Supreme Court of India
Dhan Singh vs Nagina (Kuldip Singh, J.) on 3 January, 1994
Equivalent citations: 1994 SCC (2) 493, JT 1994 (1) 654
Author: K Singh
Bench: Kuldip Singh (J)

PETITIONER:
DHAN SINGH

Vs.

RESPONDENT:
NAGINA (Kuldip Singh, J.)

DATE OF JUDGMENT03/01/1994

BENCH:
KULDIP SINGH (J)
BENCH:
KULDIP SINGH (J)
AGRAWAL, S.C. (J)

CITATION:
1994 SCC (2) 493 JT 1994 (1) 654
1994 SCALE (1)608

ACT:

HEADNOTE:

JUDGMENT:

ORDER

1. Heard learned counsel for the parties. Special leave granted.

2. This appeal arises against the order of the Orissa Administrative Tribunal, Bhubaneswar in OA No. 858 of 1989 dated June 22, 1992. The respondent joined the service as a Cook in CDMO Cuttack on February 9, 1962. Thereafter he was promoted as Disinfector and Senior Helper. He attained the age of superannuation on May 31, 1989. Before his retirement when the notice of retirement was given, he filed an application on April 24, 1989 stating that his correct date of birth is June 27, 1934 and therefore he cannot be retired. Since his representation was not accepted, he filed OA No. 858 of 1989 before the tribunal. The tribunal observed that his correct date of birth is June 27, 1934 and not May 18, 1929 as entered in the service register and therefore the respondent is entitled to be in service till the age of 60 years. Thus this appeal by special leave.

3. Rule 65 of the Orissa General Financial Rules provides thus "Every person on entering government service shall declare his/her date of birth which shall not differ from any such declaration expressed or implied for any public purpose before entering service. The date of birth shall be supported by documentary evidence such as Matriculation Certificate, Municipal Birth Certificate and entered in his/her service record. No alteration of the date of birth of government servant shall be made except in case of clerical error without prior approval of the State Government. An application for effecting a change in the date of birth shall be summarily rejected if :

(a) filed after five years of entry into government service,

(b) the change would so lower the applicant's age that he/she would have been ineligible to appear in any of the academic or recruitment examinations in which he/she had appeared or for consideration for appointment to any service or post under the Government."

4.A reading of these rules clearly shows that every person on entering government service shall declare his/her date of birth which shall not differ from any such declaration expressed or implied for any public purpose before entering service. The date of birth shall be supported by documentary evidence such as Matriculation Certificate, Municipal Birth Certificate and entered in his/her service record. No alteration of the date of birth of government servant shall be made except in case of clerical error without prior approval of the State Government. An application for effecting a change in the date of birth shall be summarily rejected if filed after five years of entry into government service, etc. From what has been stated in paragraph 7 of the order of the tribunal, it would appear that the respondent became aware of the entry in the service register in the year 1970.

Admittedly, no action has been taken within five years thereafter. Under those circumstances, Rule 65 as referred to above is clear that his claim for alteration shall be summarily rejected without any further inquiry. Now the respondent sought to place reliance on School Certificate in which the date of birth was entered as June 27, 1934. Obviously, he must have had the knowledge of the School Certificate but he failed to produce it when he entered into the service or had knowledge of the entry made in the service register as May 18, 1929 as early as 1970. Under these circumstances, the tribunal committed a manifest error in correcting the date of birth. Rule 65 is mandatory and the tribunal had not given due consideration to it. The appeal is allowed. No costs.

DHAN SING V. NAGINA (Kuldip Singh, J.) The Judgment of the Court was delivered by KULDIP SINGH, J.- This appeal is a sequel to a suit for possession by redemption of agricultural land measuring 268 kanals 6 marlas, situated at From the Judgment and Order dated November 26, 1985 of the Punjab and Haryana High Court in Regular Second Appeal No. 5 of 1977 Village Haibatpur, Tahsil and District Kamal (Haryana), instituted by the appellant-plaintiff in the year 1970. The suit was decreed by the trial court. The lower appellate court, however, set aside the judgment of the trial court and dismissed the suit. The High Court, in second appeal, declined to interfere with the findings of the lower appellate court. This appeal by way of special leave is by Dhan Singh appellant-plaintiff.

2. One Surjit Singh was the owner of land in dispute.He sold 122 bighas 15 biswas (including the land in dispute) of agricultural land, a house and a bara to Nagina and Sher Singh, respondents-defendants for a sum of Rs 2500 on July 9, 1945. Dhan Singh, a collateral of Surjit Singh, challenged the sale by way of a reversionary-suit. In the said litigation the High Court in second appeal by its judgment dated July 17, 1951 came to the conclusion that the part of the land sold by Surjit Singh was ancestral land and in respect of the said land there was no evidence to show that it was an act of good management. The High Court in its judgment dated July 17, 1951 held as under :

> "As half of the consideration should be held to be for ancestral land which would come to Rs 590 I, therefore, hold that the suit should be dismissed in regard to one-half of the land and with regard to the other half, the sale should be converted into a mortgage, in that the plaintiff will be entitled to get the land after the death of alienee on payment of Rs
>
> 590."

3.It is obvious from the above-quoted judgment of the High Court that the part of the sale was held to be not for legal necessity and, as such, to safeguard the interest of reversioners, the same was converted into mortgage and the right of the vendees to get the amount of Rs 590 back was preserved. What was done by the High Court was most equitable under the circumstances.

4.Dhan Singh instituted the present suit for possession by way of redemption on the ground that Surjit Singh was not being heard of for the last more than 7 years and, as such, was presumed to be dead. He claimed redemption and possession on the basis of the High Court judgment dated July 17, 1951 (quoted above).

5.Although the suit instituted by Dhan Singh was for possession by way of redemption of the land in dispute but the lower appellate court and the High Court came to the conclusion that the suit was a simple suit for possession. The contention of the appellant that the suit was for redemption of mortgage and, as such, the limitation for filing the suit was 30 years, was rejected. The appellant was non-suited on the short ground that the suit filed by him being a suit for simple possession, it was barred by limitation. The lower appellate court gave its findings on the following reasoning :

> "The learned lower court, as well as the learned counsel for the parties, are in error in believing that technically there was a mortgage and that a suit for redemption was maintainable. I hold that the present suit was one for possession on the basis of a declaratory decree obtained by the plaintiff under the customary law and I hold further that for the purpose of limitation Article 2 of the Schedule to the Punjab Limitation (Custom) Act will apply to the present case. According to Article 2(b) the period of limitation for bringing a suit for possession is three years, if a declaratory decree has already been obtained and the period begins to run from the date on which the right to sue accrues or the date on which the declaratory decree is obtained, whichever is later.

It is undisputed that the right to sue in the present case will arise on the death of the vendor because it is the death of the vendor which could give to the plaintiff a right to bring the suit for possession based upon the declaratory decree which had been granted in his favour by the Hon'ble High Court. Therefore, the question arises as to when the death of the vendor took place and whether taken from that date the suit was brought within three years."

The lower appellate court further held as under:

"Since in this case it would be presumed that the vendor was dead is the year 1962-63 which presumption has to be drawn as per evidence led by the plaintiff himself, it is clear that the suit was not brought within three years of that period and it was clearly time barred. I have already held above that by no stretch of imagination this suit can be treated as a suit for redeeming the property. This suit cannot be called legally as a suit for redemption of the property. It is a suit plainly for possession of the land subject to the condition that the plaintiff will have to pay Rs 590 to the vendees as has been held by the Hon'ble High Court in its judgment Exbt. P-3."

6. The High Court upheld the findings of the lower appellate court in following words :

"Lastly, the learned counsel for the appellant argued that in the earlier litigation the High Court had converted the sale effected by Surjit Singh into a mortgage on July 17, 1951 and the present suit for redemption of that mortgage is within limitation and 30 years' period is prescribed under the Limitation Act, 1963 for such suits. His argument was that Surjit Singh would be presumed to be dead in view of Section 108 of the Evidence Act as he was not heard of for the last 15 or 16 years prior to the filing of the suit by the persons who were expected to know about him and the plaintiff being his heir has a right to redeem. am of the opinion that argument has no force. This Court in the earlier litigation converted the sale into a mortgage in the notional sense i.e. Dhan Singh plaintiff was allowed to get the property on payment of Rs 590 after the death of the alienor. Though the present suit has been framed as if it is a suit for redemption but actually it will be deemed to be a suit by the reversioner for possession of the land which had been alienated and which alienation has been successfully challenged under custom. The period of limitation for such suits will be governed by Punjab Limitation (Custom) Act."

7.The short question for our consideration is whether the suit filed by the appellant was a suit for redemption or a suit for possession simpliciter. Mr Vikram Mahajan, learned counsel for the appellant, vehemently contended that the High Court by its judgment dated July 17, 1951 specifically converted the sale into a mortgage. According to him even if it is assumed that the said conversion was in the notional sense, a litigant cannot be penalised for understanding the simple language of the judgment and acting upon the same. We see considerable force in the contention of the teamed counsel. We may, at this stage, refer to the reasoning of the trial court which is in the following words :

> "From this judgment, one can clearly gather that half of the sale was converted into the mortgage. The learned counsel for the defendant has urged that such a conversion of sale into the mortgage is not permissible and such a judgment is not binding upon the defendants. The argument is not tenable because a perusal of the judgment would indicate that the sale not held entirely to have been made for legal necessity and, therefore, to safeguard the interest of the reversioners, the sale to the extent of half was converted into the mortgage and the rights of the vendees to get the amount of Rs 590 back were preserved in lieu of the return of the property which was the most equitable relief. In these circumstances, there is a further followed authority which is Hardev Singh v. Dr Sharan Singh' wherein it was held that where the sale was not for legal necessity, it would be converted to a mortgage. So, the mortgage stands as alleged by virtue of the judgment referred to above and I uphold the contention of the learned counsel for the plaintiff that the order of the Hon'ble High Court amounts to a creation of a mortgage."

8.We are of the view that the respondents being parties to the earlier suit the decision of the High Court in the said suit was binding on them. It was not open to the appellate court and the High Court in the subsequent suit to proceed on the basis that the sale of half of the property was not converted into mortgage as a result of the earlier judgment of the High Court. We, therefore, set aside the findings of the lower appellate court and of the High Court on the said issue.

9.On the question of relief, we are of the view that in the facts and circumstances of this case, the ends of justice would be met if the appellant is permitted to take possession of only half of the land in dispute from the respondents. On September 29, 1993, this Court passed the following order:

"The appeal is adjourned to October 12, 1993, to enable the parties to probe the possibility of settlement."

10.Thereafter, the arguments were heard on October 27, 1993, and this Court passed the following order: 1 AIR 1952 Pep 87 "We have heard arguments from both sides. Mr V.C. Mahajan, learned senior counsel appearing for the appellant states that his offer of leaving half the land to the respondents is still open. Mr Kirpal Singh, learned counsel appearing for the respondents has not been able to have any response from his clients. We give him more time to contact his clients. List the matter in Chambers on November 18, 1993 at 1.40 p.m."

11.Even on November 18, 1993, when we heard the arguments finally, the learned counsel for the respondents was unable to contact his clients. Keeping in view the fact that the respondents are in possession of the land for the last about 50 years and also the fair concession made by Mr V.C. Mahajan, under instructions from his client, we direct that the appellant shall be entitled to possession from the respondents of half of the land in dispute. Any construction on the land or any wells etc. sunk by the respondents on the land shall remain in possession of the respondents. We direct the Tahsildar, Kamal, either himself or through a subordinate officer, to have the land in dispute distributed half and half in terms of our judgment.

12.We allow the appeal, set aside the judgment of the lower appellate court and the High Court and decree the suit of the appellant modifying the judgment of the trial court to the above extent. The parties shall bear their own costs.