
(2006) 07 P&H CK 0234

High Court Of Punjab And Haryana At Chandigarh

Case No: Appeal No. 85 of 2005

Kunda Singh

APPELLANT

Vs

Rangi Ram

RESPONDENT

Date of Decision: July 23, 2006

Acts Referred:

- Evidence Act, 1872 - Section 13, 157, 32

Hon'ble Judges: Teja Singh, C.J

Bench: Single Bench

Advocate: Dalip Chand, for the Appellant; Kishori Lal, for the Respondent

Judgement

Teja Singh, C.J.

This appeal arises out of a suit for redemption. The Plaintiff's case was that he mortgaged the house in suit to Sadhu Ram Defendant for Rs. 400 on 25th Magh 1991 that he delivered the possession to him and that he was entitled to get back the house from the mortgagee on payment of the mortgage money. Kundha Singh Defendant 2, was impleaded because he was in possession of the house. Sadhu Ram admitted the mortgage as well as the amount for which the mortgage took place, but he contended that he had spent Rs. 200 on the improvements of the house and before the Plaintiff could be allowed to redeem he must pay him this amount in addition to the mortgage money. Kundha Singh's defence was that he was the owner of the house. He further pleaded that he had been in possession adversely to the Plaintiff and Sadhu Ram for more than twelve years and accordingly he had acquired title therein.

2. The following two issues were framed by the trial Sub-Judge:

1. Whether the Plaintiff is the owner of the house in dispute and is entitled to redeem it?

2. In case issue 1 being proved, whether Defendant 2 Kundha Singh is in adverse possession?

3. It may here be pointed out that though it was alleged in the plaint that Kundha Singh was in actual possession of the house, the Plaintiff did not claim any relief against him. On the other hand, the prayer clause of the plaint was to the effect that a decree for redemption be granted to the Plaintiff against Sadhu Ram, Defendant 1 since this was a redemption suit and it was not the Plaintiff's case that Kundha Singh claimed the property through Sadhu Ram mortgagee or he had been let into possession by the latter, Kundha Singh should not have been made a Defendant at all. In any case, the adverse title claimed by him should not have been put in issue. But unfortunately neither Kundha Singh nor Sadhu Ram raised his objection in the Courts below and it was not even urged on Kundha Singh's behalf that if the Plaintiff wanted to have him dispossessed, he should bring a separate suit against him in which the title of the two contesting parties or the adverse possession which appeared to be the main plea of Kundha Singh, could be adjudicated upon. Taking into consideration the form of Issue 2, my impression is that this issue must have been framed at Kundha Singh's instance and he was keen that he should be given an opportunity of substantiating his adverse possession. The trial Sub-Judge found against the Plaintiff on Issue 1 and dismissed the suit. Issue 2 was left undecided. On appeal, the learned District Judge set aside the finding of the trial Court on Issue 1. He decided Issue 2 against Kundha Singh and granted the Plaintiff a decree for possession of the house on the condition that he paid Rs. 400 to Sadhu Ram. Kundha Singh is now the Appellant before me.

4. The first point raised before me by the Appellant's counsel is that since the Plaintiff did not claim any relief against him, and since it was a suit for redemption, neither Issue 2 should have been decided nor a decree for possession passed against the Appellant. As I have already observed, had the parties raised proper pleas not only no relief should have been granted against Kundha Singh, who did not claim any concern with the mortgage out of which the suit for redemption arose, but even the question of Kundha Singh's adverse possession would not have been adjudicated upon. But Kundha Singh himself created the whole trouble by insisting that he be given an opportunity of establishing his adverse possession. Now that both sides have examined evidence on the point and the matter has been decided by the District Judge it is not desirable that the case should be allowed to go back to the stage at which it might have rested if Kundha Singh had adopted a different attitude. This will without doubt mean further litigation between the parties and will subject them to unnecessary expense and bother. It is not even urged before me by the Appellant's counsel that because there was misjoinder of causes of action there has been a failure of justice or that the Appellant has not had a fair opportunity of fighting the case on the question of adverse possession. This objection of the counsel is, therefore, overruled.

5. As regards merits, the learned District Judge has pointed out that the evidence adduced by Rangi Ram Plaintiff in support of his title was oral as well as documentary. The documentary evidence includes the mortgage-deed executed by the Plaintiff in Sadhu Ram's favour in 1991. Kundha Singh was not able to prove that this was a fictitious document and was a result of conspiracy between Rangi Ram and Sadhu Ram and they joined together in depriving him of a very valuable right in the house. The other document relied upon by the Plaintiff is the mortgage-deed executed by one Tota Ram in favour of Kishori Lal on 4-6-1993.

The property which was the subject-matter of this mortgage adjoins the suit property and this fact finds prominent mention in the document. It was urged by the Appellant's counsel that neither the Plaintiff nor the Defendants being parties to this document, it was not admissible in evidence, and he cited *Mam Raj v. Goverdhan* 3 P L.R. 337 a case decided by a learned single Judge of the Patiala High Court. It was held in that case that a recital in a document as to the ownership of adjoining lands is not admissible in evidence as against persons who are not parties to the document. The facts of the case do not appear clearly from the judgment and it cannot be said whether the party who relied upon the document in which the boundaries of adjoining properties were given contented himself by merely proving the document or he examined the executant of the document as his witness and used the document itself with a view to corroborate his evidence. I must, however, say with respect that the rule enunciated by the learned Judge, if it can be taken to mean that the recital in a document regarding the ownership of adjoining properties cannot be admitted in evidence in any case, is not quite correct. This question has been the subject-matter of discussion in a large number of cases. It is unnecessary to refer to all of them, because there is consensus of opinion that if the document is proved as an independent piece of evidence the recitals therein are not relevant because they do not come within the scope of Section 13, Evidence Act, but if the executant of the document is examined as a witness and he deposes to the ownership of the adjoining properties and the document which he executed sometime ago is produced and proved to corroborate his testimony, the recital in the document is considered as a previous statement and is admissible in evidence u/s 157, Evidence Act. It is sufficient in this connection to refer to a decision of the Patna High Court in [Ram Nandan Prasad and Another Vs. Tilakdhari Lal](#), where it was held that a recital of this kind is not admissible u/s 13, but may be admissible if the executant is called and deposes to the boundary to corroborate him u/s 157 or if he is dead u/s 32. Tota Ram's mortgage was also very old and the value of it as a piece of evidence corroborating the statement of Tota Ram himself is considerable. The oral evidence adduced by the Plaintiff has been carefully considered by the learned District Judge and I am in entire agreement with him that the Plaintiff's title to the house in dispute and the factum of mortgage by the Plaintiff in favour of Sadhu Ram was sufficiently established.

6. As regards Issue 2, the point stressed before me by the Appellant's counsel was that Sadhu Ram mortgagee had admitted that Kundha Singh got possession of the house more than twelve years ago. Relying upon this admission of Sadhu Ram, the counsel argued that Kundha Singh had acquired title by adverse possession. In the first place I am inclined to think that Sadhu Ram's statement, contradicted as it is by the evidence of the Plaintiff, and this appeared to me to be more reliable than Kundha Singh's evidence, was false. Evidently, Kundha Singh was put up by Sadhu Ram himself and the impression that I gathered by going through the evidence was that they had both colluded to deprive the Plaintiff of his property. In addition, even if it be conceded for a moment that Kundha Singh was in possession as owner for more than twelve years, since the property was under mortgage and the mortgage was with possession the possession could not be adverse to the Plaintiff and accordingly it could not affect the Plaintiff's right to redeem the house. Reference in this connection may be made to a Bench decision of the Madras High Court in [Maramittath Theruvil Moothachettiam Veetil Kelu Vs. Kuttiyl Machikandy Chekkara Cheppan and Others](#), where it was held that when a person is proved to be in adverse possession of a mortgaged property he acquired no title against the mortgagor.

7. Last of all it was urged by the Appellant's counsel that because of Sadhu Ram's own admission that Kundha Singh remained in adverse possession for more than twelve years, the latter had become the owner of the mortgagee rights and accordingly the mortgage money should be paid to him. This plea was not raised in the Court below, and Sadhu Ram, who is the principal person concerned with it had no chance of controverting it. Apart from this, no authority has been cited before me in support of the proposition that when a property is under mortgage and a person other than the mortgagee acquires possession, in case his possession extends to more than twelve years, he becomes entitled to the mortgage money.

8. The result in my opinion, is that the appeal fails on all grounds and must stand dismissed with costs.