IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 331 of 1998.

Judgment reserved on: 19.12.2008

Date of decision:31.12.2008.

Surjan Singh ……..Appellant

Vs.

Jabbar Singh and Ors. …. Respondents.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] Yes

For the Appellants : Mr. G.D. Verma, Sr. Advocate with Mr. Romesh Verma, Advocate.

For the Respondents : Mr. Ajay Kumar, Advocate, for respondent No.1.

Kuldip Singh, Judge.

The dismissal of suit by learned Sub Judge Ist Class (II) Rohru on 23.8.1994 in Case No.15/1 of 91, upheld by learned District Judge, Shimla on 6.4.1998 in Civil Appeal No.106-S/13 of 1994 has been assailed by way of second appeal.

2. The facts in brief are that respondent No.1 filed a suit against appellant, praying therein a decree of possession in favour of respondents No.1 to 4 by pleading that land comprised in khasra No. 334, measuring 0-00-54 hect. in village Dalgaon, Tehsil Rohru, District Shimla is owned by respondents No.1 to 4. The entire khasra No.334 prior to the year 1990 was being used by villagers as footpath

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Whether the reporters of the local papers may be allowed to see the Judgment?Yes

but after the year 1990 the foot path was converted into a motorable road excluding land comprised in khasra No.334/1. In fact, motorable road passes through other land and khasra No.334 now is no more a footpath. The appellant on 11.9.1990 had forcibly encroached upon land comprised in khasra No.334/1 measuring 0-00-54 hect. without any right or title, therefore, respondent No.1 filed suit for possession against appellant.

3. The suit was contested by appellant by filing written statement. In the written statement he has pleaded that villagers of village Dalgaon in his absence and without his consent made motorable road through his land and when he objected then the villagers gave him the area of the above mentioned foot path with the consent of respondent No.1 and his sons. He has pleaded that he never encroached the suit land. He denied for want of knowledge that land comprised in khasra No.334 is owned by respondent No.1. The villagers of Dalgaon and general public have got right, title and interest to use the suit land as path. The appellant prayed for dismissal of the suit. The respondent No.1 filed replication and reiterated his stand.

4. The learned Sub Judge held that respondents are the owners of the suit land and appellant has forcibly encroached the suit land. It was held that the suit land was not exchanged with the villagers and the suit was decreed on 23.8.1994. The appellant filed appeal against the decision dated 23.8.1994 which was dismissed by learned District Judge on 6.4.1994, thereafter the appellant has filed

the second appeal which has been admitted on the following substantial questions of law:-

1. ***Whether the findings by the courts below are vitiated for want of consideration and appreciation of the pleadings of the parties?***
2. ***Whether in the absence of findings on material issues arising out of the pleadings of the parties, the findings of the courts below are liable to be set aside?***
3. ***Whether the plaintiff was competent to claim a decree for possession with respect to area in the shape of thoroughfare?***
4. ***Whether in the absence of general public the suit for possession of area shown as thoroughfare can be maintained?***
5. ***Whether in view of the admissions made by the plaintiff that the area in suit is thoroughfare, he was barred from claiming the possession thereof?***
6. ***Whether the application filed by the applicant for production of additional evidence has been wrongly rejected?***
7. ***Whether the findings by both the courts below are liable to be set aside for want of proper appreciation of the oral and documentary evidence?***
8. ***Whether in view of the entries in the current settlement in which suit land is shown as Gair mumkin and in use of public at large, the decree for possession cannot be claimed?***

5. I have heard Mr. G.D. Verma, Senior Advocate learned counsel for the appellant and Mr. Ajay Kumar, learned counsel appearing on behalf of respondent No.1 and gone through the record. It has been submitted on behalf of the appellant that the courts below have not properly appreciated the pleadings and the issues arising out of the pleadings. The respondent No.1 was not competent to claim a decree for possession, which was in the shape of a thoroughfare for general public who was not impleaded as party in the suit. The application for additional evidence filed by the appellant was wrongly rejected. The oral and documentary evidence has not been properly appreciated. The suit land in the revenue record has been shown in the use of public, therefore, the suit for possession filed by respondent No.1 was misconceived. The learned counsel for respondent No.1 while supporting the impugned judgment, decree has submitted that appellant in his written statement has projected the case that the suit land was given to him by the villagers as well as by respondent No.1 and his sons which he has miserably failed to prove. The respondents have proved their ownership of the suit land and therefore, on the basis of title, they are entitled to possession in absence of proof of better title by the appellant, which he has not proved. The appellant in the written statement has not taken the objection of maintainability of suit for want of necessary party especially the general public. The appellant has not pleaded use of public path on the suit land by way of

easement, custom, grant or otherwise. He has submitted for dismissal of the appeal.

Substantial Questions of Law No.1,2 and 7

6. The substantial questions of law 1,2, and 7 are taken up together as these are interconnected. The respondent No.1 had filed the suit against appellant, praying for a decree of possession in favour of respondents on the basis of title. In the written statement the appellant has denied the ownership of respondent No.1 of the suit land for want of knowledge but simultaneously he has pleaded that the suit land was given to him by villagers with the consent of respondent No.1 and his sons. In other words, the appellant has admitted the ownership of respondent No.1on the suit land when he has pleaded the suit land was given to him with the consent of respondent No.1. In jamabandi Ex.PW-1/B respondent No.1 has been shown as one of the owners of khasra No.334. In misal hakiyat jadid Ex.DC respondent No.1 has again been shown as one of the owners. Thus, the ownership of appellant on khasra No.334 has been proved. No doubt in jamabandi Ex.PW-1/B and missal hakiyat jadid Ex.DC, khasra No.334 has been shown “Share-Aam”. In the written statement, the appellant has indicated that the suit land was being used as path by the villagers but he has not pleaded under what right such as easement, custom, grant etc., the villagers had been using the suit land as a path. He has not specifically pleaded his independent right or user of suit land as path by way of easement, or custom or grant etc. The parties were aware of case of the opposite side. In these circumstances non-framing of any specific

issue has not caused any prejudice to any party. It is not the case of the appellant that in absence of specific issue he was misled to defend his case. At the time of hearing learned counsel for the appellant has not pointed out what specific pleadings were not appreciated and considered by the two Courts below. No issue of easement, custom etc. emerges from the pleadings of the parties regarding the user of path by the villagers, therefore, it cannot be said that proper issues were not framed by the trial Court. The learned counsel for the appellant has submitted that tatima showing the suit land has not been prepared by proper demarcation and therefore cannot be relied for identifying the suit land. He has relied ***LHLJ 2008(HP) 484 Salig Ram and Ors. Vs. Ram Lal and Ors.*** in support of his contention on the point of demarcation. In the present case identification of the suit land was not disputed in the pleadings of the parties. Therefore, ***LHLJ 2008(HP) 484*** supra is not applicable in the facts and circumstances of the case. It has not been pointed out on behalf of appellant what material evidence has been ignored by the two Courts below while decreeing the suit. It has also not been pointed out that some inadmissible evidence has been considered by the two Courts below and on that basis relief has been granted to respondent No.1. The substantial questions of law 1,2 and 7 in these circumstances are decided against the appellant.

Substantial Questions of Law No.3,5 and 8

7. The substantial questions of law 3,5 and 8 are taken up together as these are interconnected. The appellant has not taken up any specific plea with respect to his own right to use suit land as path

nor he has pleaded under what right the villagers had been using the suit land as path. Innocuous entry of "Share Aam" in the revenue record pertaining to suit land without any specific pleadings and proof indicating how 'Share Aam " right was created in favour of general public or appellant would not give any right to the appellant and villagers to use the suit land as path. The learned counsel for the appellant has relied ***Bahal Singh and others vs. Mohammad Yusuf and others AIR 1929 Allahabad 504*** , wherein it has been held that the passing of the public does not confer a right of easement on the public. This judgment supports the case of respondent No.1 more in comparison to appellant. Mr. Verma has also relied ***Halim Mohammed and others vs. Commr. of Cuttak Municipality and others AIR 1956 Orissa 92,*** wherein it has been held that a right of way vesting in a person or body of persons, over another man's land is not inconsistent with the title to the land remaining in the owner, such a right of passage can be created by grant or by dedication. There is no whisper in the written statement of appellant that the suit land was given to the villagers by way of grant or dedication by respondent No.1. It is significant to note that respondent No.1 is a co-owner of the suit land. The appellant has not taken a plea in defence that the suit land was dedicated or granted to the villagers by the owners by way of grant or dedication, therefore, ***Halim Mohammed*** supra is not applicable in the present case. ***Ranjit Singh and others vs. Ram Nath Singh and others AIR 1976 Allahabad 417*** has been relied by the appellant for the proposition that the right to use a public highway is not an easement but the right

to use the path way is an incident of public right over it. In that case, plaintiffs case was that their house abutted on the pathway in question and that their right to egress or ingress is towards the path way and their such right was affected by encroachment. On those facts the Court has held that the plaintiffs can sue for removable of the obstruction interrupting that right. In the present case no such right has been pleaded by the appellant, rather his case is that alternative path has been created and he threatened to close that alternative path in case he is ejected from the suit land. In the facts and circumstances of the case ***Ranjit Singh and others vs. Ram Nath Singh and others AIR 1976 Allahabad 417*** is not applicable. The respondent No.1 has stated that after the construction of the motorable road the suit land is no more a public path. On the contrary appellant has pleaded that after the construction of the motorable road through his land the suit land was given to him by villagers as well as respondent No.1 and his sons. In other words, the appellant has himself projected the case that after the construction of the motorable road the suit land is no more a thoroughfare, rather it was given to him. How the villagers could give the suit land to him that has not been explained, similarly transfer of the land by respondent No.1 and his sons in favour of appellant has also not been proved. The substantial questions of law 3,5 and 8 are decided against the appellant.

Substantial Question of Law No.4

8. The appellant has not taken any objection in the written statement that the suit is bad for non-joinder of necessary party

namely General Public. There is no issue to this effect. Order 1 rule 9 provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Hence, substantial question of law No.4 is decided against the appellant.

Substantial Question of Law No.6

9. The Suit was filed on 20.3.1991. The appellant filed written statement on 22.7.1991. The appellant filed an application under Order 41 Rule 27 CPC in the Ist Appellate Court on 4.10.1994 seeking permission to prove writing dated 8.5.1991, which was allegedly written at the instance of respondent No.1. The application under Order 41 Rule 27 CPC can be allowed only within the parameters provided under Order 41 Rule 27 CPC. In the application it has been stated that the writing dated 8.5.1991 could not be brought on record due inadvertence and ignorance. The writing was in possession of Amar Singh. It has not been stated in the application when the writing came in possession of appellant. The writing dated 8.5.1991 has not been pleaded in the written statement filed by appellant. The appellant while in witness box has emphatically denied that any writing was executed for giving the suit land to him. The learned Ist Appellate Court has considered the application under Order 41 Rule 27 CPC and has recorded a finding that writing is not genuine. The explanation given by the appellant for not producing the writing earlier is not believable. The learned lower Appellate Court has rightly rejected the application for additional

evidence, hence substantial question of law No.6 is decided against the appellant.

10. The two Courts below have rightly appreciated the material on record. The two Courts below have recorded concurrent findings of facts. The appellant has failed to make out any case so as to take contrary view on the basis of substantial question of law referred above which have already been decided against the appellant.

11. No other point was urged.

12. The result of above discussion, the appeal fails and is accordingly dismissed.

(Kuldip Singh)
Judge.

December 31, 2007
(sks)