

**APPELLATE CIVIL.**

*Before Tek Chand J.*

FAKIR KHAN AND OTHERS (PLAINTIFFS) Appellants

*versus*

ISMAIL KHAN AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 277 of 1928.

*Redemption of Mortgages (Punjab) Act, II of 1913, Section 12: Suit to get rid of Collector's order under Section 10 directing redemption—Civil Procedure Code, Act V of 1908, Order XXXIV: whether applicable—Abatement—on death of one of the co-mortgagees—partial or in toto—Estoppel by admission—must be read as a whole—Indian Evidence Act, I of 1872, Section 115: whether operates as estoppel unless party relying upon it was misled by it.*

*Held*, that the provisions of Order XXXIV of the Civil Procedure Code have no application to a suit instituted under section 12 of the Redemption of Mortgages (Punjab) Act to get rid of the order passed by the Collector allowing, or refusing to allow, redemption which is not in form or in substance a suit for redemption.

*Kaura v. Ram Chand (1)*, followed.

*Consequently*, in such a suit, the rules which govern the impleading of parties to a suit for redemption do not apply. Where the five plaintiffs were shewn in the Revenue Records as Co-mortgagees, each holding a well-defined and divisible share, each of them was "aggrieved" by the order of the Collector and, under section 12, possessed an individual right to establish the erroneous nature of that order. The death of one of these plaintiffs during the suit and the absence of his heirs from the record did not result, therefore, in the abatement of the suit *as a whole*, but only as regards the deceased's share.

*Sant Singh v. Gulab Singh (2)*, followed.

*Held also*, that in litigation arising out of proceedings under the Punjab Redemption of Mortgages Act (as in a suit for redemption) a mortgagee can put the party who seeks to

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(1) (1925) I. L. R. 6 Lah. 206, 212. (2) (1929) I. L. R. 10 Lah. 7 (F.B.).

redeem the mortgage to proof of his title, unless such person is the original mortgagor whose title the mortgagee cannot deny on the principle that a grantee cannot deny his grantor's title. Where the defendants are not the original mortgagors, but claim a derivative title, the burden is on them to prove it.

In this case, the defendants being bound by the gift by the original mortgagor, had no interest in the equity of redemption and the mere fact that the revenue authorities had erroneously entered their names as mortgagors in the revenue papers, could not confer any title on them, in face of the clear judicial decision in the litigation of 1887.

*Held (on the plea of estoppel)*, that the question, being not one purely of law to be decided on facts apparent on the record, should not have been allowed to be raised for the first time at the appellate stage.

*Held also*, that if a party wishes to have a statement made by the opposite party treated as an admission, the whole statement must be taken into consideration.

*And*, in order to sustain the plea of estoppel it must be proved that the persons relying on the declaration made, were thereby misled to act to their detriment in such a manner as they would not otherwise have done.

*Baba Jwala Das v. Pir Sant Das (1)*, followed.

*Second Appeal from the decree of Mr. J. D. Anderson, District Judge, Gurdaspur, dated the 15th October, 1927, reversing that of Lala Balak Ram, Subordinate Judge, 4th class, Shakargarh, dated the 2nd December, 1924, and dismissing the plaintiffs' suit.*

M. C. MAHAJAN, for Appellants.

SHAMAIR CHAND and MUHAMMAD AMIN, for Respondents.

TEK CHAND J.—The property in dispute is a TEK CHAND J. plot of agricultural land, 34 *kanals*, 3 *marlas* in area, situate in *Mauza Postan* in the Shakargarh *Ta'sil*

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of the Gurdaspur district. The land originally belonged to one Malle Khan, Afghan, who owned 1/6th share in a *khata* of 100 *ghumaons*. On some date, between 1865 and 1870, Malle Khan mortgaged, with possession, 34 *kanals*, 3 *marlas*, out of this *khata* to Buland Khan, son of Ashraf Khan, for Rs. 43. Mutation was duly effected in favour of the mortgagee and he has been continuously shown in the revenue papers as in possession up to the date of this litigation. The mortgagee Buland Khan, son of Ashraf Khan, has since died and the present plaintiffs-appellants are his descendants.

On the 10th of September, 1873, Malle Khan gifted his share in the aforesaid *khata*, including the equity of redemption in the land which he had mortgaged to Buland Khan, son of Ashraf Khan, to his sister's son Nazar Din. Mutation of the gift was duly effected in the revenue papers and in the order dated the 24th January, 1874, sanctioning the mutation, it is stated that Jiwan Khan, collateral of Malle Khan, had consented to the gift. It may be stated that Jiwan Khan was an absentee from the village and had been living for some years in the Jammu State territory. After Malle Khan's death, some time in the eighties of the last century, Jiwan Khan's sons came to Mauza Bustan and attempted to get possession of the property which he had gifted to Nazar Din. Thereupon, Nazar Din brought a suit against them for a declaration that the land had been gifted by Malle Khan to him, that Jiwan Khan had consented to the gift and that his sons had no right in it. This suit was decided on the 27th of July, 1887, the gift being upheld and a decree passed in favour of Nazar Din.

In accordance with this decision Nazar Din should have been entered in the revenue papers as the mortgagor of the land in dispute, which had been mortgaged by Malle Khan to Buland Khan, son of Ashraf Khan, but by some oversight the names of Jiwan Khan's sons were shown in the revenue papers from 1899 to 1910 as "absentee" mortgagors. In the course of the last Settlement, the Assistant Collector, by order dated the 18th of September, 1910, directed the removal of the names of Jiwan Khan's sons from the revenue papers, and Nazar Din's descendants were entered as the mortgagors and Buland Khan, son of Ashraf Khan, as the mortgagee. When Jiwan Khan's sons came to know of this order, they made an application for restoration of their names. The Assistant Collector, on what was evidently an incomplete enquiry, set aside the order of his predecessor dated the 18th of September 1910 and directed that the names of Nazar Din's descendants be removed and those of Jiwan Khan's descendants be restored as mortgagors of the land in dispute.

It appears, that about the same time, Nazar Din's heirs, who had been entered in the revenue papers as mortgagors by order of the revenue officer dated the 18th of September, 1910, filed an application before the Collector under Punjab Act II of 1913, for redemption of the land in dispute from the present plaintiffs who are the sons of Buland Khan. This application also was disposed of by the Collector on the 15th of December, 1915, who dismissed it on the ground that the mortgagors were the descendants of Jiwan Khan absentee and not Nazar Din's sons. No suit under section 12 of the Act II of 1913 was brought by Nazar Din's descendants within one year to contest the Collector's order.

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The result of this litigation was that the mortgagee continued in possession until 1922, when the present defendants, who are the descendants of Jiwan Khan, the "absentee" collaterals of Malle Khan, applied to the Collector under Act II of 1913 for redemption of the land. The Collector granted the application and on payment of the mortgage money, Rs. 43, put the defendants in possession.

On the 1st of October 1923 the plaintiffs, five in number, brought a suit in the Civil Court for possession of the land on the ground that the defendants, as the representatives of Jiwan Khan, had no right to redeem the land and that the Collector had erroneously granted their application under Act II of 1913. The suit was decreed by the trial Judge, and against his decree the defendants preferred an appeal to the District Judge. During the pendency of this appeal it was discovered that one of the plaintiffs, Ghazi Khan, had died two days after the institution of the suit in the trial Court, that the factum of his death had not been brought to the notice of the trial Judge, and that a decree had been passed in favour of the plaintiffs, including Ghazi Khan, deceased, in ignorance of the fact that he had died. The learned District Judge, Mr. Skemp, dismissed the defendants' appeal but added a declaration in his decree that "the decree of the trial Court was a nullity" by reason of one of the plaintiffs having died during the pendency of the suit and his representatives not having been brought on the record within the time prescribed by law for the purpose.

Against this order of the learned District Judge the plaintiffs preferred a petition for revision to this

Court, which was disposed of by a Single Bench judgment, *Sikandar Khan v. Baland Khan* (1). It was held that the order of the learned District Judge dismissing the defendants' appeal and embodying in his decree the declaration aforesaid was erroneous, and the case was sent back to him for rehearing and redecision.

Mr. Skemp having been succeeded by Mr. J. D. Anderson, the defendants' appeal was reheard by him. In a lengthy judgment the learned Judge has held that the death of Ghazi Khan during the pendency of the suit and the failure of the plaintiffs to bring his representatives on the record had resulted in the total abatement of the suit and that the decree of the trial Judge in favour of the plaintiffs was a nullity. On the merits, the learned Judge has held that it was not necessary for him to decide whether the equity of redemption in the land in dispute vested in the defendants-respondents or in the descendants of Nazar Din, as he was of opinion that that was a matter for decision between the defendants and the descendants of Nazar Din and that the plaintiffs were bound to surrender the land to the persons who were recorded as mortgagors in the revenue papers, on payment of the mortgage-money. The learned Judge has further held that the plaintiffs were estopped from denying the right of the present defendants to redeem the land, by reason of a certain admission which they had made before the Collector in the proceedings taken in 1915 on the application of Nazar Din's sons for redemption of the land under Act II of 1913. On these findings he accepted the defendants' appeal and dismissed the suit with costs.

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The plaintiffs have come up in second appeal to this Court and have assailed the findings of the learned District Judge on all the three points mentioned above.

The first question for determination is whether the suit in the trial Court has been rightly held to have abated in its entirety by reason of the death of Ghazi Khan and the failure of the plaintiffs to have his representatives substituted within 90 days. After hearing both counsel I have no doubt that the decision of the learned District Judge on this point is erroneous and cannot be sustained. The learned Judge has treated the suit as if it were one for redemption, to which all the co-mortgagees are necessary parties under Order XXXIV, rule 1, Civil Procedure Code. As one of the mortgagees, Ghazi Khan, had died and his heirs were not brought on the record, the learned Judge has held that the suit could not proceed, and had, therefore, abated in its entirety. It must be noted, however, that the present suit is *not* one for redemption by the mortgagor against the mortgagees. As stated already, it is a suit by the mortgagees, instituted under section 12 of the Redemption of Mortgages Act (Punjab), II of 1913, to get rid of the order of the Collector passed under section 10 of the Act, directing redemption to take place on payment of Rs. 43 by the defendants to the plaintiffs. It is obvious that the provisions of Order XXXIV have no application to a suit of this kind. The nature and scope of such a suit have been considered at length by Moti Sagar J. and, on appeal from his decision, by the Letters Patent Bench, in judgments which are reported as *Kaura v. Ram Chand* (1). There it was held

that a suit under section 12 was really one to get rid of the order passed by the Collector allowing, or refusing to allow, redemption and is not in form or in substance a suit for redemption. As pointed out by leRossignol J. who delivered the judgment of the Letters Patent Bench, "the suit referred to in section 12 of the Act is a suit to set aside an order of the Collector. From the very wording of that section it is clear that the cause of action for such a suit is not the original contract but the order of the Collector which aggrieves the party suing. It is a suit to establish the erroneous nature of that order." It will thus be seen that the very basis of the decision of the learned District Judge is wrong. It follows from what has been stated above that the rules which govern the impleading of parties to a suit for redemption do not apply to the suit before me. Here we find from the revenue entries that the five plaintiffs are shown as co-mortgagees, each holding a well-defined and divisible share. Each of them is "aggrieved" by the order of the Collector and under section 12 possesses an individual right "to establish the erroneous nature of that order." I fail to see how, in such a case, the death of one of the plaintiffs, Ghazi Khan, and the absence of his heirs from the record can possibly result in the abatement of the suit as a whole. Ghazi Khan's share in the land in dispute is admittedly one-fourth and the suit was one for possession of the entire land by all the five co-mortgagees. In these circumstances it must be held under the authority of the Full Bench decision in *Sant Singh & another v. Gulab Singh & others* (1), that the suit abated *qua* Ghazi Khan's one-fourth share only, but that it could proceed in respect of

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the remaining three-fourth shares held by the surviving plaintiffs. Thus the decree of the trial Judge was good in so far as it granted possession of three-fourths of the land in dispute to plaintiffs 1, 3, 4 and 5, but it was a nullity in respect of the one-fourth share of Ghazi Khan.

The decision of the learned District Judge on the merits also is vitiated by errors of law and cannot be sustained. He has held that in the present suit it is not necessary to decide whether the defendants have a subsisting interest in the equity of redemption and that this is a matter between them and the descendants of Nazar Din, to be settled in a dispute between themselves. The learned Judge has observed that as the defendants are recorded in the revenue papers as the mortgagors, therefore, they have a right of redemption unless the mortgagees can show that they are prevented by limitation or other special cause from exercising their right. In my opinion this view is erroneous. In litigation arising out of proceedings under Punjab Act II of 1913—as in a suit for redemption—a mortgagee can put the party, who seeks to redeem the mortgage, to proof of his title, unless of course such person is the original mortgagor whose title the mortgagee cannot deny on the principle that a grantee cannot deny his grantor's title. In the present case, however, as has been stated above, the defendants are not the original mortgagors, but they claim a derivative title from Malle Khan, who had created the mortgage in question in favour of the ancestors of the plaintiffs. The law applicable to such a case is thus enunciated by Ghose in his standard work on the *Law of Mortgages*, Volume I, 5th Edition, page 278: "The mortgagee may also put any person claiming derivatively

from the mortgagor to proof of his title. For he is not bound to give up the property to any person who may start up with the allegation that he has succeeded to the rights of the original mortgagor; on the contrary, it is his duty to admit no claim upon it, until assured of the title of the claimant." The learned District Judge has cited no authority in support of his conclusion and Mr. Shamair Chand for the respondent has frankly admitted his inability to support it. It is conceded that the original mortgagor Malle Khan had gifted his property, including the equity of redemption in the land in dispute, to Nazar Din, and in a suit between him and the ancestors of the defendants the gift was upheld. The defendants are bound by that decision and have, therefore, no subsisting interest in the equity of redemption, and it has not been shown how they are entitled to possession of the land on payment of the mortgage money. The mere fact that the revenue authorities had erroneously entered their names as mortgagors in the revenue papers cannot confer any title on them, in face of the clear judicial decision in the litigation of 1887.

The third ground on which the learned District Judge has dismissed the suit is that the present plaintiffs are estopped by reason of a certain admission made by them before the Collector in the course of the proceedings under Act II of 1913, which were started on the application of the descendants of Nazar Din in 1915. The alleged admission is contained in the written statement (Exhibit D. 1), which the present plaintiffs filed in those proceedings on the 22nd of July 1915, to the effect that the then applicants (the descendants of Nazar Din) had no right to

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redeem the land in the presence of the defendants, who were the heirs of the original mortgagor Malle Khan, but who, too, had lost their rights to redeem, with the result that the mortgagors (present plaintiffs) had become absolute owners of the land. The learned District Judge has held that this admission operated as estoppel against the plaintiffs, and it was no longer open to them to urge in this suit that the right to redeem vested in the descendants of Nazar Din and not in the defendants.

Now the first point to be noticed in this connection is that the plea of estoppel was not raised in the trial Court, nor is it covered by the issues. It appears to have been urged for the first time before the learned District Judge after the case had gone back to him on remand from this Court. The question is not one purely of law to be decided on facts apparent on the record, but is one, which if raised at the proper time would have necessitated further investigation. In these circumstances, the learned District Judge was not justified in allowing it to be raised at the appellate stage and basing his decree on it. But leaving this aspect of the case out of consideration, there can be no doubt that the plea is without any substance whatever. It will have been noticed that the so-called "admission" is a qualified one, and taken as a whole is not by any means an admission but is in fact a repudiation of the defendants' right to redeem the land. It is a settled rule of law that if a party wishes to have a statement made by the opposite party treated as an admission, the whole statement must be taken into consideration. It is not open to him to split up the statement and pick out the portion which may be favourable to him

and ignore the rest, *Baba Jwala Das v. Pir Sant Das & others* (1). Further, in order to sustain the plea of estoppel it must be proved that the defendants, relying on the declaration made by the plaintiffs, were misled to act to their detriment in such a manner as they would not otherwise have done. There is no allegation, much less proof, that the defendants were aware of the alleged representation made by the plaintiffs in the proceedings of 1915, or that from that time to the date when the present litigation began they had taken any action detrimental to themselves by reason of the representation supposed to have been contained in the so-called admission. I hold, therefore, that the plaintiffs were not estopped from denying the defendants' right to redeem the land.

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For the foregoing reasons I accept the appeal, set aside the judgment and decree of the learned District Judge, and in lieu thereof pass a decree in favour of Sikandar Khan, Alaf Khan, Maula Dad and Nazir Khan, plaintiffs Nos. 1, 3, 4 and 5 for possession of 3/4th of the land in dispute. The suit relating to the remaining 1/4th share has abated and is dismissed. The defendants shall be entitled to take back 3/4ths of the sum of Rs. 43 which they had deposited in accordance with the order of the Collector passed in the proceedings under Punjab Act II of 1913.

Having regard to all the circumstances I leave the parties to bear their own costs in all Courts.

*N. F. E.*

*Appeal accepted.*