

**IN THE HIGH COURT OF HIMACHAL PRADESH  
SHIMLA**

FAO No.11 of 2006.

Judgment reserved on: 29.5.2006

**Date of Decision: May 31, 2006**

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Smt. Kamla Devi & ors.

...Appellant.

**Versus.**

Anil Kumar & ors.

... Respondents.

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*Coram:*

*The Hon'ble Mr. Justice Deepak Gupta, Judge.*

*Whether approved for Reporting?*

For the Appellant(s):      **Mr. Bhupender Gupta, Sr.Advocate with  
Mr. Neeraj Gupta, Advocate.**

For the Respondent(s):      **Mr.K.S.Verma, Advocate.**

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**Deepak Gupta, J.**

The present appeal under Order 43 rule 1(u) of the Code of Civil Procedure is directed against the order passed by the Presiding Officer, Fast Track Court, Ghumarwin in Civil Appeal No.17/13 of 2004/2001 decided on 12.12.2005, whereby he has allowed the appeal and remanded the case back to the trial Court with a direction that the plaintiffs be granted one more opportunity to examine plaintiff-Joginder Singh and to produce the witnesses in rebuttal and also to tender in evidence the documents already placed on the file.

It is not necessary to give all the facts of the case. Suffice to say that the plaintiffs had filed a suit in the trial Court for a decree for permanent prohibitory injunction restraining the defendants from changing the nature of the suit land or raising any construction or extracting resin from the Cheel trees from the suit land which was previously owned by Thola Singh, predecessor-in-interest of the parties on the ground that both sides are owners in joint possession of the suit land. The suit was contested by some of the defendants on various grounds including the ground that the land had been willed by Thola Singh in their favour. Various issues were framed. The plaintiffs led evidence and close their evidence in affirmative on 31.3.1995 and statement of the counsel for the plaintiffs to this effect was recorded. Thereafter the defendants led evidence and finally the evidence of the defendants was closed on 12.1.1999 and the case was adjourned to 2.2.1999 for rebuttal evidence of the plaintiffs. On 2.2.1999, the plaintiffs filed an application to amend the plaint which application was finally dismissed on 21.8.1999 and the case was listed for rebuttal evidence of the plaintiffs on 10.9.1999. On the said date, an application for adjournment was moved by the plaintiffs on the ground that they had challenged the order of the trial Court dated 21.8.1999 in a Civil Revision filed in this Court. Adjournment was granted and the case was fixed for 27.9.1999. On 27.9.1999 also no evidence was present and again adjournment was sought. The case

was adjourned to 13.10.1999 and the plaintiffs were allowed to take Dasti summons to serve their witnesses. On 13.10.1999, two witnesses were examined in rebuttal and the plaintiff sought permission to file fresh list of witnesses in rebuttal. Permission was granted and the case was adjourned to 17.11.1999. On 17.11.1999, summons had not been received back after service and the matter was adjourned to 15.12.1999. On 15.12.1999 also witnesses were not served and the case was adjourned to 27.12.1999 as last opportunity. On the said date also again witnesses were not served and the evidence was closed by order of the Court and the case was listed for arguments on 22.2.2000.

This Court in the Civil Revision ordered that though the proceedings may continue but final judgment in the matter shall not be pronounced and the matter was adjourned from time to time. Finally the revision petition was dismissed and the judgment was pronounced on 11.5.2001 and the suit was dismissed.

Aggrieved against the dismissal of the suit, the plaintiff filed an appeal before the District Judge. Here it would be pertinent to mention that in the grounds of appeal taken before the lower appellate court though a ground was taken that the trial court had wrongly closed the evidence but there was no mention that on 27.12.1999 when the evidence was closed, the plaintiff Joginder Singh was present in person. Thereafter, an application was filed under Order 41 rule 27

CPC in which a fresh ground was raised. In this application it was stated that on 27.12.1999, the plaintiff Joginder Singh was present but his statement in rebuttal was not permitted to be recorded. This averment in my opinion is patently false. From 27.12.1999 till 11.5.2001 i.e. for a period 1-1/2 years the matter remained pending in the trial Court but no application was moved by the plaintiff-Joginder Singh that the order dated 27.12.1999 had not been correctly recorded. He did not complain that his presence has wrongly not been marked or that he was present on the said date. Even in the grounds of appeal this was not stated. It was only in the application under Order 41 rule 27 CPC that this fact has been stated. The learned lower appellate Court accepted the plea of the plaintiff and held that the evidence had wrongly been closed and directed that the plaintiff could also be examined in rebuttal. How the learned lower appellate court had come to the conclusion that the plaintiff – Joginder Singh was present on 27.12.1999 is not clear. Sanctity has to be attached to orders of the Court and court record. Unless there are very compelling reasons to disbelieve the same, the same have to be accepted to be true. The presence of the plaintiff Joginder Singh was not marked and as directed above, neither any application was moved for making his presence nor was such a ground taken in the grounds of appeal. Therefore, in my opinion, he was not present on the said date.

Order 18 Rule 3A of the Code of Civil Procedure reads as follows:-

**“3-A. Party to appear before other witnesses.** – Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.”

This provision lays down that where a party who is to appear as his own witness must appear before any other witness on his behalf has been examined, unless the Court for reasons to be recorded permits him to appear as his own witness at a later stage.

In the present case as noted above, the plaintiffs witnesses in rebuttal were examined without the plaintiff Joginder Singh seeking any permission of the Court to appear at a later stage. Even the presence of the plaintiff was not marked on any of the dates. In my opinion, after considering the entire facts and record, I am of the view that the learned lower appellate court was correct to the extent that the evidence of the plaintiffs had wrongly been closed by the order of the trial court. There was no express order of the trial Court prior to 27.12.1999 that it was the responsibility of the plaintiffs to get the witnesses served. Therefore, merely for the reason that the summons had come back unserved, the evidence of the plaintiffs could not have been closed. However, the direction of the lower appellate court that

the plaintiff Joginder Singh was present and should be permitted to appear along with his witnesses cannot be allowed since in my opinion, neither the plaintiff was present nor any permission under order 18 rule 3A was sought for.

In view of the above discussion, the judgment of the learned lower appellate court in so far as it remands the case is concerned, is upheld with the following modifications/directions:

- i) that the trial court shall permit the plaintiffs to summon the witnesses whose names are already mentioned in the list of witnesses and the plaintiffs shall not be allowed to examine any other witnesses keeping in view the fact that the plaintiffs had already been granted six opportunities to lead rebuttal evidence. The trial court shall direct the plaintiffs to take Dasti summons for the service of the unserved witnesses and it shall be the responsibility of the plaintiffs to serve them.
- ii) The plaintiff Joginder Singh shall not be permitted to appear in rebuttal in view of the fact that he has not sought permission under order 18 rule 3A CPC;
- iii) The plaintiffs shall be permitted to tender in evidence the documents which are already on record and which can be admitted to evidence without formal proof.

Parties through their learned counsel are directed to appear before the learned trial Court on 1.8.2006. The learned trial Court is directed to allow the plaintiffs to adduce their remaining evidence in rebuttal and decide the case as expeditiously as possible in any event not later than December 31.12.2007.

The registry is directed to return the records of the trial Court so as to reach there before the date fixed.

The appeal is disposed of in the aforesaid terms with no orders as to cost.

May 31, 2006.  
s.

( Deepak Gupta),  
Judge.