

(1968) 01 P&H CK 0001

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 439 of 1959

Mohan Lal and others

APPELLANT

Vs

Jit Singh and others

RESPONDENT

Date of Decision: Jan. 23, 1968

Acts Referred:

- Limitation Act, 1963 - Section 19

Hon'ble Judges: P.C. Pandit, J

Bench: Single Bench

Advocate: Harbans Lal and J.L. Gupta, for the Appellant; P.C. Jain for Respondents No. 1 to 5, for the Respondent

Judgement

P.C. Pandit, J.

The following pedigree table will be helpful in understanding the facts of this case.

2. In 1879, by means of Exhibit P.W/ 1, Bir Singh mortgaged land measuring 193 Bighas 3 Biswas situate in village Handiaya, district Sangrur, in favour of Bhagwan Singh for Rs. 1000. In 1886, an additional charge for Rs. 880/- was created by Narain Singh and his brother Waryam Singh, who were both sons of bir Singh, on 53 Bighas 13 Biswas out of the mortgaged land vide Exhibit PJ/1. In 1911, Kehar Singh and Sunder Singh sons of the original mortgagee Bhagwari Singh, transferred the mortgagee rights in 158 Bighas 18 Biswas in favour of Mangu Mal vide Exhibit P.W. In 1949, by means of Exhibit PD/1, Smt. Brahami, defendant No 1, widow of Mangu Mal sold the mortgagee rights evidenced by Exhibit PW to Mohan Lal, Jugal Kishore, Babu Ram and Hem Raj, defendants 2 to 5 for Rs. 2280/. Some of these rights in a part of the land were transferred by defendants 2 5 in favour of Harnam Singh, Gurdev Singh, Kartar Singh Surjit Singh and Sham Singh, defendants 6-10 In 1952, the land in dispute measuring 15t Bighas and 18 Biswas, covered by the document PD/1, was mutated vide Exhibit PS in favour of defendants 2-5 on the ground that they had become owners of the same by lapse of time, as the limitation for redeeming the mortgage had expired. In 1957 the descendants of the two branches

of Rai Singh and Kataria brought a suit for possession of the land in dispute by redemption of the mortgages of the years 1879 and 1886 on payment of Rs. 1880/- on the ground that they were the heirs of the original mortgagor Bir Singh whose grand son Kaka Singh had died. It was further alleged by them that the limitation for bringing the suit for redemption had been extended u/s 19 of the Limitation Act by the document Exhibit P W executed in 1911.

3. The suit was resisted by the defendants mainly on the ground that Kaka Singh was not dead and the plaintiffs had, therefore, no locus standi to bring the present suit. It was also pleaded that the suit was barred by time in as much as the document Exhibit P.W. could not be held to be an acknowledgment within the meaning of section 19 of the Limitation Act and it could not, therefore, extend the limitation.

4. On the pleadings of the parties a number of issues were framed The trial court dismissed the suit and left the parties to bear their own costs, on the findings that Kaka Singh had not been proved to be dead and that the suit was barred by time, because limitation for filing the same was 30 years which period was over long before the institution of the suit. The document Exhibit P. W. was, however held to be an acknowledgment, but since it was executed after 30 years from the date of the mortgage when the limitation for bringing the suit for redemption was over, it could not, according to the trial Judge, extend the period of limitation. Against this decision, the plaintiffs went in appeal before the learned Additional District judge, Sangrur. while the defendants filed cross objections claiming that they should not have been deprived of their costs by the trial Court. Before the learned Additional District judge, only two points were debated, one with regard to the question of limitation and the other concerning the death of Kaka Singh. On the question of limitation, the finding of the learned Judge was that the Farmani Shahi of 1899, by which 30 years limitation had been provided for a redemption suit, had been later on rescinded by another Farmanishahi of 1901 which had laid down a period of 60 years for such a suit. This period of 60 years ended in 1939, but before that there was an acknowledgment of liability on the part of the then mortgagees, contained in Exhibit P. W., sufficient to extend the limitation u/s 19 of the Limitation Act and the suit was thus within time. As a matter of fact, Learned Counsel for the parties were agreed that Exhibit P.W. was a valid acknowledgment u/s 19 of the Limitation Act. Regarding the death of Kaka Singh, the finding of the learned Judge was that it had not been proved that Kaka Singh was alive or was actually dead. It had, however, not been established whether or not he had left any children or a widow in case he had died. AH these facts, according to the learned Judge, were obscure, because Kaka Singh went to China long ago and had not returned to this Country since then. Since the death of Kaka Singh had not been proved, the plaintiffs, according to the learned Judge, could not redeem the mortgage in question. During the course of the judgment, the learned Judge also gave a finding that the mutation Exhibit P.S. by which the revenue officers removed the name of Kaka Singh from the column of

ownership of the land in dispute on the ground that the right to redeem the mortgage had become time barred, could not effect the rights of the plaintiffs, because the said mutation had been effected without issuing any notice to them. On the basis of these findings, the learned Additional District Judge accepted the appeal, set aside the judgment and decree of the trial court and granted the plaintiffs a declaration to the effect that the mutation, Exhibit P.S. would not affect their right to redeem the mortgage of the land in dispute, if they succeeded in proving that Kaka Singh had died issueless and without a widow. The present suit for redemption, however, was dismissed by the learned Judge and the parties were left to bear their own costs. The cross-objections filed by the defendants were also rejected. Against this decision, defendants 2 -10 have come in second appeal to this Court praying that no declaration should have been granted to the plaintiffs regarding the mutation Exhibit P.S. The plaintiffs have also filed cross-objections to the effect that it should have been held that Kaka Singh had died and the plaintiffs were, therefore, entitled to redeem the land, as owners of the equity of redemption. It was also stated by them that their suit for redemption should have been decreed.

5. The first question for decision, in order to dispose of the appeal and the cross-objections, is whether it has been rightly held by both the courts below that it had not been proved on the record that Kaka Singh was dead on the date of suit *Prima facie*, this is a finding of fact and if the same is not vitiated by any error of law, it would be binding on this Court in second appeal. Learned Counsel for the plaintiffs, however, submitted that this finding of the learned Additional District Judge was vitiated inasmuch as:

- (a) the evidence of Arjan Singh plaintiff, as P.W. 6 when he stated that Kaka Singh was dead and he had been informed about that fact by one Baru of the same village, who had accompanied Kaka Singh to China where he had died, had been erroneously brushed aside;
- (b) the statement of Lashkri Ram, P. W. ? that Kaka Singh had died and Exhibit PP had been erroneously ignored by the learned Judge; and
- (c) Mutations Exhibits PR and PQ had been discarded on conjectural grounds.

So far as far is concerned, the finding of the learned Judge was that according to Arjan Singh, it was Kaka Singh son of Rattan Singh who had died in China. The witness should have known that Kaka Singh was son of Narain Singh and not Rattan Singh. It is undisputed that it was for the lower appellate court to appraise the evidence and come to a finding thereon. The reasons given by the learned Additional District Judge for not relying on the statement of Arjan Singh cannot be said to be non-existent because the fact remains that he had stated in his evidence that Kaka Singh son of Rattan Singh had died, whereas the plaintiffs had to establish that Kaka Singh son of Narain Singh was dead on the date of the institution of the suit.

6. Now coming to the statement of Lashkri Ram, it is true that in the examination-in-chief, he had stated that Kaka Singh was dead, but it appears that the Learned Counsel for the plaintiffs did not rely on his evidence and did not make a reference to it before the lower appellate court. It seems that he did not consider it important enough for proving the death of Kaka Singh. This witness was, however, referred to by the trial Judge who did not believe him on the ground that he had not disclosed the source of his knowledge. From his cross-examination, it appears that he did not even know the date of death of Kaka Singh. His evidence, therefore, was rightly not considered to be of much value by the Learned Counsel for the plaintiffs to prove the death of Kaka Singh and it was therefore, that no reference was made to it before the lower appellate court. Exhibit PP was the mutation which was sanctioned on the death of Narain Singh and his estate was mutated in favour of his son Kaka Singh. There, it was mentioned that Kaka Singh was employed in China. Obviously, the plaintiffs cannot derive any benefit from this to prove that Kaka Singh was dead simply because, he was in service in China. So far as the two mutations PR and PQ were concerned, in one of them i. e. Exhibit PR, the death of Kaka Singh was reported to the village Patwari who recorded it at No. 307 of his Daily diary and the revenue officer then mutated his land in favour of his reversioners on 30th May, 1950. In the other, Exhibit PQ the death of Waryam Singh was reported to the Patwari and he recorded it also at No. 307 of his Daily diary and the revenue officer mutated his land in favour of Kaka Singh on the same date i.e. 10th May, 1950. The learned Additional District Judge had placed no reliance on these mutations on the ground that on the same date in one of them the revenue officer took Kaka Singh to be alive and in the other he was considered to be dead. Counsel for the plaintiffs submitted that it was no ground for ruling them out of consideration, because in the first instance on the death of Waryam Singh, the land was entered in the name of his nephew Kaka Singh. Later on when it was reported that Kaka Singh was dead, his estate was naturally mutated in the name of his reversioners. The learned Additional District Judge had not thought it fit to rely on those mutations for proving the death of Kaka Singh. The mere fact that Kaka Singh's estate was mutated in favour of his reversioners by the revenue officer on 30th May, 1950 when on the same day Waryam Singh's land was mutated in his favour, does not, in my opinion, prove that Kaka Singh had necessarily died.

7. It was also contended by the Learned Counsel for the plaintiffs that u/s 108 of the Indian Evidence Act, since Kaka Singh was not heard of for seven years by those who would naturally have heard of him, namely the plaintiffs, if he had been alive, the burden of proving that he was alive then shifted to the defendants and they had failed to discharge that onus. That being so, according to him, it should have been held by the learned Additional District Judge that Kaka Singh was dead.

8. There is no substance in this contention. This was not the case set up by the plaintiffs in their pleadings. On the other hand their de. finite stand was that Kaka Singh was dead. They never relied on the presumption mentioned in section 10b of

the Indian Evidence Act. Naturally, therefore, no issue was framed on this point. Besides, they had not produced any evidence to show that he had not been heard of for seven years by those who would have naturally heard of him, if he had been alive. Under these circumstances, they cannot derive any benefit from the provisions of section 108 of the Indian Evidence Act.

9. I would, therefore, hold that the finding of fact given by the learned Additional District Judge that Kaka Singh had not been proved to be dead, was not vitiated in any manner.

10. The next question that requires consideration is that if Kaka Singh was not dead, could the plaintiffs file a suit for redemption ? Learned Counsel submitted that in view of the provisions of section 91 (a) of the Transfer of Property Act, the plaintiffs could bring a suit for redemption and it was not for the defendants to raise such an objection because that was a matter between them and Kaka Singh. Their suit for redemption should be decreed and if and when Kaka Singh would come, argued the counsel he could recover the property from them. Section 91(a) says.

91. Besides the mortgagor, any of the following persons may redeem or institute a suit for redemption of, the mortgaged property, namely :

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) * * *

According to the Learned Counsel, the plaintiffs, who were the collaterals of Kaka Singh, had an interest in the property mortgaged, because if Kaka Singh died issueless and without leaving a widow the property would be inherited by them. If a suit for redemption of the property was not brought within limitation by Kaka Singh, the right of redemption would be extinguished and thus the mortgagees would become the owners of the property, with the result that not only Kaka Singh but they also would stand to suffer.

11. This argument is devoid of any force. The interest in the property mortgaged which was referred to in section 91(a) of the Transfer of Property Act, was interest in present and not a contingent interest. So long as Kaka Singh was alive, the plaintiffs would admittedly have no interest in the property. If the property was self acquired of Kaka Singh, he could dispose of it in any manner he liked and the plaintiffs would in that case not inherit any thing. If, on the other hand it was ancestral, even then he could sell it for necessity. In any case, if Kaka Singh has children or a widow, they will be preferential heirs and it is only when the line of Kaka Singh becomes extinct that the property would go to plaintiffs. Such a remote interest which the plaintiffs allege to have got in the property mortgaged cannot clothe them with the right to file a suit for redemption. It was held by the Madras High Court in *Thayammal v.*

Adhimmolam Servai AIR 1956 Mad. 304 that a person having only a contingent interest in the property would not come within the meaning of the term "any person" in the section 91, clause (a) of the Transfer of Property Act. Prima facie, such a person was expected to have a present and subsisting interest in the property, it would, there fore, hold that unless it was proved that Kaka Singh was dead, the plaintiffs have no locus standi to file the suit for redemption. That being so the plaintiffs suit for redemption had been rightly dismissed by the Courts below.

12. Finding as I do that the plaintiffs had no locus standi to file the suit for redemption, in the instant case, because they bed failed to establish that Kaka Singh was dead, it is needless to determine the question whether the suit was within lemmatization or not, because of the document, Exhibit P.W. , which was alleged by the plaintiff to be an acknowledgement made by the mortgagees to extend the period of limitation.

13. Now remains the question as to whether the learned Additional District Judge, while dismissing the suit for redemption was justified in giving the plaintiffs a declaration to the effect that the mutation Exhibit PS by which the defendants had been held to be the owners of the property because the period for redemption had expired, would not affect their right to redeem the mortgage of the land in dispute, if they succeeded in proving that Kaka Singh had died issueless and without leaving a widow. It is not understood as to why this declaration was granted to the plaintiffs by the lower appellate court. It was frankly conceded by the Learned Counsel that the plaintiffs had not claimed this relief in the plaint. It is true that while giving the history of the case, the plaintiff had stated in the plaint that the defendants had got themselves recorded as owners instead of mortgagees in the revenue papers with the connivance of the revenue officials and that the plaintiffs were not bound by such an entry in the revenue records. No reference was made to the number or the date of the mutation. The fact, however remains that no relief of declaration was claimed regarding the said mutation. All that was prayed for was a decree for possession of the land in dispute by redemption. Under these circumstances, there was no justification for the learned Additional District Judge to grant such a declaration to the plaintiffs. As a matter of fact, it was rightly conceded by the Learned Counsel that this declaration would be of no use to the plaintiffs, because now the plaintiffs would not be in a position to bring another suit for redemption as the same would be barred by limitation.

14. In view of what have said above, the appeal of the defendants is accepted to the extent that the above-mentioned declaration granted by the learned Additional District Judge would be set aside, The cross-objections filed by the plaintiffs are dismissed. In the circumstances of this case, however, the parties are left to bear their own costs in the appeal as well as m the cross-objections.