

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.295 of 1998.

Reserved on:08.12.2008.

Decided on: 31.12.2008.

Padam Ram

...Appellant.

VERSUS

State of H.P. & Anr.

....Respondents.

Coram

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

Whether approved for reporting?¹ No

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

**For the respondents: Mr A.K.Bansal, Addl.A.G., for
respondent No.1.**

**Mr.Virender K.Verma, Advocate for
respondent No.2.**

Kuldip Singh, Judge.

This appeal has been directed against the judgment, decree dated 30.5.1998 passed by learned District Judge, Kinnaur Civil Division at Rampur Bushahr in Civil Appeal No.108 of 1996 dismissing the first appeal of the appellant against the judgment, decree dated 2.8.1996 passed by learned Sub Judge 1st Class, Rampur in Civil Suit No.90-1 of 1991.

Whether the reporters of the local papers maybe allowed to see the judgment? Yes

2. The facts, in brief, are that appellant filed a suit for declaration that the revenue entries showing respondent No.1 as owner in possession of land comprised in Khasra No.18/1 chack Narkanda, as per Tatima (for short 'the suit property') is wrong and contrary to facts. He prayed consequential relief of permanent prohibitory injunction restraining respondents No.1 and 2 from dispossessing him and his tenants from the suit property and from demanding rent from appellant and his tenants.

3. The further pleaded case of the appellant is that he purchased land and double storey house from Chet Ram in July 1982 in consideration of Rs.9000. The memorandum of past transaction was written and executed by Chet Ram on 21.7.1982 in favour of the appellant. The appellant is coming in open, continuous and exclusive possession of the aforesaid property from the time of sale.

4. It is also the case of the appellant that in the year 1983 he demolished the old house and started construction of RCC building in the year 1984. The Patwari on the basis of wrong revenue entries prepared a report for ejectment of appellant from the suit property. On the basis of report of the Patwari the Assistant Collector 1st Grade, Kumarsain (for short 'Assistant Collector') passed an order of ejectment against

appellant from the suit property. The appeal filed by appellant was dismissed by Sub Divisional Collector on 27.5.1985. The appellant thereupon filed suit No.97/1 of 1987 for declaration against respondent No.1 which was dismissed for non appearance on 4.5.1989. The revenue entries showing respondent No.1 as owner in possession of Khasra No.18/1 measuring 2 biswas are wrong and contrary to facts.

5. Chet Ram had constructed double storey structure on Khasra No.18/1 measuring 2 biswas more than 40 years ago. Chet Ram and appellant became owners of the suit property by adverse possession. The appellant was put in possession of the suit property by Chet Ram on the basis of sale.

6. The appellant had leased out a portion of the premises to his tenants. The respondent No.2 had threatened the tenants and claimed rent from them. A notice under Section 80 CPC was served on respondent No.1 and thereafter the suit was filed.

7. The respondent No.1 contested the suit by filing a written statement and took preliminary objections of res-judicata, lack of cause of action, the suit has become infructuous as the possession of the suit property was

delivered to respondent No.2 on 22.7.1991 and the accommodation was allotted to tenants. The respondent No.2 is realizing the rent from the tenants, civil Court has no jurisdiction in view of Section 171 of the H.P. Land Revenue Act (for short 'the Act'). No legal notice under Section 80 CPC was given, the suit has not been properly valued for the purposes of Court fee and jurisdiction. The suit is barred in view of order dated 27.4.1989 passed by learned Sub Judge Rampur in Civil Suit No.97/1 of 1987. On merits, the respondent No.1 denied the case of the appellant. It has been pleaded that appellant had encroached the suit property in the year 1985. The appellant on 10.4.1986 appeared before the Assistant Collector where he stated that he would vacate the land in case the suit property is found to be owned by respondent No.1. The appellant filed civil Suit No.97/1 of 1987 which was dismissed on 4.5.1989. In pursuance of warrant of ejectment the appellant was ejected from the land and the house and the possession of the building was handed over to respondent No.2 on 22.7.1991.

8. The respondent No.2 filed separate written statement and contested the suit by taking preliminary objections that the suit is barred in view of the dismissal of the earlier suit filed by the appellant for want of prosecution.

The appellant has been ejected from the suit property in pursuance of warrant of ejectment dated 22.7.1991 and respondent No.2 is in possession of the suit property. The claim of the appellant was also denied on merits. The appellant filed replication to the written statement of respondent No.1 and reiterated the case. The following issues were framed by the trial Court:-

- i) Whether the plaintiff is owner in possession of the suit land by way of purchase, as alleged? OPP
- ii) Whether the entries in the revenue records are incorrect and against the facts? OPP
- iii) Whether the plaintiff is entitled to the relief of injunction, as prayed? OPP
- iv) Whether the suit is barred by principle of resjudicata? OPD
- v) Whether the suit has become infructuous as the possession has already been delivered to NAC Narkanda? OPD
- vi) Whether this Court has jurisdiction to try the suit? OPP

- vii) Whether a valid notice under Section 80 CPC has been issued, if not, its effect? OPP
- viii) Whether the suit has been properly valued for the purposes of Court fee and jurisdiction? OPP
- ix) Whether similar suit No.97-1 of 1987 of the plaintiff was dismissed by this Court on 27.4.1989 for non-prosecution? OPD
- x) Relief.

The issues No.2, 4, 6, 7 and 9 were answered in affirmative and other issues in negative and ultimately the suit was dismissed on 2.8.1996. The appeal filed by appellant in the lower appellate Court also met the same fate on 30.5.1998. Thereupon, the appellant has filed the present appeal which has been admitted on the following substantial questions of law:-

- i) *Whether Shri Chet Ram, predecessor of the appellant, having acquired ownership over suit land by way of adverse possession could not pass on to the properties in suit to the appellant without registered deed?*

- ii) *Whether the appellant having been found in possession of the suit land is entitled to the relief of injunction and he cannot be dis-possessed except through due process of law?*
- iii) *Whether the findings as recorded by learned Sub Judge below in favour of appellant and his predecessor could not be upset by learned District Judge in the absence of any challenge thereto by way of filing cross-objections and cross appeal?*
- iv) *Whether learned District Judge below has exceeded his jurisdiction by upsetting findings as recorded by the learned Sub Judge in favour of the appellant?*
- v) *Whether there has been misreading and mis-appreciation of pleadings of the parties as well as oral and documentary evidence on record?*
- vi) *Whether the plea of adverse possession having not been raised before revenue Court can be raised before the Civil Court or not?*

9. I have heard Mr.G.D.Verma, Senior Advocate assisted by Mr.Romesh Verma, Advocate appearing on behalf

of the appellant, Mr.Anshul Bansal, learned Additional Advocate General for respondent No.1 and Mr.Virender Kumar Verma, learned counsel for respondent No.2 and gone through the record. It has been submitted by Mr.Verma on behalf of the appellant that the two Courts below have not properly appreciated the material on record, the findings recorded by trial Court could not have been reversed by learned District Judge in absence of challenge to such findings by way of cross objections or cross appeal. The appellant having been found in possession of the suit property is entitled to protect his possession and he cannot be dispossessed except in due process of law. The sale of the suit property made by Chet Ram in favour of appellant has not been legally construed. The plea of adverse possession was not raised before the revenue Court and, therefore, it could be legally raised in the Civil Court. He has ultimately submitted that the two Courts below have misconstrued and misinterpreted the pleadings as well as oral and documentary evidence of the parties. The learned counsel for the respondents have supported the impugned judgment, decree and submitted for dismissal of the appeal.

SUBSTANTIAL QUESTION OF LAW No.(i):

10. The appellant has claimed ownership of the suit property on the basis of sale made by Chet Ram of suit property in his favour for a consideration of Rs.9000 in July 1982. The sale of the nature pleaded by appellant requires registration but no such document has been placed and proved on record, hence, sale of the suit property by Chet Ram in favour of appellant has not been established. The appellant has not claimed the suit property from Chet Ram as his successor, rather his plea is that of purchase of the suit property by him from Chet Ram which has already been rejected. Therefore, alleged adverse possession of Chet Ram, a trespasser, cannot be tagged with the possession of appellant of the suit property. According to the appellant, he purchased the suit property in the year 1982 and the suit was filed by him in the year 1991. In these circumstances, there is no question of adverse possession of appellant against the respondents. Accordingly, substantial question of law No.(i) is decided against the appellant.

SUBSTANTIAL QUESTION OF LAW No.(ii):

11. The appellant claims himself to be in possession of the suit property comprised in Khasra No.18/1 measuring 2 biswas having built up structure thereon. The respondent No.1 has taken a stand that in pursuance of the ejectment

proceedings the appellant was ejected from the suit property and possession of the suit property was handed over to respondent No.2 on 22.7.1991. PW-1 Kewal Ram, Special Power of Attorney holder of appellant, has admitted in his statement that Tehsildar Kumarsain had passed ejectment order against the appellant. DW-2 Surat Ram, Retired Kanungo, has stated that he remained posted as Field Kanungo, Kotgarh from 1988 to 1991. He was deputed to execute warrant of possession against appellant and he was ejected by executing the warrant Ext.DW-2/F on 22.7.1991 from land comprised in Khasra No.18/1 measuring 2 biswas. The warrant was executed vide report dated 22.7.1991 Ext.DW-2/D and receipt of possession dated 22.7.1991 Ext.DW-2/E was given by Secretary Notified Area Committed, Narkanda. DW-3 Yashpal, Secretary, Nagar Panchayat, Narkanda, has stated that on 22.7.1991 he was on the spot and the Kanungo handed over the possession of the house which was constructed by appellant on the Government land. The three tenants, who were in the building, applied that they be not evicted and they would pay the rent to Notified Area Committee. It is, thus, clear that on 22.7.1991 the appellant was ejected from the suit property which was handed over to respondent No.2. There is nothing in the plaint how after

22.7.1991 appellant came in possession of the suit property. The appellant was evicted from the suit property by due process of law. On the date of filing of the suit he was not in possession of the suit property, therefore, the appellant is not entitled to protect his alleged possession on the suit property. The substantial question of law No.(ii) is decided against the appellant.

SUBSTANTIAL QUESTIONS OF LAW No.(iii) & (iv):

12. The substantial questions of law No.(iii) and (iv) are interconnected and, therefore, both these questions are being considered collectively. The learned Sub Judge while considering issues No.4 and 9 has held that suit is barred under Order 2 Rule 2 and Order 9 Rule 9 CPC but has held that appellant had acquired title by way of adverse possession. The suit was dismissed on 2.8.1996. The appellant filed appeal against the judgment, decree dated 2.8.1996. There was no decree against the respondents, only some findings were against the respondents. It is settled law that appeal lies against the decree and not against the findings. Therefore, the respondents could not file appeal against the judgment, decree dated 2.8.1996. The respondents were within their right to support the decree and

the lower appellate Court had jurisdiction under Rule 33 Order 41 CPC to make such further or other decree as per the proved case. The first appellate Court in the impugned judgment has noticed that respondents have not filed any counter appeal or cross objections. In other words, the first appellate Court was aware that respondents have not filed any appeal against the judgment, decree dated 2.6.1996 and only thereafter reversed the findings of trial Court on issues No.3 and 10. The learned first appellate Court has rightly exercised powers vested in it under Rule 33 Order 41 CPC in reversing erroneous findings in favour of appellant on adverse possession returned by trial Court. The first appellate Court in these circumstances has rightly set aside the conclusion of trial Court on issues No.3 and 10 by holding that appellant has not acquired adverse possession on the suit property. The ejectment order was passed against the appellant regarding suit property under Section 163 of the Act and the order was executed on the spot on 22.7.1991. The substantial questions of law No.(iii) and (iv) are decided against the appellant.

SUBSTANTIAL QUESTION OF LAW No.(v):

13. At the time of hearing of the appeal, no specific pleading, oral and documentary evidence has been pointed

out on behalf of the appellant which has been misread and mis-appreciated by the Courts below. The appellant filed the suit for injunction restraining the respondents from interfering in the possession of the appellant on Khasra No.18/1 and dispossessing him as well as his tenants from that land. The appellant has pleaded in the plaint that Assistant Collector has passed an ejectment order against him regarding land comprised in Khasra No.18/1, he filed appeal which was dismissed by Sub Divisional Collector on 27.5.1985. He then filed civil suit No.97/1 of 1987 for declaration which was dismissed in default on 4.5.1989. Thereafter, the appellant has filed the present suit. The earlier suit of the appellant was dismissed in default. In the present suit, the appellant has raised the same controversy, hence, the subsequent suit out of which the present appeal has arisen is not maintainable. The ejectment order passed against the appellant under Section 163 of the Act and its execution is a bar to grant relief to the appellant in the present case. The learned counsel for the appellant has failed to make out any case of misreading and mis-appreciation of pleadings, oral and documentary evidence. Hence, substantial question of law No.(v) is decided against the appellant.

SUBSTANTIAL QUESTION OF LAW No.(vi):

14. The appellant has failed to prove his adverse possession on the suit property against the respondent, as noticed above. On merits, adverse possession of appellant on the suit property has not been established, hence, substantial question of law No.(vi) is decided against the appellant.

15. No other point was urged.

16. The result of the above discussion, the appeal fails and is accordingly dismissed with costs.

December 31, 2008.
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(Kuldip Singh), J.