GURBAKSH SINGH

v.

NIKKA SINGH

1962

September 14.

(S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.)

Second Appeal—Failure of first appellate court to give finding on question of title—Interference by High Court—Entry in revenue records—Presumption as to correctness—Code of Civil Procedure, 1908 (Act 5 of 1908), s. 100—Punjab Land Revenue Act, 1887 (Punj. 17 of 1887), ss. 37 and 44.

Teja Singh and Jhandha Singh were co-sharers in certain agricultural land. They partitioned the land taking 1 and 7 shares respectively and applied for mutation of names to the revenue authorities. In the mutation by mistake the entire land was shown against the name of Teja Singh. On discovering the mistake Jhandha Singh applied for correction of the entry. During the pendency of these proceedings Teja Singh died and his brother and heir Mula Singh sold the entire land in favour of the appellant. Mula Singh appeared before the revenue authorities and admitted the mistake. On this admission and on the report of an enquiry made into the matter by a subordinate revenue officer the authorities corrected the mistake and the correct shares of Teja Singh and Jhandha Singh were shown as 1/8 and 7/8. The appellant filed a suit for declaration of his exclusive title to the land. The trial court decreed the suit holding that the corrected mutation entry which was made on the admisson of Mula Singh after he had already sold the property was not properly made. On appeal the first appellate court upheld the decree, holding that Gurbaksh Singh was a bonafide purchaser in good faith but without giving any finding on the question of title. In second appeal the High Court reversed the findings and dismissed the suit. The appellant contended that the High Court had no jurisdiction to set aside concurrent findings of fact in second appeal and that no presumption could arise in favour of the corrected entry.

Held, that the High Court was justified in interfering in second appeal as the first appellate court had given no finding on the question of title. The finding that the appellant was a bonafide purchaser in good faith wasn ot based upon any evidence and the onus was on the transferee to show that the nransferor was the ostensible owner. The appellant had full tkowledge of the defect in the title of Mula Singh.

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Held, further, that the presumption under s. 44 of the Punjab Land Revenue Act arose that the corrected entry was true as the entry was made in accordance with law. Section 37 provided that such an entry could be made in accordance with facts proved or admitted to have occurred. Though Mula Singh's admission after he had parted with the interest in the property, could not have been relied upon, the entry was made in accordance with the facts proved before the revenue authorities by the report of the subordinate revenue officer which recited the terms of the partition also. The appellant did not adduce any evidence to rebut the presumption.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 128 of 1960.

Appeal by special leave from the judgment and decree dated November 4, 1955, of the Punjab High Court in R. S. A. No. 493 of 1950.

K. C. Sarpal, S. K. Mehta and *K. L. Mehta*, for appellant.

Anant Ram Whig and *J. B. Agarwal*, for respondent No. 1.

1962. September 14. The Judgment of the Court was delivered by

Subba Rao, J.

SUBBA RAO, J.—This appeal by special leave is filed against the judgment and decree of the High Court of Punjab, at Chandigarh, in Second Appeal No. 493 of 1950 setting aside the order of the Subordinate Judge, Amritsar, confirming that of the Revenue Officer, Amritsar, decreeing the appellant's suit.

The subject-matter of the appeal is land measuring 9 kanals and 2 marlas bearing Khasra Nos. 292 and 296 in mauza Kot Syed Mahmud,in the District of Amritsar; the previous corresponding Khasra Nos. of the land were 324 and 328. This land formed part of a larger area which originally belonged to a number of co-sharers, including Teja Singh and Jhandha Singh. There was a partition among the said co-sharers and pursuant to that partition, on April 20, 1929 an application was filed before the Revenue Authorities

for mutation of the names in accordance with the terms of the partition; and the petition was signed by all the co-sharers including Teja Singh and Jhandha Singh. It was stated in the petition, marked as Ex.D-6 in the case, that in respect of the said Khasra numbers one share should be entered in the name of Teja Singh and 7 shares in the name of Jhandha Singh. This fact is not admitted. But in the mutation that was effected on August 26, 1929 the entire extent of the said Khasra numbers was shown against Teja Singh alone. The mutation number was 960. On August 10, 1934, Jhandha Singh, discovering the mistake committed in the revenue record, applied to the Revenue Authorities for correcting the said mistake. The Revenue Authorities enquired into the matter from August 10, 1934, to October 31, 1935. The record of that enquiry discloses that Mula Singh, the brother of Teja Singh—Teja Singh died and Mula Singh was his heir—admitted the mistake made in the revenue record before the concerned authorities. That apart, they had before them a report of the enquiry made by a subordinate officer of the revenue department tracing the history of the said Khasra numbers and also giving the relevant facts, namely, the partition between the co-sharers and the joint application filed by them for mutation of their names in respect of the plots allotted to each one of them. On the material so placed before them, the Revenue Authorities corrected the mistake, and against mutation No. 1490 the correct shares of Teja Singh and Jhandha Singh, namely, 1/8 and 7/8 respectively were given. On October 24, 1934, i.e., after Jhandha Singh had filed the application for correcting the mutation No. 960, Mula Singh executed a sale deed conveying the said land bearing Khasra numbers 324 and 328 in favour of Gurbaksh Singh, the appellant, i.e., on the very date when Mula Singh had to appear before the Revenue Authorities. The appellant obtained a security bond from Mula Singh to indemnify him against any loss that might be caused to him in

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respect of the said property; he also paid the bulk of the consideration only on October 22, 1937, i.e., after three years of the sale deed. Jhandha Singh in his turn sold his 7/8 share in the said Khasra numbers, along with others, to Gopal Singh from whom Nikka Singh, the first respondent, purchased the said share by a sale deed dated October 27, 1936. The appellant filed a suit under s. 117 of the Punjab Land Revenue Act, 1887, out of which the present appeal arises, in the revenue court for a declaration of his exclusive title to the said two Khasra numbers, and in that suit Nikka Singh, the first respondent, and Mula Singh, the second respondent, were the defendants. The suit has had a chequered career and it is not necessary to trace it. It would be enough if we start with the decision of the Subordinate Judge dated February 14, 1949, to whose file the suit was transferred from the file of the revenue court by the District Judge after it was remanded by the High Court on an earlier occasion. The learned Subordinate Judge expressed his opinion on the relevant issue thus:

> ".....so far as the land in suit is concerned, Mula Singh had sold it to the plaintiff on 24th October, 1934, and any admission by him made on 10th August, 1936 would not affect the plaintiff. Under Section 37 of the Land Revenue Act, a mutation can be based either on facts proved or admitted. No facts had been proved before the Officer who attested mutation No. 1490, and Mula Singh was nobody to admit any facts in relation to land which he had sold two years before to the plaintiff. The mutation entry 1490 was therefore not properly made and I decide issue No. 11 accordingly."

It will be seen from the aforesaid observations that the learned Subordinate Judge based his finding on the assumption that the admission of Mula Singh

could not bind the appellant who purchased his property before the said admission and that there was no other evidence before the Revenue Authorities to make the mutation entry No. 1490. On appeal the learned District Judge, though he made certain observations indicating his line of thought, did not give any definite finding on the question of title, but he dismissed the appeal on the finding that the appellant was a *bona fide* purchaser in good faith. The first respondent preferred a second appeal to the High Court. The High Court held that the correction of the earlier mutation No. 960 was made with the consent of both the parties and there is a presumption attached to the correctness of the later mutation and that the appellant was fully cognizant of the real state of affairs, namely, that Mula Singh had only 1/8 share in the said Khasra numbers. On those findings, the decree of the learned Subordinate Judge was set aside and the plaintiff's suit was dismissed with costs throughout. Hence the appeal.

Learned counsel for the appellant raised before us the following points: (1) The High Court has no jurisdiction under ss. 100 and 101 of the Code of Civil Procedure to set aside concurrent findings arrived at by the two lower courts. (2) Under s. 37 of the Punjab Land Revenue Act there is a presumption in favour of an entry in the revenue record if it is made in accordance with the facts proved or admitted to have occurred; but, as in the present case the entry was corrected on the admission of Mula Singh after he transferred his interest in favour of the appellant, the said admission could not constitute a legal basis for the said entry and therefore no presumption under that section would attach to that entry.

It is true that as early as 1931 the Privy Council held that the High Court had no jurisdiction to entertain a second appeal on the ground of erroneous findings of fact however gross the error may seem to be, and the said ruling has since been followed by all the

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courts in India and accepted by this Court in a number of decisions. But in this case the learned District Judge has not given any finding on the question of title, but contented himself to dispose of the appeal on the ground that the appellant purchased the land in good faith from Mula Singh. The question of title was, therefore, left open and the High Court was certainly within its right in giving its own finding thereon.

The finding given by the learned District Judge that the appellant was a *bona fide* purchaser in good faith was not based on the evidence in the case, but was merely an *ipsi dixit*. Nor did the District Judge consider the impact of the provisions of s. 41 of the Transfer of Property Act on the facts of the case. Such a finding arrived at without evidence and without applying the correct principles of law cannot obviously bind the High Court. Section 41 of the Transfer of Property Act reads:

> "Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

The general rule is that a person cannot confer a better title than he has. This section is an exception to that rule. Being an exception, the onus certainly is on the transferee to show that the transferor was the ostensible owner of the property and that he had, after taking reasonable care to ascertain that the transferor had power to make the transfer, acted in good faith. In this case the facts are tell-tale and they establish beyond doubt that the appellant had

the knowledge that the title of his transferor was in dispute and he had taken a risk in purchasing the same. The appellant and Mula Singh belong to the same village Kot Syed Mahmud. Mula Singh sold his property to the appellant on the very date on which he had to appear before the Revenue Authorities. Though the sale deed was executed on October 24, 1934, the consideration was actually paid only three years thereafter i.e., on October 22, 1937. The appellant also took a security bond from Mula Singh to indemnify himself against any loss that might be caused to him in the property in dispute. These facts show that the appellant had knowledge of the defect in the title of Mula Singh. It is, therefore, not possible to hold that he had purchased it in good faith. The High Court, having regard to the aforesaid circumstances, held that the appellant knew that the transaction was in respect of a property of which the title was extremely doubtful. There are no permissible grounds for challenging the correctness of that finding before us in an appeal under Art. 136 of the Constitution.

Nor do we see any merits in the contention that no presumption can be drawn in favour of the correctness of the impugned entry in the revenue record on the ground that the condition given in the section are not satisfied. Section 37 of the Punjab Land Revenue Act reads:

> "Entries in records-of-rights or in annual records, except entries made in annual records by patwaris under clause (a) of section 35 with respect to undisputed acquisitions of interest referred to in that section, shall not be varied in subsequent records otherwise than by—
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>) making entries in accordance with facts proved or admitted to have occurred;
>
> (b) making such entries as are agreed to by all the parties interested therein or are supported

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by a decree or order binding on those parties;

x x x x

Section 44 says that an entry made in a record-of-rights in accordance with the law for the time being in force or in an annual record in accordance with the provisions of that Chapter and the rules thereunder, shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor. If the entry No. 1490 substituting entry No. 960 had been made in strict compliance with s. 37 of the Punjab Land Revenue Act, it cannot be disputed that there would be a presumption that the new entry was lawfully substituted for the old. In that event the old entry should yield to the new entry. This presumption is no doubt rebuttable. There is force in the contention of learned counsel that Mula Singh, having parted with the interest in the property, could not have admitted the correctness of the new entry or agreed to have the old entry corrected in the manner done so as to bind a purchaser. But that contention does not avail him in the present case as we are satisfied on a perusal of the record that mutation entry 1490 had been made in accordance with the facts proved before the Revenue Authorities. There were the following pieces of evidence before the Revenue Authorities, among others: (1) evidence of Mula Singh; (2) the report of the subordinate revenue officer with all the connected annexures, including Ex. D-6, wherein the terms of the partition were recited. On the said evidence the Revenue Authorities corrected the entry in the record in the manner they did. It must, therefore, be held that the provisions of s. 37(a) of the Punjab Land Revenue Act were satisfied. If so, there is a presumption that the later entry was correct. The appellant did not adduce any evidence to rebut the said presumption. On the other hand, Ex. D-6, the application dated April 20, 1929, for mutation of names in the revenue record, signed by all the co-sharers contained the following recital:

"Entries with respect to the following Khasra Nos. may be made in the revenue papers in the name of Teja Singh, co-sharer No. 5 to the tune of one share and Bhai Jhandha Singh co-sharer No. 2, to the tune of seven shares: 324/3.16, 328/5.06 etc.

The High Court was, therefore, right in holding that there was a presumption in favour of the correctness of the entry and the appellant had failed to rebut the same. The judgment of the High Court is correct and the appeal fails and is dismissed with costs.

Appeal dismissed.

M. S. ANIRUDHAN

v.

THE THOMCO'S BANK LTD.

(J. L. KAPUR, A. K. SARKAR AND M. HIDAYATULLAH, JJ.)

Guarantee—Surety—Alteration of terms of letter of guarantee by principal debtor—Discharge of surety's liability.

The appellant agreed to stand surety for an overdraft allowed by the respondent Bank to S. A blank form of guarantee was given by the Bank to S, who then had it filled up by the appellant stating the maximum amount which he guaranteed as Rs. 25000/-. When S brought the letter of guarantee duly signed by the appellant and himself to the Bank the latter refused to accept the guarantee up to that limit as it was not prepared to give S accommodation for a larger sum than Rs. 20000/- and wanted it to be limited to Rs. 20000/-. S then made alterations in the letter with the amount of the maximum limit corrected to Rs. 20000/- and gave it to the Bank. In a suit instituted by the Bank against the principal debtor, S, and the appellant on the basis of the contract of guarantee for Rs. 20000/-, the appellant pleaded that as the document was altered without his knowledge or consent, he was discharged from his liability.

Held, (*per* Kapur and Hidayatullah, JJ., Sarkar, J., dissenting), that the appellant was not discharged from his liability under the contract of guarantee.