

Daya Nand Kalu Vs. the State of Haryana

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Court : Punjab and Haryana

Decided On : Dec-09-1975

Reported in : AIR1976P& H190

Judge : R.S. Narula, C.J. and; Harbans Lal, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 9 and 38(7); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 88 and 89; Code of Criminal Procedure (CrPC) , 1974 - Sections 83 and 85

Appeal No. : Letters Patent Appeal No. 747 of 1973

Appellant : Daya Nand Kalu

Respondent : The State of Haryana

Advocate for Def. : H.N. Mehtani, Dy. Adv. General

Advocate for Pet/Ap. : P.S. Jain,; S.P. Jain,; V.M. Jain and;

Disposition : Appeal allowed

Judgement :

R.S. Narula, C.J.

1. This appeal under Clause 10 of the Letters Patent against the judgment of a learned Single Judge of this Court reversing that of the Lower Appellate Court, and consequently dismissing the suit of the plaintiff-appellant raises the question of interpretation and scope of certain provisions contained in Sections 88 and 89 of the Code of Criminal Procedure, 1898 (hereinafter called the Code). The facts of the case which are not in dispute may first be noticed.

2. The rights of occupancy tenancy in two Bighas and 13 Biswas of agricultural land situate in village Taoru, Tahsil Nuh, District Gurgaon, belonged in equal shares to Lakshmi Narain deceased and Daya Nand plaintiff-appellant who is a nephew of Lakshmi Narain, The aforesaid Lakshmi Narain was wanted in a murder case, was not apprehended, had absconded and was consequently proclaimed as an absconder under Section 87 of the Code. Lakshmi Narain not having surrendered to custody in spite of the proclamation, his half share in the occupancy tenancy rights was attached under Section 88 of the Code on June 9, 1924, and possession of the half share in the land was subsequently taken by the Collector, Gurgaon, on behalf of the then Punjab Government under Sub-section (4) of Section 88. No claim under Sub-section (6-A) of Section 88 in respect of the attached property was made by anyone, and it is the

common case of both sides that no one other than Lakshmi Narain had any interest in the said estate during Lakshmi Narain's lifetime. Lakshmi Narain was subsequently apprehended, brought to trial and convicted on December 30, 1944. A copy of the judgment of Magistrate First Class is Exhibit P-3. His appeal to the High Court was, however, accepted, and he was acquitted and released from custody. Neither before his conviction nor after his acquittal did Lakshmi Narain make any application for restoration of the attached property. As Lakshmi Narain had not appeared within the time specified in the proclamation issued against him the property in question of which possession had been taken by the Collector came to be and continued to be at the disposal of the State Government under Subsection (7) of Section 88. The State did not, however, dispose of the property. In the meantime the occupancy rights of Lakshmi Narain in the land in question ripened into rights of ownership by operation of Section 3 of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953. At about the same time Lakshmi Narain died leaving behind him his nephew Daya Nand plaintiff-appellant as the sole heir. This fact is also not disputed that Lakshmi Narain has left behind no other heir. Since the exact date of death of Lakshmi Narain is not available and the only finding is that he died either in 1952 or in 1953, the occupancy rights in his land ripened into ownership thereof either in his own hands or after him in the hands of the plaintiff. It was in the above-mentioned circumstances that on May 30, 1961, the appellant before us filed a suit for possession of the land in dispute against the State of Punjab (now represented by the State of Haryana). The suit was contested by the State and the contest led to the framing of the following issues by the trial Court--

- '(1) Is plaintiff the owner of 1/2 share of the suit land as of his own right ?
- (2) Is plaintiff the owner of the other half as heir of Lakshmi Narain, and is that Lakshmi Narain dead ?
- (3) Did defendant attach and forfeit the share of Lakshmi Narain before his alleged death If so, to what effect ?
- (4) Is the suit maintainable in the present form ?
- (5) Is the suit within time?
- (6) Relief.'

3. By his judgment, dated April 24, 1962, the Court of Shri Dev Raj Khanna, Subordinate Judge First Class, Gurgaon, held on Issues Nos. 1, 2 and 5 (quoted above) that the plaintiff was the owner of half share in the land which was originally in his occupancy tenancy, that the plaintiff was the heir of Lakshmi Narain, but did not become the owner of the land in dispute as the right of the plaintiff to get the land restored to him as such heir under Section 89 of the Code of Criminal Procedure was barred in the light of the judgment of the Lahore High Court in Dewa Singh v. Fazal Dad, AIR 1928 Lah 562. Issue No. 4 was decided in favour of the plaintiff and it was held that the suit was maintainable. No separate clear finding was recorded on Issue No. 3 though it was found that the State had attached the land in question before the death of Lakshmi Narain. The effect of the attachment and non-restoration of the land was that it remained at the disposal of the State Government which was interpreted by the learned Subordinate Judge to mean that the land could continue to remain in the possession of the Government which was free to deal with it in such manner as it

chose.

4. In the plaintiff's first appeal against the dismissal of his suit Shri Har Narain Singh Gill, Senior Subordinate Judge (invested with enhanced appellate powers), Gurgaon, held by his judgment, dated November 28, 1962, that the attached property was never forfeited by the Government, that the position of the Government qua that property was analogous to that of a receiver who is bound to restore the property to the plaintiff, who being the real nephew of the deceased, was his nearest heir. He further held that Section 89 of the Code is no bar to the possessory suit and the jurisdiction of the Civil Court has not been barred either expressly or impliedly. It was observed that the cause of action arose to the plaintiff after the deceased had become the owner of the land in dispute by operation of Section 3 of the Act because prior to that the plaintiff could not claim the property in dispute. The learned Senior Subordinate Judge refused to accept the contention of the Government that the only remedy for the plaintiff was to move the State for the restoration of the property and that the suit for possession was not maintainable in the Civil Court. That plea was turned down because it had not been raised by the defendant in his written statement. The first appellate Court refused to look into the evidence recorded upon that plea on account of its not having been raised in the pleadings of the parties. As a result of the above-mentioned findings the Senior Subordinate Judge accepted the plaintiff's appeal, set aside the decree of the trial Court and passed a decree for possession of half share of the deceased out of two Bighas and 13 Biswas of the entire land.

5. Regular Second Appeal No. 499 of 1963, preferred by the State of Punjab against the decree of the Lower Appellate Court was allowed by the judgment of R. M. Mittal, J., the decree of the Lower Appellate Court was reversed, and the suit of the plaintiff-appellant was ordered to be dismissed though without any order as to costs. The learned Judge held that the question of jurisdiction of the Civil Court, though not raised in the written statement of the Government, could be allowed to be raised even at the second appellate stage for the first time as it relates to inherent lack of jurisdiction in a Court. It was observed that no further evidence was required to determine that question. On the merits of that plea it was held that the deceased (the proclaimed offender) not having made the claim under Section 89 of the Code for the restoration of the property which had vested in the State Government under Sub-section (7) of Section 88, neither his own claim nor that of his heir can be entertained by a Civil Court after the expiry of the period of two years mentioned in Section 89. In view of the fact that there is no provision in the Code under which an order passed under Section 89 can be challenged by a separate suit and in view of the policy of the Legislature that wherever it is intended that the matter decided by the Criminal Court is subject to the decision of the Civil Court, it has been specifically so provided in the Code, it was held that the decision of the Criminal Court under Section 89 was appealable under Section 405 and unlike Sub-section (6-A) of Section 88 which provides for recourse to proceedings in a Civil Court after the decision of the Criminal Court, no provision at all is made enabling the proclaimed offender (or his heir) to knock at the door of the Civil Court for restoration of the property. It was finally held that the remedy of a person whose property is attached under Section 88 lies only in filing a claim under Section 89 of the Code and not in instituting a suit 'against the attachment'. Following the Judgment of a Division Bench of the Lahore High Court in the case of Dewa Singh, AIR 1928 Lah 562 (supra), it has been held by the learned single Judge that a proclaimed offender whose immovable property has been attached and sold by a Criminal Court in proceedings under Sections 87 and 88

of the Code has no right to maintain an ordinary civil action. (Attention of the learned Single Judge was not drawn to the difference between a case where the property has been sold away by the Government after its being at its disposal and a case like the present one where the property has still at the disposal of the Government and has not been disposed of.) It was in the context of the findings in the case of Dewa Singh that the learned Judge observed that a civil suit for the purpose of setting aside such a sale is impliedly barred by the provisions of the Code. The judgment of the Bombay High Court in *Dattaji Nana Patil v. Narayanrao Bhimrao Patil*, AIR 1923 Bom 198, which had not been followed by the Lahore High Court in the case of Dewa Singh, did not find favour with the learned Judge. The expression 'at the disposal of the suit' used in Sub-section (7) of Section 88 was interpreted to mean that the attached property stays under the control of the State Government and no rights in it can be transferred by any person in any way during the continuance of the attachment. It was on that reasoning that the learned Judge held that the occupancy rights not having been released from attachment, still continued in existence and did not ripen into ownership, as the Government was and continues to be in possession of the occupancy rights in dispute. Clause (a) of Section 3 of the Act was held to have no effect on the encumbrance of attachment created on the occupancy rights. Consequently the learned Judge held as below:--

'Therefore, the occupancy rights will remain at the disposal of the State Government and the Civil Court has no jurisdiction to adjudicate upon those rights. Other rights, than the occupancy rights in the land, namely, the landlord's rights, however, vest in the plaintiff-respondent.' It was on the basis of the above finding that the State's appeal was accepted and the plaintiff-appellant's suit was dismissed by the learned Judge. Not satisfied with the same, the unsuccessful plaintiff has preferred this appeal.

6. After hearing learned counsel for the parties at length. we feel that the judgment of the learned single Judge in the Regular Second Appeal cannot be upheld. The law laid down by the Lahore High Court in the case of Dewa Singh, AIR 1928 Lah 562 has no application to the matter before us. The absconder had in that case applied under Section 89 of the Code for restoration of the property, before that the property had already been sold out by the Government. Whereas his application was rejected by the Magistrate, it was allowed on appeal by the Sessions Judge. In a petition for revision of that order, the Lahore High Court modified the order of the Sessions Judge and directed payment of the sale proceeds of the property to the absconder. Thereafter the absconder instituted the suit for a declaration to the effect that the sale of the attached land by auction was invalid and void and would not affect the absconder's rights. It was that kind of a suit which was held to be barred. The two main distinctions between that case and ours are apparent. Firstly, the absconder had resorted to proceedings under Section 89 which had culminated in the final order of the High Court. Secondly, the property in dispute was not at the disposal of the Government when the suit was filed, but had already passed out of the Government's hands to a third person. The claim of the proclaimed offender for restoration of the property having failed, his claim in a civil suit for a declaration about the sale being illegal or void was held to be outside the jurisdiction of the Civil Court.

7. In *Dattaji Nana Patil's* case AIR 1923 Bom 198 (supra) no application for restoration had been made by the proclaimed offender under Section 89 of the Code within the prescribed period and in the meantime an order of confiscation of the attached property to the State was passed. It was held that the effect of the order of

confiscation was to put an end to any title which the proclaimed offender might have had with regard to the attached property and unless the offender had in some way acquired a title after the attachment it was difficult to see how his suit could be maintained. On the facts of the case it was held that the plaintiff in the suit before the Bombay Court had not acquired any title since confiscation of the property, and, therefore, he could not maintain the suit for possession. Thus the only material difference between the Lahore case and the Bombay case on the point with which we are concerned is that whereas in the Lahore case title in the property had passed out to a third person by sale, the title in the property in the Bombay case had passed to the Government itself by the express order of confiscation, and the title claimed by the plaintiff in the suit was of pre-confiscation time.

8. Mr. Pritam Singh Jain, learned counsel for the plaintiff-appellant, has invited our attention to the Full Bench judgment of the Madras High Court in *Secretary of State for India in Council v. Rangasamy Aiyangar*, 17 Cri LJ 296 - (AIR 1917 Mad 366). It was held in that case that a reading of Clause (7) of Section 88 with Clauses (3) and (4) of that section shows that the right accrued to the Government by the property being at its disposal is only to secure to the Government the enjoyment of the income therefrom during the continuance of the attachment as there are no words in Section 88 or 89 vesting the property and the share of the absconder in the Government. Since no further action had been taken by the Government in that case (that is neither the property was expressly ordered to be confiscated nor sold out to a third person), it was held that the apparent intention was to give the Government a hold on the property till the absconder surrendered himself. It was observed that there is no indication in Section 38 that by the mere process of attachment, confiscation of the property takes effect. The Full Bench held that the attached property is subject to the rights of the other members of the family and the appointment of a receiver to realise the share of the absconder would not necessarily take the property out of the hands of the managing member. The question referred to the Full Bench in that case which was answered in the affirmative was:--

'Can the undivided interest of an absconding person who is a member of an undivided Hindu family, in the family property or any portion thereof be attached under Section 88 of the Code of Criminal Procedure?'

Though the observations as contained in the judgment given by the Madras High Court. on the basis of the opinion of the Full Bench do have some resemblance of being in favour of the plaintiff-appellant, they do not in fact deal with the exact proposition with which we are faced.

9. The next case to which reference was made by Mr. Jain is the judgment of a learned Single Judge of the Patna High Court in *Bindeswari Prasad v. Lal Mungarj Lal*, AIR 1937 Pat 642. The question that arose for decision in that case was whether any interest in the attached property which had been sold by the proclaimed offender before the attached property is sold by the Government vests in the purchaser from the Government or not. It was held that the property which is sold under Section 88 is the property of the accused and if he has before the sale, transferred any interest in that property such interest cannot obviously be sold by the Government as the Government by attaching the property does not get any rights in its favour beyond what Section 88 specifically provides. Only the auction-purchaser was held to be a necessary-party (besides the mortgagor) to the suit filed by the mortgagee (in whose favour the accused had mortgaged the attached property) for the mortgage-decree

after the sale of the attached property by the Government. Except that the suit was not held to be barred by any provision of law, the judgment of the Patna High Court in the case of Bindeswari Prasad (supra) does not appear to be of any direct help.

10. Counsel then referred to the judgment of a learned Single Judge of the Bombay High Court in *Narayan Kondaji Temkar v. Govind Krishna Abhyankar*, AIR 1929 Bom 200, wherein it was held that the words 'at the disposal of Government' in Clause (7) of Section 88 do not imply that from the moment the absconder fails to appear on the date ordered, all his right, title and interest in the property immediately pass over to the Government as the right passes to the Government only with effect from the date of actual attachment of the property. It was further held that attachment confers no title, but merely prevents an alienation. Mr. Jain also invited our pointed attention to the form of the order authorising an attachment of the property of an absconder by the Deputy Commissioner as Collector prescribed under Section 88 of the Code contained in Schedule V. The operative words of the said order in the prescribed form are:--

'You are hereby authorised and requested to cause the said land to be attached and to be held under attachment pending the further order of this Court, and to certify without delay what you may have done in pursuance of this order.'

Our attention was drawn to the above in order to show that no title in the property passes to the Government as a result of mere attachment of the property, and that the Government merely holds it pending further orders of the concerned Court. We agree with counsel that inasmuch as no further orders had been passed by the concerned Court and the property had neither been confiscated by the Government nor sold to any outsider, it was retained by the Government in a position analogous to that of a receiver.

11. The next case to which Mr. Jain referred is the judgment of the Lahore High Court in *Shah Muhammad v. Emperor*, AIR 1925 Lah 629. It was held by a learned single Judge of that Court in the case of *Shah Muhammad* that the property of an absconder against whom proceedings under Sections 87 and 88 have been taken should be freed from attachment on the death of the absconder as all that can be attached under Section 88 is the interest of the absconder, and on his death that interest ceases and the attached property must be released in favour of his heirs. Though it is not necessary for us to go to that extent for deciding the present appeal, it does appear to us that no provision in the Code of Criminal Procedure bars the jurisdiction of a Civil Court trying and adjudicating upon the claim of an heir of a deceased absconder for restoration of the property in which the title originally vested in the absconder and at the time of the suit vests in his heir and it the property is still held by the Government under Subsection (7) of Section 88 without any further order in the nature of confiscation, etc., of the property having been passed unless the property has in the meantime been sold out by the Government to some third person. There is difference in the rights of an absconder under Section 39 and those of an heir of the absconder. The absconder can get the property restored within two years under Section 89 only if he is able to prove to the satisfaction of the Criminal Court that he did not abscond or conceal himself for the purpose of avoiding the execution of the warrant and that he had not such notice of the proclamation as to enable him to attend within the time specified therein. If he is not able to prove the above-mentioned ingredients of Section 89, he cannot claim restoration of the property even within two years. No such restriction is laid on the right of an heir of the deceased absconder to get back

the property which is still held at the disposal of the Government under Section 88 (7).

12. As long ago as in 1915 it was held by the Chief Court of Punjab in *Niamat Ali v. Secretary of State for India* 1915 Pun Re 52 = (AIR 1915 Lah 12), that the heirs of a deceased absconder are entitled to succeed to the property of the absconder after his death, and that the possession of the Government over the property even if claimed to be that of an owner does not become adverse to the heirs till the death of the absconder. Still earlier than that in *Sadhu Singh v. Secretary of State for India*, 1908 pun Re 18, it was held by the Full Bench of the Chief Court of Punjab that where the ancestral immovable property of a person subject to Punjab Customary Law is attached under Section 88 of the Code and sold by the Government, the sale conveys the life interest of the absconder and does not extinguish the right of inheritance of his male lineal descendants or of collaterals after his death.

13. The object of attaching the property of an absconder is not to punish him but to compel his appearance. If the property has not been confiscated or disposed of, the title therein continues to vest in the owner and thereafter in his heirs. In the instant case the property had admittedly been mutated in the name of the appellant, and even the learned single Judge has held that rights other than those of occupancy, viz., 'the landlord's rights vest in the plaintiff'. The finding that occupancy rights continued despite the coming into force of the Act does not appear to be correct. All such occupancy rights in Punjab as were held by the absconder ripened into ownership on the coming into force of Section 3. Section 3 brought about an improvement in the status of the title of the occupancy tenant and not of the receiver or of anyone 'at whose disposal' the property stood on that day as a result of attachment. Title never ceases or gets transferred by attachment, but continues in the original owner.

14. It is true that a civil suit for the land could not be filed by the absconder himself after two years of attachment and otherwise than on the fulfilment of the two conditions laid down in Section 89, but no such shackles are attached to the right of an heir of the absconder after the latter's death. Such heir has no right to apply under Section 89. The implied bar of Section 89 is only for such person who could have applied under that provision. The present plaintiff could not have so done. The occupancy tenancy (which had been attached) had ceased to exist as such. The title in the property admittedly vested in the plaintiff. No provision of law barred the jurisdiction of the Civil Court to try this suit for possession of his property.

15. For the foregoing reasons we hold that the jurisdiction of the Civil Court to try this suit was not barred by Section 89 of the Code or by any other provision of law. Section 9 of the Code of Civil Procedure provides that the Civil Court has the jurisdiction to try all causes which are not expressly or impliedly barred by any other law.

16. For the reasons assigned above, we allow this appeal, set aside and reversed the judgment of the learned single Judge and restore in its place the judgment of the first appellate Court granting the plaintiff a decree for possession of the land in dispute. In view of the complete absence of any direct authority on the question of law involved in the case we leave the parties to bear their own costs throughout.