
Basakhi Ram Vs Kalu and Others

Regular Second Appeal No. 137 of 2001

Court: High Court of Himachal Pradesh

Date of Decision: March 13, 2014

Acts Referred:

Evidence Act, 1872 - Section 90

Hon'ble Judges: Tarlok Singh Chauhan, J

Bench: Single Bench

Advocate: S.S. Mittal and Mr. Surinder P. Sharma, for the Appellant; K.D. Sood and Mr. Sanjeev Sood, Advocate for Respondents No. 3 and 4, for the Respondent

Final Decision: Dismissed

Judgement

Tarlok Singh Chauhan, J.

The plaintiff is the appellant and is aggrieved by the concurrent findings recorded by the learned Courts below.

The plaintiff/appellant had filed a suit for declaration and injunction on the allegations that the land comprised in Khasra No. 1528, Khata Khatauni

No. 245/513, measuring 2-18-0 bighas, situate at Phati Fozal, Kothi Hurang Tehsil and District, Kullu is recorded in the revenue record in co-

ownership and joint possession of S/Shri Chande Ram and Khimi Ram in equal shares. On 27.2.1955, the above named owners created a

mortgage over the suit land to the extent of $\frac{1}{2}$ share in favour of Shri Jhabu for a consideration of Rs. 900/- and on this basis mutation No. 328

to this effect was attested by the Revenue Officer on 22.5.1955. After the death of Chande Ram mortgagor his estate was inherited by his widow

Smt. Ailu, who gifted her half share to the appellant and $\frac{1}{2}$ share remained with Jhabu as mortgagee which was also redeemed by the appellant.

2. It was further alleged that that Mortgagee Jhabu sold his mortgage rights in favour of the appellant for mortgage debt of Rs. 450/- and the

possession was also delivered. After the death of Khimi Ram his entire property was inherited by his widow Ghinu Devi and after her death the

same has been inherited by defendant/respondent No. 1 and Chilku Devi. Chilku Devi transferred her rights to Ishru the predecessor-in-interest of

defendants No. 2-A to 2-C (hereinafter referred to as respondents). On such allegations, the appellant prayed for declaration since

defendants/respondents No. 1 and 2 had failed to redeem the mortgage to the extent of $\frac{1}{2}$ share of said Khimi Ram in the suit land and the

appellant is coming in possession of this mortgaged land for the last more than 30 years and is therefore, become owner of this land by afflux of

time.

3. The suit was contested by the defendant/respondent No. 2 who has alleged that the plaintiff was estopped from filing the suit due to his own act,

conduct and acquiescence. On merits, it has been alleged that the mortgage was without possession and the possession remained with the

predecessor-in-interest of the defendant. The defendant has further alleged that he has already redeemed the mortgage of the suit property by

making payment of Rs. 225/- on 3.2.1963. The defendant No. 1 on the other hand alleged that he is a marginal farmer and therefore question of

foreclosure of suit land to the extent of his share does not arise. The learned trial Court on 14.5.1992 framed the following issues:-

1. Whether the plaintiff has become owner of $\frac{1}{2}$ share i.e. of the defendants by way of foreclosure in the land in suit, as alleged? OPP

2. Whether the suit is not maintainable, as alleged? OPD.

3. Whether the plaintiff has no cause of action to file present suit, as alleged OPD

4. Whether the defendant No. 1 is a marginal farmer, as alleged, if so, its effect? OPD

5. Whether defendant No. 2 has got redeemed the mortgage in respect of $\frac{1}{2}$ share in the land in suit, as alleged? OPD-2

6. Whether the defendants No. 1 and 2 are in possession of the land in suit as alleged, if so, its effect? OPD

7. Whether the plaintiff is estopped from filing the present suit by his acts and conduct, as alleged? OPD-2

8. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as alleged? OPP

9. Whether in the alternative, the plaintiff has become owner of suit land by way of adverse possession, as alleged? OPP

10. Relief.

The learned trial Court after recording the evidence and hearing of the parties dismissed the suit which resulted into filing the appeal before the

learned lower appellate Court which was ordered to be dismissed vide judgment and decree dated 25.3.2000 of the learned District Judge, Kullu.

It is this judgment which is under appeal before this Court.

4. This Court on 19.4.2001 was pleased to admit the appeal on following substantial questions of law:-

1. Whether the benefit of Section 3(e) of the Himachal Pradesh Relief of Agricultural Indebtedness Act, 1976 is available only to the original

mortgagor who is not a debtor or can it be extended to its heirs, alienees etc. who become small or marginal farmers?

2. Whether the Court was justified in attaching the presumption of truth to receipt Ex. DW-2/A which is not admitted by the executant?

5. I have heard the learned counsel for the parties and with their able assistance gone through the records of the case. Mr. S.S. Mittal, Senior

Advocate assisted by Mr. Surinder P. Sharma, Advocate has argued that in terms of Section 3 of the Himachal Pradesh Relief of Agricultural

Indebtedness Act 1976 (shortly referred to as the "Act") the benefit there under is available only to the original Mortgagor who is not a debtor and

this benefit cannot be extended to his heirs, alienees or anyone claiming through him. Further this benefit can only be extended to those who

succeed to the estate of original mortgagor in the natural course of succession and not otherwise.

6. On the other hand, Mr. K.D. Sood, Senior Advocate assisted by Mr. Sanjeev Sood, Advocate has argued that the Section 2(k) of the Act

which defines the marginal farmer does not draw any distinction as has been sought to be canvassed by the opposite party. According to Mr. K.D.

Sood, the definition is absolutely clear and unambiguous and has to be read as it exists and given its plain meaning. Section 2(k) of the Act defines

the marginal farmer in the following terms:-

2(k) ""marginal farmer"" means an agriculturist who earns his livelihood mainly by agriculture and who holds land not exceeding one hectare of

unirrigated or half hectare of irrigated land.

Provided that if a marginal farmer holds both classes of land then the area for the purpose of this clause shall be determined on the basis of half

hectare of irrigated land counting as one hectare of unirrigated land and on the basis of this conversion ratio the total area of such farmer shall not

exceed one hectare.

7. A bare reading of aforesaid provision makes it absolutely clear that the legislature has not categorized or made distinction amongst the marginal

farmers on the basis of which they acquire interest in the property which is subject matter of the mortgage, be it, by way of succession, inheritance,

testamentary disposition, gift etc. The further reading of the Act no where suggests that benefits under the Act were to be conferred upon the

natural successor of property through inheritance from the original mortgagor alone. Therefore, question No. 1 is answered accordingly by holding

that the benefit of Section 3(e) of the act is available not only to the original mortgagor but also to his successors irrespective of the means, and

manner and mode of succession.

8. In so far as question No. 2 is concerned, the defendant DW-1 Smt. Shakuntla Devi has clearly stated that the suit land to the extent of share of

deceased defendant No. 2 Ishru Ram was redeemed in the year 1963 and plaintiff had received the mortgage consideration to the tune of Rs.

225/- and executed receipt Mark-A in lieu thereof. It has been proved on record that the scribe and marginal witness of this receipt had reportedly

expired. Therefore, the defendant examined (DW-2) Ram Nath and DW-3 Paras Ram the sons of marginal witness and scribe of this receipt in

order to prove the execution of this receipt. DW-2 Ram Nath has clearly stated that the receipt Ex. DW-2/A was signed by his father Shri Dhani

Ram who was also President of Hurang Panchayat. He has further stated that his father had expired in the year 1966. In cross-examination, he has

emphatically denied that this receipt was forged one and the same has not been signed by his father.

9. Similarly, DW-3 Paras Ram has stated that his father Thakur Dass had scribed receipt Ex. DW-2/A. He also recognized the signatures and

handwriting of his father on this receipt. Though this witness has been subject to lengthy cross-examination but nothing has been elicited from his

cross-examination.

10. This receipt Ex. DW-2/A had infact put to the plaintiff during his examination as PW-1. He no doubt denied the fact regarding redemption and

the receipt having been scribed by one Thakur Dass and witnessed by Dhani Ram but the defendants have led cogent and convincing evidence to

prove execution of this receipt. The learned Courts below have correctly appreciated the entire evidence to this effect calling for no interference by

this Court.

11. The learned trial Court also invoked the provision of Section 90 of the Indian Evidence Act and held the document i.e. receipt Ex. DW-2/A to

be 30 years old and coming from proper custody, attaching presumption of truth. Mr. S.S. Mittal, learned Senior Advocate has seriously laid

challenge to this finding as according to him the period of 30 years is required to be calculated from the date of commencement of the lis and not

from the date when the same is proved on record. According to him, it cannot be denied that at the time of institution of the suit, the receipt Ex.

DW-2/A was less than 30 years old. It was only during the examination of the defendants witnesses that this document had become 30 years old,

Mr. Sood has not disputed this fact but has strenuously argued that the period of 30 years has to be reckoned from the date when the document

was sought to be put into evidence and not at the time of institution of the suit. According to him, this can be clearly gathered from the bare reading

of provisions of Section 90 of the Indian Evidence Act.

12. I have given my deep and thoughtful consideration to the proposition mooted by Mr. S.S. Mittal, learned Senior Advocate. Section 90 of the

Indian Evidence Act, 1872 reads thus:-

S. 90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case

considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any

particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the

persons by whom it purports to be executed and attested.

Explanation - Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they

would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such

as to render such an origin probable.

The period of 30 years is to be reckoned not from the date upon which the deed is filed in the Court, but from the date on which it having been

tendered in evidence, its genuineness or otherwise becomes subject of proof. The period of 30 years is to be computed from the date of execution

of the document to the date on which the document was sought to be put into evidence. In AIR 1936 15 (Privy Council) it has been held as

follows:-

The period of 30 years, under S. 90 of the Act is to be reckoned not from the date upon which the deed is filed in the Court but from the date on

which, it having been tendered in evidence, its genuineness or otherwise becomes subject of proof.

13. In Kesarapu Manikyalu Vs. Venna Perumallayya (died) by LRs. and others, it has been held as follows:

The period of 30 years for raising presumption under S. 90 is to be computed from the date of execution of the document to the date on which the

document was sought to be put into evidence. Therefore, where the suit challenging genuineness of the document was filed 28 years after its

execution however the period of 30 years was completed on the date on which the document was sought to be put in evidence and the evidence

was recorded, the presumption u/s. 90 could be raised.

14. In Smt. Anika Bi, Bhopal vs. Anees Ahmad Siddiqui, Bhopal and others AIR 2005 Madhya Pradesh 64, wherein it has been held that-

10. Point (b): The defendants have produced registered sale deed dated 15-1-1957 (Ex. D. 1). The plaintiff also knows that there is some

document executed by her husband Mustaq Ahmad in favour of Mohd. Ismile. That finds vague reference in her plaint. Siddique Hasan (D.W. 3)

has deposed that this sale deed was registered in his presence. He is nephew of the plaintiff. He marked his thumb impression as a witness on this

sale deed. According to him Mustaq had signed on this sale deed in his presence and it had been attested by another witness Jiyaul Bari. Thus, the

execution of the registered sale deed by Mustaq is proved. Even otherwise the document has become more than 30 years old by the time it came

to be considered by the trial Court. This registered sale deed has been produced in the Court from proper custody. Therefore, the Court could

presume the signature of the executant on this document. It is well settled that the period of thirty years mentioned in Section 90 of the Evidence

Act is to be counted from the date which the document bears. The outer limit of time is to be reckoned not from the date on which the document is

filed in Court, but the material date is the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of

proof....

15. In view of the settled law, the learned Courts below have rightly invoked the provisions of Section 90 of the Indian Evidence Act to the receipt

Ex. DW-2/A. When the receipt Ex. DW2/A is taken into consideration, then it is clearly proved on record that Ishru Ram the predecessor-in-

interest of defendant 2(a) to 2(c) had redeemed the land of his share by making payment of mortgage consideration. As such, the suit land to the

extent of his share stood redeemed. No doubt, this factum could not be given effect in the revenue record qua the suit land but this is

inconsequential and has no effect over the right, title and interest of these defendants.

16. Insofar as share of defendant No. 1 is concerned, he has already been proved to be marginal farmer in the proceedings conducted by the

Tehsildar, Kullu, on the orders of learned trial Court. This finding has not been seriously contested by the learned counsel for the plaintiff-appellant.

In view of the detailed discussion hereinabove, I do not find any merit in this appeal and consequently the same is dismissed, leaving the parties to

bear their own costs.