IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA No.97 of 1995

Reserved on: 16.4.2007

Date of decision:30.4.2007

Balku & others ... Appellants.

Versus

Kaltu (through LRs. Tikkam Ram & ors.) ... Respondents.

Coram

The Hon'ble Mr. Justice V.K.Ahuja, J.

Whether approved for reporting[1]*?*

For the appellant: **Mr.Onkar Jairath, Advocate.**

For the respondent: **Mr. K.D.Sood, Advocate with Mr. B.N.Gupta Advocate for respondent No.1(f).**

Ms. Anita Dogra, Court Guardian, for the minor LR Boby Singh.

V.K.Ahuja, J.

This Regular Second Appeal has been filed by the appellants against the judgment and decree of the Court of learned Addl. District Judge, Kullu dated 1.12.1994 dismissing the appeal of the appellants against the judgment and decree of the Court of learned Sub Judge, Ist Class, Kullu dated 25.9.1992 in a suit for permanent prohibitory and mandatory injunction and possession by way of demolition.

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[1] Whether the reporters of Local Papers may be allowed to see the Judgment?

Briefly stated, the facts of the case are that the original respondent Kaltu now represented by his Legal Representatives as plaintiffs filed a suit for permanent prohibitory and mandatory injunction as well as for possession by way of demolition as against the original defendant now represented by the present appellants. It was alleged by the plaintiff that the land comprised in Khasra No.3125 measuring 0.9.biswas is in possession of the plaintiff as owner and defendant was trying to raise a Khokha over the suit land for which he has collected construction material and he filed an application for amendment of the plaint taking the plea that during the pendency of the suit, a Khokha has been raised by the defendant for which the relief of possession by way of demolition was also claimed by the plaintiff. Defendant originally took up the plea that he has already constructed a Khokha upon a piece of govt. land adjoining the suit land. He also pleaded that he has no concern with the suit land and has not caused any interference to the plaintiff over his rights of enjoyment and possession of the suit land. In the amended written statement defendant took up the plea that the suit land was given to him by his grand father in the year 1953 who was in adverse possession of the suit land for the last 20 years. In regard to the construction it was pleaded that it has been raised in the year 1984 prior to the filing of the suit.

Issues were framed. The suit was tried by the learned trial Court who held that the defendants were interfering with the possession of the plaintiff and their plea of adverse possession or the construction having been raised over the govt. land was not accepted by the learned trial Court. These findings were affirmed

by the learned first appellate Court. The appeal has been admitted by this Court on two substantial questions of law namely, (i) whether the suit for the relief of mandatory injunction is within limitation and (ii) whether the defendant has become the owner of the suit land by way of adverse possession.

Arguments advanced by the learned counsel for the appellant were that the defendant was in possession since 1984 and the report of the Patwari was wrongly relied upon by the Courts below and the application for amendment of the plaint was also wrongly allowed by the learned trial Court. It was also submitted that the appellant was in possession of the govt. land and if the report of the Patwari goes, there is nothing on the record to prove that the construction has been raised over the suit land. It was also submitted that the suit was barred by limitation and application for appointment of Local Commissioner filed on 21.1.1993 was neither allowed nor rejected by the learned first appellate Court and there is no reference in the judgment to this application also.

On the other hand, the learned counsel for respondent No.1 submitted that the report of the Patwari appointed by the Tehsildar was accepted by both the parties and no objections were taken by either of the parties and the appellant has failed to prove his possession over the govt. land or that he had raised the construction in 1984 hence the findings of both the Courts below which are based upon the correction appreciation of evidence and law are liable to be affirmed.

Reliance was placed upon the decision in **Ishwar Dass Jain (dead) through LRs** vs. **Sohan Lal (Dead) By LRs** (2000)1

Supreme Court Cases 434 wherein the observations made are relevant and are being reproduced below:

> "Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

On appraisal of the record of the case, it is clear that the appeal was admitted on two substantial questions of law as mentioned above, which are in regard to the question whether the suit for relief of mandatory injunction was within limitation and whether the defendant has become the owner of the suit land by way of adverse possession. Further, the submissions have been made by the learned counsel for the appellant as mentioned above in regard to the question as to whether the construction was raised upon the govt. land or the suit land, report of Patwari and in regard to filing of some application before the learned first Appellate court about which there was no allegation made in the grounds of appeal which have been considered by me also. However, I may mention that this plea was raised that the application was not decided by the first appellate Court and the perusal of the record of the learned first appellate Court shows that the application under Order 26 Rule

9 was filed on 21/1/1993 to which reply was filed by the other party and since the application was filed during conciliation proceedings, the learned first appellate Court had also appointed a retired Kanungo who submitted his report which is on record of the case, but it has not been referred to in this judgment since this application was allowed during the conciliation proceedings. A perusal of the record shows that the application was considered by the learned first appellate Court who passed appropriate orders. It does not lie in the mouth of the appellants that this application remained undecided or that the case deserves to be remanded on this ground. The contention put forth is repelled being devoid of any force.

Coming to the two substantial questions of law, there are findings of both the Courts below that the construction has been raised by the respondent who claimed to have raised it in the year 1984, whereas the respondent had pleaded that it was raised in 1989 during the pendency of the suit. The learned trial Court had given its finding that the plaintiff was proved to be the owner in possession of the suit and even if the construction had been raised in 1984 as pleaded by the defendant, he was entitled to the relief of possession based upon the title of the plaintiff. The said findings were affirmed by the learned first Appellate Court who concluded that the defendants have not been in possession on any portion of the suit land prior to 1984 or the year 1989. The plaintiff's possession over the suit land was not disputed by the defendants, and since the suit was filed within 12 years of raising construction

by the defendant, the plaintiff was rightly held entitled to the relief of possession by way of demolition.

In regard to the second substantial question of law in regard to the proof of adverse possession both the Courts below have given concurrent findings that keeping in view the allegations made in the earlier written statement that that they are not in possession over the suit land and they had also pleaded that there was no interference in possession of the plaintiff over the suit land for which the courts below rightly came to the conclusion that defendant had failed to prove his adverse possession over the suit land for the last 12 years. The possession at the most can be attributed to the defendants since 1984 or 1989 which was not the statutory period of 12 years and the findings of both the courts below that the defendants have not become owners by way of adverse possession are liable to be affirmed.

In regard to the other pleas raised that the report of the Patwari was wrongly relied upon by the Courts below in coming to their conclusion, the Patwari had been appointed for giving the Tartima in pursuance of the application filed before the Tehsildar and both the parties had not disputed the said Tartima prepared by the Patwari during the course of the hearing in the present case and the presence of other defendants at the spot was also observed to be there when the land was demarcated by the Patwari. In case the defendants are claiming their possession by way of construction over the govt. land, they are certainly not affected by the relief given by the trial Court regarding the suit land and as such there is no basis in the claim preferred by the

defendants who had taken different pleas during the course of trial of the case before the Courts below. The concurrent findings of both the Courts below over all the issues are based upon correct appreciation of evidence and law and these findings do not call for any interference by this Court, therefore, the appeal filed by the appellant being devoid of any merit is hereby dismissed. A copy of judgment along with the record be sent back to the courts below. Parties to bear their own costs.

30th April, 2007 (V.K.ahuja),J.
(sds)