

(1994) 03 SHI CK 0010

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 210 of 1984

Balak Ram

APPELLANT

Vs

Kedar Nath (deceased) through his L.Rs. Joginder Paul and
Others

RESPONDENT

Date of Decision : 03-03-1994

Acts Referred:

Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953 —
Section 11(1), 11(2)
Punjab Courts Act, 1913 — Section 41
Transfer of Property Act, 1882 — Section 111, 117

Citation : (1995) 1 ShimLC 191

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : P. Malhotra, for the Appellant; Chhabil Dass, for the Respondent

Final Decision : Allowed

Judgement

Devinder Gupta, J.—This second appeal filed by the Defendant u/s 41 of the Punjab Courts Act, 1913 is against the judgment and decree passed on 23rd June, 1981 by the District Judge, Hamirpur and Una Districts at Hamirpur dismissing his appeal and thereby affirming the judgment and decree passed on 23rd June, 1981 by the Senior Sub-Judge, Hamirpur decreeing the suit of the Plaintiff Kedar Nath. During the pendency of the appeal, Plaintiff Kedar Nath died and is represented by his legal representative Joginder Paul.

2. The facts, in brief, are that a suit for possession of 5 Kanals 2 Marias of land comprised in Khasra Nos. 159, 160, 163 situate in Tika Jahu-Khurd, Tikka Mewa, Tehsil and District Hamirpur, was filed by the Plaintiff against Defendants Balak Ram and Milkhi Ram on the basis of his title. It was alleged by the Plaintiff that the suit land is owned by him. The Defendants, who were in unauthorised occupation of the suit property had no right, title or interest therein. On the basis of his title, he was entitled to get a decree for possession since despite requests, which lastly was made in June, 1973, the Defendants had failed to deliver

possession to him. This suit was instituted on 3rd January, 1975. Defendants contested the same and alleged that they were in possession of the suit property since the time of their predecessors-in-interest in the capacity as tenants at-will on payment of rent. Plaintiff had not come to the Court with clean hands and had twisted the facts. In view of the relationship of landlord and tenant, the suit for possession was neither competent, nor maintainable in civil court. Plaintiff in the replication for the first time came up with a new plea, which had not been taken earlier in the plaint. It was alleged that S/Shri Bidar, Chuglu and Ranjhu owned certain property, part of it was under mortgage with Hari Dass and others. The remaining land was under tenancy with the predecessors-in-interest of the Defendants. In the year 1959, the Defendants purchased 2/3rd undivided share of Chuglu and Ranjhu and undertook to get the mortgage redeemed. The third co sharer Shri Bidar got the mortgage redeemed and sold his undivided 1/3rd share in Plaintiff's favour. Thus, the Plaintiff became owner to the extent of 1/3rd share. The Defendants on purchase of 2/3rd share had ceased to be the tenants. During the consolidation of holding operations, the suit land was allotted to him by separating his Khatta. Name of the Defendants was incorporated in revenue records in the capacity as tenants under him. On the basis of these pleadings, parties went to trial on the following issues:

1. Whether this Court has jurisdiction to try this suit? OPD.
2. Whether the Defendants are tenants of the Plaintiff and have been inducted by the Plaintiff? OPD.
3. Relief.

Issue No. 2 was re-casted on 3rd August, 1976 as follows:

Whether the Defendants are not tenants under the Plaintiff? OPP.

3. The trial Court held that in view of the disputed relationship of landlord and tenant, the civil court undoubtedly had jurisdiction, since the question of jurisdiction had to be decided on the basis of the averments made in the plaint and not on the basis of the case set up by the Defendants. On the second issue, the trial Court recorded a finding that Defendants and their predecessors-in-interest were tenants under S/Shri Bidar, Chuglu and Ranjhu on the land, which was entered in Khatauni No. 335 measuring 8 Kanals 5 Marias in the Jamabandi for the year 1954-55, which fact also stood admitted during the evidence on behalf of the Plaintiff. But due to the Defendants purchasing 2/3rd undivided ownership rights from Chuglu and Ranjhu, the lesser estate held by them as tenants stood merged in the higher estate acquired by them. In other words, it was held that on purchase of 2/3rd undivided share by the defendants from Chuglu and Ranjhu, there was complete merger of the tenancy rights held by them and ever since 1959, they became co-sharers alongwith Bidar and since the Plaintiff was admittedly a purchaser from Bidar, the Defendants, who were co-sharers had no right to claim tenancy under another co-sharer. Khatta had been separated during the consolidation of holding proceedings. On the principle that a

person at the same time cannot be a owner as well as a tenant, the Defendants were liable to deliver back possession to the Plaintiff, who admittedly was the owner of the property. Plaintiff's suit was thus decreed Feeling aggrieved, Defendants carried the matter in appeal.

The lower appellate Court formulated the following point for determination:

Whether the suit land was under the tenancy of Appellant/Defendant and principle of merger applies?

4. The lower appellate Court agreed with the findings of fact recorded by the trial Court with slight modification. It was held that the Defendants were tenants only over a part of the land held by S/Shri. Chuglu and Ranjhu, but were not the tenants of the entire land, therefore, there was no question of merger of rights of the share of owner Bidar, which was subject to mortgage and which was not subject to tenancy. It was held that Bidar's share in the property was under mortgage, which was got redeemed by him prior to sale in favour of Plaintiff and thus the Plaintiff acquired ownership rights free from all encumbrances. He was, therefore, entitled to get possession from the Defendants on the basis of his title. As a consequence to this finding, the appeal was dismissed It is this judgment and decree, which is under challenge in this appeal I have heard Ms. Pratima Malhotra appearing for the Appellant and Mr. Chhabil Dass for Plaintiff-Respondents. I have also gone through the record.

5. At the very outset, it may be noticed that the lower appellate Court recorded its finding primarily on the basis of the consideration of Jamabandi for the year 1963-64, which had not been tendered in evidence In para 12 of his judgment, the lower appellate Court remarked that the Jamabandi for the year 1963-64 had been marked by him as "X" and on perusal of the same, it is found that no part of the property held by Bidar was under tenancy with Defendants or their predecessors Share of Bidar was under mortgage, which stood redeemed and after redemption, it was purchased by the Plaintiff, therefore, the Plaintiff had become owner and was entitled to possession. There was no question of merger since the entire property held by him was not under tenancy. These findings recorded by the lower appellate Court ate contrary to the record. Even the principle of merger as applied by the trial Court is not in consonance with the pleadings of the parties or with the provisions of law.

6. Doctrine of merger as incorporated in Clause (d) of Section 111 of the Transfer of Property Act says that a lease of immovable property determines, in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right. This doctrine of merger will not be applicable to agricultural tenancies, in view of Section 117 of the Transfer of Property Act, which exempts leases for agricultural purposes from the operation of Chapter V of the Act. As to the leases before coming into force of the Transfer of Property Act, as also to such of the leases, to which provision contained in Section 111(d) of the Act does not apply, the doctrine of merger has

been applied by various Courts under general law under which it has been held that merger depends upon the intention of the parties. There is merger if the conduct of a party shows that there was no intention to keep the interests apart.

7. A Division Bench of Allahabad High Court in *Mt. Kesar Kuar Vs. Kallu Ram*, considered the question of merger of tenancy rights with proprietary interests. Tenant of agricultural land acquired a share in the proprietary interests of the landlord. It was held that tenancy does not come to an end in its entirety. It was so held on the principle that there is nothing in law to prevent a co-sharer from having tenancy rights of any kind and being liable to the payment of rent either to another co-sharer or to the general body of co-sharers, and if a tenant subsequently acquires proprietary rights in the land his tenancy does not automatically come to an end in its entirety. Reliance was placed upon earlier unreported and reported decisions. The Court held:

The point which has been urged before us on behalf of the Appellant is that having become a proprietor in the Mahal she has ceased to be a tenant and the only remedy now open to the Plaintiff is a suit for profit in which the rent could be taken into account and adjusted. It is further urged that a person cannot both be a zamindar and a tenant in one and the same Mahal. But there cannot be a complete merger of two rights unless the two are co-extensive. We are of opinion that this point is concluded by a series of authorities, which it is not now possible to disturb. We may refer to the case of *Mahabir Singh v. Ahsanullah* (1901) AWN 53, followed subsequently in *S.A No. 303 of 1918*, decided on 28th February, 1918, and *Abdul Hasan Khan v. Bhura* (1906) AWN 226. We may also mention that the Board of Revenue has accepted the same principle as shown by the case of *Jamna Prasad Rai v. Damri* (Vol. I, Unpublished Decisions of the Board of Revenue (1925 p. 77)). All these cases are authorities for the proposition that there is nothing in law to prevent a co-sharer in a coparcenary Mahal from having tenant rights of any kind and being liable to the payment of rent either to another co-sharer or to the general body of co-sharers, and that if a tenant subsequently acquires proprietary rights in the land his tenancy does not automatically come to an end in its entirety.

8. This decision was followed in a subsequent decision of the same Court in *Niadar and Others Vs. M. Mohammad Ahmad*, and by the Madras High Court in *Tadikonda Ramakrishna Rao and Another Vs. Kottagundu Subba Rao*, .

Even on the applicability of the doctrine of merger as incorporated in Clause (d) of Section 111 of the Transfer of Property Act, the Courts have consistently held that the interests of the lessor, which vests in the lessee must be in the whole of the property, otherwise there is no merger. The interest of the lessor and the lessee in the whole of the property become vested at the same time in one person in the same right, that is to say, there must be union of the entire interest of the lessor in the lessee. A lease is not extinguished because the lessee purchased a part of the reversion. It was so held by the Judicial Committee of Privy Council in *AIR 1931 63 (Privy Council)* in which case the lessee had

acquired 1/8th share of the proprietary interest of the three shops as part of the whole property, while his tenancy rights extended to the three shops in their entirety. In *Badri Narain Jha and Others Vs. Rameshwar Dayal Singh and Others*, same principle was applied in holding that there was no merger and extinction of the lease if one of the several lessee had purchased only a part of the lessor's interest. In such a case the leasehold and the reversion cannot be said to coincide since there is no coalescence of the interest of the lessor and the lessee in the whole of the estate and that being so, the interest of the purchaser does not merge in the superior interest. In *Hari Pratap and Another Vs. Ramgopal and Another*, relying upon the two decisions of Allahabad High Court in *Mata Ghulam Vs. Sheo Mangal and Others*, , and that of *Mt. Kesar Kaur's* case (*supra*), it was held that there was no merger of the tenant's interests in the shop, which had been let out jointly by three owners in favour of the tenant, on the tenant's purchasing share in the shop from one of the lessor. It was so held on the principle that where a tenant purchases a fractional share of certain property in respect of a portion of which he is a tenant, he does not become a proprietor of the whole of the property and cannot be allowed to urge that his tenancy has come to an end.

9. In the State of Punjab, Transfer of Property Act was not applicable. A question had arisen in *Takhat Singh Vs. Prem Chand and Another*, on merger of a tenant's interest when the tenant of the larger portion of the property had purchased a smaller portion therein. It was held that Section 111 of the Transfer of Property Act has no application to the State and such of the provisions had also not been applied as a rule of equity, justice or good conscience. Taking that plea of merger had been raised apart from Section 111 of the Transfer of Property Act, it was held that the same will have to be determined in each case as to what was the intention of the owner of the bigger estate. Did he intend to keep the smaller estate alive or did he intend, at the time, when he acquired the bigger estate that the smaller estate should merge and be wiped out. In holding so reliance was placed on the following observations made in *Jyotish Thakur and Others Vs. Tarakant Jha and Others*,

While the union of the superior and subordinate interests will not automatically cause a merger, merger will be held to have taken place if the intention to merge is clear and not otherwise. In the absence of any express indication of intention, the Courts will proceed on the basis that the party had no intention to merge if it was to his interest not to merge and also if a duty lay on him to keep the interests separate. In deciding the intention of the party the Court will have regard also to his conduct.

10. Learned Counsel for the Respondents also placed reliance on the two decisions, which were relied upon by the trial Court, namely, *Malagar v. Shiv Ram* 1969 PLR 276 and *Paras Ram and Ors. v. Bhuru* ILR 1973 HP 31.

11. In *Malagar's* case (*supra*), the parties to the litigation were co-owners. 3/80 shares belonging to the Appellants, whereas the 77/80 shares belonging to the

Respondents. The case of the Appellants was that ever since the year 1943-44, they had been shown to be in occupation of the property, in the revenue records as tenant under the Respondent on payment of rent. The question, which had arisen was as to whether a co-sharer could hold the property also as a tenant under the other co-sharers, It was held that the title of lessee is inferior to that of the lessor. Both the titles cannot co-exist in the same person, and since each co-owner is to the extent of his undivided share an owner in the entirety or in every inch of the undivided property, therefore, applying the principle on which Clause (d) of Section 111 of the Transfer of Property Act is founded, it was held that a lease of immovable property stands determined, in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right, since a co-sharer cannot be a tenant under the other co-sharer and cannot acquire proprietary rights.

12. This decision in Malagar's case (supra) was noticed by the Division Bench of this Court in Paras Ram's case (supra) It was held that a tenant was precluded from acquiring the ownership rights of the land-owner under the provisions of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953, when some of the other land-owners were such whose rights could not be acquired because of the protection provided to them under Sub-section (2) of Section 11 of the said Act. It was held that the tenancy is a parcel of land held under one lease or one set of conditions and the entire body of landlords constitute one landlord. Tenancy being one and indivisible, the protection, because of the disability of one of the landlords, must be extended to the other landlords, till such time the disability ceases. Decision in Paras Ram's case (supra) was reversed by Full Bench of this Court in Smt. Savitri Devi v. Santa and Ors. ILR 1981 HP 563. It was held that a tenant is entitled to acquire the proprietary and other rights under the provisions of Sub-section (1) of Section 11 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act of one or more co-owners, who are not suffering from any one or more of the disabilities as provided under Sub-section (2) of Section 11 of the Act and on acquisition of rights, he continues to remain as a tenant of the remaining land of other co-owners who suffer from such disability.

13. From the aforementioned, case appears to be fully covered by the decision in Smt. Savitri Devi's case (supra) that there is no prohibition in law for a tenant, when the property is held by him under tenancy from co-sharers in acquiring right, title and interest of some of the co-sharers. By acquiring such right, the tenancy rights are not wiped out on the share of such of the co-sharers, whose rights, title and interest have not been acquired by him. He continues to remain in occupation of the property as a tenant. Thus, the principle laid down in Smt. Savitri Devi's case (supra) will have to be applied to the facts of the instant case. Otherwise also, on the ratio of the decision in Jyotish Thakur's case (supra), the union of superior and subordinate interests will not automatically cause a merger since it depends upon the intention of the parties In the absence of any express indication of intention, the Courts will proceed on the basis that

the party had no intention to merge.

14. As noticed earlier, plea of merger was neither specifically raised by the parties in their pleadings, nor an issue was claimed, but both the parties had gone to trial assuming that there was a plea of merger. In these circumstances, it has to be considered as to whether there was any intention to merge the tenancy rights with superior rights.

15. Ex. P-18 is jamabandi for the year 1910-11. The trial Court as also the appeal Court have taken note of this document and observed that predecessors-in-interest of the Defendants were in occupation of the property as tenants under the predecessors-in-interest of Bidar, Chuglu and Ranjhu. In Khatauni No. 156, possession of tenant Gushaun is recorded on 13 Kanals 8 Marlas of land. The remaining land measuring 1 Kanal 10 Marlas is in occupation of Govinda, Hiru etc. son of Manna. Remarks column of this Jamabandi suggests that one of the co-sharers had mortgaged his 1/3rd share to the extent of 4 Kanals 19 Marias in lieu of Rs. 73 in favour of Ganpat son of Kesru. Ex. P-17 is the Jamabandi for the year 1935-36, wherein same position is reflected. Subsequently, it appears that part of the property was mortgaged with Hiru etc. of which reference is made in the Jamabandi for the year 1954-55. The land under Khatauni No. 333 is shown to be in self-occupation of the owners free from mortgage. The remaining land to the extent of 14 Kanals 6 Marias entered under Khatauni Nos. 334 and 335 is shown to be mortgaged as also in occupation of the tenants, the Defendants.

16. It is not in dispute that the Defendants acquired the rights of Chuglu and Ranjhu through Ex. P-13, which is a copy of the sale deed dated 3rd November, 1959. Effect to this transfer was given in the revenue record through mutation No. 840 Ex. D-1, which was attested on 3rd August, 1962. Irrespective of having acquired the ownership rights, they were continued to be shown in occupation of the property as tenants on the share of Bidar, who had not transferred his rights till then. Bidar sold his 1/3rd undivided share of property in favour of Plaintiff Kedar Nath by means of a sale deed dated 17th October, 1964. Neither the sale deed, nor its copy is on record, but there is a reference of this transfer in Ex. P-22, which is a copy of the Report Roznamcha No. 258 dated 9th January, 1964 (should have been 9th January, 1965). Effect to this sale deed was given to in the revenue records through mutation No. 975 Ex. D-2 attested on 28th January, 1965.

17. During this period when transfers took place, there has been consolidation of holding operations and in re-partition the suit property, which fell in the Khewat of Bidar, stood transferred in favour of Plaintiff Kedar Nath, which was separated from the Khatta of the Defendants. In subsequent revenue record produced on record, namely, Ex. D-4 for the year 1963-64, Ex D-5 for the year 1967-68 and Ex D-3 for the year 1972-73, the possession of Defendants is entered as tenants under the Plaintiff on the disputed property, namely, 5 Kanals 2 Marlas of land.

18. The mention of the mortgage rights in the column of ownership in Jamabandi

Ex. D-4 was removed later on from the revenue record for which reference be made to a few documents on record. Ex. P-19 is a copy of the report Roznamcha No. 259 dated 9th January, 1964 (should have been 9th January, 1965) It records that the Plaintiff Kedar Nath paid Rs. 12.17 paise to mortgagee Gauri Dutt and got redeemed land entered in Khewat No. 167 for which mutation No. 976 was entered in the revenue record Ex P-20 is the copy of report Roznamcha No. 256 dated 9th January, 1964 (should have been 9th January, 1965) by which Balak Ram Defendant paid Rs. 24.33 to Plaintiff Kedar Nath for getting redeemed land entered in Khewat No. 169 Mutation No. 973 was entered in the revenue record on the basis of this report. Ex. P-21 is the copy of the report Roznamcha No. 257 dated 9th January, 1964 (should have been 9th January, 1965) by which Milkhi Ram, Defendant paid Rs. 24.33 paise to the Plaintiff Kedar Nath for getting redeemed the land entered in Khewat No. 172 for which mutation No. 974 was entered. It appears that the Patwari, while issuing copies of Roznamcha Ex P-19 to Ex. P-22 wrongly mentioned the date of the reports as 9th January, 1964 instead of 9th January, 1965, which fact has also been noticed by the trial Court. On reference being made to copy of mutation Ex. D-2, entered on the basis of Roznamcha Ex P-22, this inadvertant mistake becomes apparent wherein the date of the report shown is 9th January, 1965 and not 9th January, 1964.

19. From the aforementioned documents as also from the sale deed Ex. P-13, it could not be shown by the learned Counsel for the Respondents that any intention has been expressed or it can be inferred that Defendants while purchasing 2/3rd undivided share of Chuglu and Ranjhu intended to be given up their tenancy rights The inference, which can be drawn is that it was never intended to merge the rights of tenancy with the ownership rights. In other words, the intention was to keep the tenancy rights intact.

20. Entry of the name of the Defendants as tenants under the Plaintiff in the column of possession in the revenue records, which were prepared during consolidation of holding operation is a strong piece of circumstance, which goes against the Plaintiff that at appropriate stage, no steps were taken by him for having the record rectified. Had the intention been to merge their tenancy rights with the ownership rights, there is no manner of doubt that the Plaintiff ought to have been brought it to the notice of the consolidation authorities. No challenge has been made to the entries made in the revenue records during consolidation, by which the name of the Defendants has been continued to be shown as tenants under Bidar and thereafter under the Plaintiff, as a transferee from Bidar. It appears that the Plaintiff became wiser immediately prior to the filing of the suit when he moved an application on 26th June, 1972 before the Assistant Collector 2nd Grade for getting deleted the names of the Defendants from the revenue record The Assistant Collector 2nd Grade instead of ordering the deletion of the names of the Defendants directed that instead of rent as has been reflected in the 9th column of the Jamabandi it should be shown that the occupation of the Defendants is unauthorised one (Billa Lagan Bawaja Kabza Nazayas), for which reference be made to copy of the order dated 26th June, 1973 Ex. P-12 passed

by the Assistant Collector 2nd Grade. After lapse of about 1-1/2 years, the Plaintiff preferred the suit. Strangely enough the Plaintiff in the suit did not challenge the entries in the revenue record, which recorded the possession of the Defendants as tenants under him.

21. From the aforementioned discussion, it is not capable of being disputed that on purchase of 2/3rd undivided share of Chuglu and Ranjhu, the Defendant's tenancy rights in the remaining 1/3rd share remained uneffected. Being tenants under Bidar, they were rightly shown to be tenants under the Plaintiff and being the tenants on the property, the Plaintiff had no right to get a decree of possession against them in this Civil Suit, which was liable to be dismissed. In view of this finding, judgments and decrees passed by the Courts below are liable to be set aside.

22. Resultantly, the appeal is allowed. Judgments and decrees passed by the Courts below are set aside. Suit of the Plaintiff-Respondents is dismissed, leaving the parties to bear their respective costs.