(c) A statutory notice is given to all transferees that class-I co-heirs have a preferential right and until that is exhausted either by its exercise or by its non-exercise in spite of notice they are not free to take the transfer.

Unless such an interpretation is given to the provisions of Section 22(1) of the Act, the preferential right contemplated therein would really bean airy one and the true legislative intention cannot be given effect to. I would, therefore, interpret sub-section (1) of Section 22 in the aforesaid manner and would hold that the transferor heir must propose or notify his intention to transfer to the other class-I co-heirs and a transfer made without following that procedure would be vulnerable even after it is completed on proof by the co-heir who has the preferential right that the transfer was made without notice of the proposal of transfer to him."

This takes us to the another case of ***Arati Das(Supra)*** decided by the Division Bench of this court where the point was raised whether a preferential right can be invoked by the other heirs if the transfer has already been effected by one of the heirs specified in Clause-I schedule to a stranger. The Court held:

"After hearing the learned Counsel for the parties and after going through the provisions quoted above, we find that the aforesaid provision of the Act has conferred an additional right of pre-emption otherwise than the ones provided in Section 4 of the Partition Act or in Section 8 of the West Bengal Land Reforms Act. Unlike the provision contained in the Partition Act, here, the right of pre-emption is not limited to the dwelling house belonging to an undivided family but to any immovable property or business carried on by a Hindu dying intestate either solely or in conjunction with others. However, such right is available only to the heirs specified in Class-I of the Schedule. The provision of Section 8 of the West Bengal Land Reforms Act, it is needless to mention, is limited to the plot of land held by a rayat as provided in the said Act and specific manner of enforcement of that right has been prescribed therein.

A distinguishing feature of Section 22 of the Act is that whereas in case of pre-emption provided in the other Statutes, the right to apply for pre-emption generally accrues only on the registration of the deed of transfer, but in this provision, such right has been conferred upon the pre-emptor even before the actual transfer, if any of the heirs of Class-I proposes to transfer his undivided share. Another peculiar element present is that here, the value of the consideration of the proposed transfer

should be decided by the Court unless otherwise agreed to by the parties i.e. the transferor and the pre-emptor.

The first question that falls for determination before us is if the transfer has already taken place filing of an application under Section 22(2) of the Act, whether the right of pre-emption conferred under the sub-Section(1) of Section 22 is lost.

Our considerate view is that even if the transfer has taken place, the right of the pre-emptor under this Section is not lost. It is absurd to suggest that the right conferred upon an heir as provided in sub-section(1) of Section 22 can be frustrated by merely completing the transfer without disclosing the intention of the transfer to the persons who have the right of pre-emption. However, if in spite of disclosing the intention of transfer, the persons, who have the right of pre-emption, decide to waive such right, the Court, in a given situation, can refuse to grant the relief of pre-emption, the right of pre-emption being a weak right."

In case of ***Madanlal Vs. Prema Das AIR 2008 Himachal Pradesh, 71,*** though the question which is involved in the instant appeal does appear to be directly connected with the questions raised therein; Yet, the observations made therein on the interpretation of the expression "proposes to transfer" may be of some relevance in

the instant case. It is held that the interpretation of the said expression involved the incident of the underlying legislative intent. The Court held that it is imperative upon the co-sharer proposing to transfer his share in the immovable property to the outsider to offer the same to the other co-sharer first before embarking its journey by selling his share to the outsider. It is further held that the transfer already effected without following the said procedure is still vulnerable as any other interpretation would eschew the mischief of the said provision. It is ultimately held that the proceeding under the aforesaid provision is maintainable even after the transfer is completed. Though there has been a divergent view on interpretation of the expression "proposes to transfer" but this court in ***Arati Das(Supra)*** has held that it cannot destory the right of the heir specified in Class-I to maintain the proceedings asserting the preferential right. The Mayne's Treatise on Hindu Law and Usage encompasses his views while conceptualising the situation that has arisen on divestation of right, title and interest by making gift to an outsider. The author commented:

"A difficult question arises as to the meaning of the expression 'transfer'. The word 'transfer' is of wide import and would ordinarily include a sale, exchange, mortgage, gift and lease which are the usual modes of transfer recognised under the Transfer of Property Act;

as also a transfer by way of trust. The main object of the section is to prevent the heirs other than the transferor from being compelled to be in joint enjoyment of immovable property or a business with a stranger or other person with whom they do not wish to associate themselves. The transferee of the interest of the heirs is likely to insist on partition of the immovable property or to be in actual possession as a tenant-in-common with the other heirs or to carry on business with them or to claim dissolution by taking away his share resulting in great hardship to the other heirs. It is to prevent such hardship that the section is enacted and the other heirs are given a right of pre-emption. It would, therefore, appear proper to interpret the expression 'transfer' to cover the case of a mortgage or a gift as the other heirs may not like the mortgage or the donee to share the property with them. The mere fact that there is no consideration for a gift is of no consequence. Even in such a case the heirs may be anxious to avoid the donee's presence by offering to pay consideration. Again in the case of a mortgage with possession the heirs may not like the presence of the mortgage. Though the expressions 'consideration' and "acquiring the interest" are used it does not follow that they are appropriate only in the case of a sale. They may be made to apply to other cases of transfer also. As the main object is to avoid introduction of a stranger perhaps

the expression 'transfer' may be interpreted as to exclude transfer where the transferee has no right to obtain possession physically of a part of the property either by partition or otherwise. For example, it may exclude the case of a simple mortgage where the mortgage is only entitled to recover the money."

The nuances of the gift has been a seminal point in ***Sonia Bhatia(Supra)*** where the Apex Court held that the gift is purely a gratuitous transfer, made out of love and affection or for the spiritual of benefit of the donor. There is no element of the adequate consideration nor the same can be incorporated while conceptualising the gift. The consideration or the adequate consideration postulates such consideration capable of being measured in terms of money value which is conspicuously absent in case of gift.

There is no ambiguity that the gift is a transfer without consideration. The legislature never conceptualised the gift for consideration or adequate consideration but it is a gratuitous transfer out of love and affection and sometimes for the spiritual benefit of the donor. It is incongruous to say that the gift is not a transfer. It has all the incident of transfer and the right, title and interest of the donor passes to the donee upon execution, registration and acceptances thereof.

A distinction is sought to be made on interpretation of Section 22 of the said Act that the word 'proposes to transfer' appearing in sub-Section(1) of Section 22 of the Act must be read conjointly with the provision contained in sub-Section(2) thereof and, therefore, the consideration plays a vital role in bringing the incident of transfer within the conntour of the said provision. In our opinion, Sub-Section 1 and 2 of Section 22 of the Act contemplates different eventualities and does not override the integral facet on the preferential right. Sub-Section(1) expounded the right of the heir specified in Class-I of the schedule to invoke preferential right to acquire the interest of the other heir who transferred his or her interest in the property or business to third party. Sub-Section(2) can be visualised as the consequential steps for acquisition of such share and does not control sub-Section(1) thereof. The moment the transfer is affected by a well recognised mode of transfer, sub-Section(2) requires acquisition of such share upon payment of the consideration either on the basis of an agreement subsequently arrived or in absence thereof the consideration determined by the court. The element of "transfer" divest the executant of the deed of all his right which came to be vested upon the recipient thereof may be by way of a gift which does not contain the consideration. Such right of the recipient cannot be taken without the payment of the consideration and precisely for such reason sub-Section(2) has been incorporated. The vested right can only be divested

by well recognised mode of transfer. The hypothetical example can be made in this regard when 'A' gifted his immovable property to 'B' out of love and affection. B in turn wanted to sale the said property to any stranger as such deed of gift is not conditional one. He is entitled to receive the consideration although he acquired the right, title and interest by way of a gift which admittedly does not contain consideration.

In the light of the above, Section 2 should be interpreted when the court deprives a stranger to the property acquiring an interest by way of a gift and such right is being vested upon the heir specified in Class-I of the Schedule. It is anomalous when a co-sharer who gifted the property and the donee who received the property shall not be entitled to any consideration if the property by the operation of the law is directed to be given to the co-sharer or the heir is specified in Class-I of the Schedule. The proper meaning which can be assigned to sub-Section(2) of Section 22 is the moment the Court finds that an heir is entitled to a preferential right under sub-Section(1), in absence of any agreement, the consideration so determined shall pass to the stranger purchaser. Any other interpretation would render the provision otiose and redundant. The word 'transfer' has to be given a pragmatic meaning and not in conjunction with the consideration appearing in sub-Section(2) of Section 22 of the Act. If any restrictive meaning of the word transfer is given, it would be a premium to the heir

divesting his right by way of a gift to wriggle out of mischief of the provision contained in sub-Section(1) of Section 22 of the Act.

We, thus, held that even a gift being the transfer comes within the ambit of Section 22 of the Act and the heir coming within Class-I of the Schedule is entitled to preferential right.

So far as the concluded transfer is concerned, we do not find any restriction having put under Section 22 to have its restricted applicability in case of proposed transfer if the transfer has been affected without his knowledge, still the heir can maintain the proceeding invoking the preferential right enshrined under Section 22 of the Act. We thus modifying the decree of the Trial Court to the extent that plaintiff has a preferential right in respect of Ka(1) Schedule Property.

In view of the modification of the decree, the matter is remitted to the Trial Court for determining the market price of the share in respect of the immovable property acquired by the defendant by way of a gift and such determination shall be made after affording an opportunity of the hearing to the respective parties.

In the event of such consideration, so determined, is deposited by the plaintiff, the court shall pass the consequential order thereupon. However, in case of a default the modalities have been provided in the Section itself which we expect that the Trial Court will pass appropriate order.

The appeal is thus disposed of.

No order as to costs.

Urgent certified website copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(Kausik Chanda, J.) ***(Harish Tandon, J.)***