

# IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 127 of 2000

Reserved on: 15.12.2010

Date of decision : 31.12.2010.

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Sohan Lal and others

...Appellants.

Versus

Jagdish Chand and another

...Respondents.

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## ***Coram***

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

*Whether approved for reporting?*<sup>1</sup>

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

For the respondent No.1: Mr. Arun Kumar, Advocate.

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## **Deepak Gupta, J.**

1. This Regular Second Appeal is directed against the judgement and decree dated 3<sup>rd</sup> May, 1999 delivered by the learned District Judge, Bilaspur in Civil Appeal No. 25 of 1993 whereby he dismissed the appeal of defendants No. 1 and 2 and upheld the judgement and decree of the learned trial Court decreeing the suit of the plaintiff.
2. Briefly stated the facts of the case are that the plaintiff filed a suit claiming to be owner in possession of land measuring 2-5 bighas comprised in Khewat No. 34 min, Khatauni No. 53, Khasra No. 61 situated in village Ghumarwin. According to them the entries in the revenue

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<sup>1</sup> ***Whether the reporters of the local papers may be allowed to see the Judgment? yes.***

record showing the defendants to be in possession as non-occupancy tenant are wrong, null and void. It was further pleaded that the suit land is a grass land and therefore, the entries showing defendants No. 1 and 2 to be in possession as non-occupancy tenant is against law since no person can be a tenant of grass land. It was alleged that the defendants have never been inducted as tenants over the suit land.

3. Defendants 1 and 2 contested the suit on various grounds but on facts it was stated that defendant No.3 Tulsi Ram alongwith Bohtu Devi was owner in possession of the suit land. According to the defendants their father Beli Ram came in possession of the suit land and brought it under cultivation after changing the nature of the land in the year 1950. Since then their father remained in possession of the suit land till the year 1960 and thereafter it was the defendants No. 1 and 2 who were coming in peaceful, continuous and open possession of the land as land owners till date. They, therefore, claimed that they had become owners of the land by way of adverse possession. A counter claim was also filed by defendants No. 1 and 2 and they prayed that a decree be passed declaring that they had become owners in possession of the suit land by way of adverse possession. Defendant No.3 supported defendants No. 1 and 2 and stated that even before executing the gift deed of the property in question in favour of the plaintiff the defendants No. 1 and 2 were already in adverse possession

of the same. In written statement to the counter claim the plaintiff again denied that the defendants were in possession of the suit land.

4. On the pleadings of the parties the following issues were framed:-

1. Whether the plaintiff is owner in possession of suit land? OPP
2. Whether the entry recording the defendants in possession as non-occupancy tenants is wrong, null and void? OPP
3. Whether the defendants have become owners of the suit land by virtue of adverse possession? OPD.
4. Whether the gift deed executed by defendants No.3 in favour of the plaintiff is wrong, illegal, null and void? OPD.
5. Whether the defendants are entitled to a decree for declaration and permanent injunction? OPD.
6. Whether the plaintiff is estopped to file the present suit by his act and conducts? OPD.
7. Relief.

5. Normally, this Court in second appeal would not examine the evidence in detail but I am constrained to observe that the learned lower Appellate Court totally abdicated its duties and just upheld the findings of the learned lower Court without proper discussion of the evidence. Therefore, I have gone through the evidence also.

6. According to PW-1, the disputed land is in possession of the plaintiff and the defendants No. 1 and 2 never

remained in possession of the same. According to him, entries in the revenue record showing the defendants to be in possession are wrong. Two separate versions have been given as to how the land came to be owned by them. PW-1 states that this land had been inherited from Tulsi Ram. This apparently cannot be correct since Tulsi Ram was alive and defendant No.3 in the suit. The other plea set up is that this property was gifted to them by Tulsi Ram in the year 1963. This is the only oral evidence led by the plaintiff.

7. Dhani Ram appeared as DW-1. According to him the land in question was earlier owned by Tulsi Ram and Bohtu Devi and in the year 1953 their father Beli Ram came into possession of the land. The land earlier was uncultivated but Beli Ram made it cultivable. Thereafter, Beli Ram continued in possession of the land without any objection from any person. After the death of Beli Ram defendants No. 1 and 2 remained in possession and continue to be in possession of the land. Nobody interfered in their possession and it was open and hostile. He also stated that they are the owners of the land in question. In cross-examination the witness stated that he does not know how plaintiff Jagdish Chand came into possession of the land. However, in the next sentence he admits that the plaintiff is the owner of the land. He, however, denied that the land is uncultivable. According to him, the land consists of seven fields and he has given detailed description of the land. DW-2 is a co-villager and according to him it is the

defendants who are coming in possession of the suit land. Defendant No.3 has also appeared as his own witness. According to him, he was owner of the property and he had given the property to Beli Ram and thereafter defendants No. 1 and 2 were coming in possession of the property. According to him even when he had gifted the property to the plaintiff the same remained in the possession of the defendants. He also states that earlier the land was uncultivable but Beli Ram by his efforts started cultivating the same. After Beli Ram the defendants No. 1 and 2 are coming in possession of the land.

8. It also stands proved on record that defendant No.3 had earlier filed a suit for cancellation of the gift deed but the same was dismissed as withdrawn with liberty to file afresh suit but no such suit was filed. This is apparent from documents Ext.PX, PY and PZ. Though this appeal has been admitted on a number of questions of law but after hearing the matter I am of the opinion that only the following questions of law arise in this appeal:-

- 1) Whether the plaintiff has been able to rebut the presumption of truth attached to long standing entries in the revenue record?
- 2) Whether the defendants No. 1 and 2 are not bound by document Ext.PZ since they were not parties to the earlier suit.
- 3) Whether the defendants No. 1 and 2 have been able to establish that they are in adverse possession of the suit property?

9. Ext.D-3 is the Jamabandi for the year 1957-58. In the column of ownership defendant No.3 Tulsi Ram and Bohtu Devi are shown to be owners. In the column of cultivation Tulsi Ram co-owner has been shown to be in cultivation through Beli Ram S/o Moti as gair maurusi. The entry in the column of rent reads as follows:- "Bila Lagan Bawazaha Tasawar Malqiyat Khud"; meaning that no rent was being paid and the person in possession claimed to be owner of the land. The quality of land is Barani (Cultivable).
10. Ext.D-2 is the copy of Khasra Gardawari 1962 to 1966. This shows that defendants No. 1 and 2 were in possession of the property. The land is shown as Barani. In the entry for the Kharif crop for the year 1962 it is shown that maize was sown and in the Rabi crop wheat was sown. Similar entries were there for 1963 and the first part of 1964. For two seasons the land is shown to be empty and thereafter gram has been sown. The only revenue record placed on record by the plaintiff is Ext.PZ/1, which is the misal haqiat for the year 1987-88 in which the plaintiff Jagdish Chand is shown as owner and Lekh Ram and Dhani Ram, defendants No.1 and 2 are shown in occupation. The entry in the column of rent is again "Bila Lagan Bawazaha Tasawar Malqiyat Khud." In this misal haqiat the land is described as Banjar Kadeem.
11. The perusal of the entire record shows that throughout defendants No. 1 and 2 or their predecessor-in-interest have been shown in possession of the property.

The plaintiff has never been shown in possession of the property. Therefore, the case set up by the plaintiff that he is in possession of the property is not supported by the revenue records. Other than examining himself the plaintiff led no other evidence. The defendants on the other hand have examined two other witnesses who have clearly stated that the property in dispute is in the possession of the defendants. The plaintiff has miserably failed to discharge the onus which was on him to rebut the presumption of truth which was attached to the long standing entries in the revenue record showing the defendants No. 1 and 2 and their predecessor-in-interest to be in possession of the suit land. Therefore, the findings of the courts below that the plaintiff is in possession of the suit land are totally perverse and against the entire revenue records placed on record and are accordingly set-aside.

12. The next question which arises is whether the possession of the defendants was hostile to the owners and has matured into title. The plaintiff in this regard has made two fold submissions. It is urged on behalf of the plaintiff that the predecessor-in-interest of defendants No. 1 and 2 was inducted into the land by defendant No.3 Tulsi Ram and therefore, the possession being permissive could not become hostile. It is further submitted that since the defendant while appearing in the witness box has admitted the ownership of the plaintiff they cannot claim adverse possession. It is argued by Shri Arun Kumar, learned counsel

for the plaintiff-respondent that mere possession of the defendants and non payment of rent or discontinuance of payment of rent would not amount to the defendants being in adverse possession and in this regard he has relied upon the judgement of the Lahore High Court in **Sohawa Singh vs. Kesar Singh and others, AIR 1932 Lahore 586**. It would be pertinent to mention that in the very same judgement it has also been laid down that presumption of truth is attached to revenue entries. In that case also the revenue entries wherein the person in occupation had asserted his ownership were "Bawaja taswar malkiyat khud". The Lahore High Court held that after such entries were made the adverse title would begin at the end of the year at which year entries were made. In that case the plea of the plaintiff that he had become owner by way of adverse possession was rejected on the ground that notice for ejectment was given within 12 years of the possession become hostile. Therefore, this authority does not support the respondent.

13. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly and impliedly in denial of the title of the true owner. Such possession must be by a person who does not acknowledge the rights of other but denies them. The party claiming to hold the immovable property adversely must at least go on to prove that it was in denial of the owner's title and that he excluded him from the enjoyment of the property. If the



possession is hostile, notorious and exclusive so that the owner could perceive the same it will be termed to be adverse to the true owner. It is also well settled law that permissive possession will not become hostile till there is an assertion of the adverse possession to the knowledge of the owner.

14. In the present case, even assuming that defendant No.3 Tulsi Ram had originally given the land to the father of defendants No. 1 and 2 and the initial possession was permissive, the entries in the revenue record clearly show that the father as well as defendants No. 1 and 2 asserted their ownership and denied the ownership of the plaintiff. The entry made in the column of rent Bila Lagan Bawazaha Tasawar Malqiyat Khud. These entries were never challenged by the plaintiff or the predecessor-in-interest of the plaintiff. Here we are dealing with a case where the parties reside in a village and are expected to know about the entries in the revenue record. Most importantly, even according to the plaintiff he got the land by way of gift from defendant No.3 and mutation in this regard was attested. When he got the mutation attested and got his name entered in the column of ownership what prevented him from getting the entries in favour of defendants removed and it must be presumed that at the time of mutation he knew about the entries in favour of the defendants. The plaintiff cannot be heard to argue that he was unaware of such entry since he himself had got the mutation attested.

15. Another important factor is that even according to the plaintiff the defendants never paid any rent. If the defendants were not paying rent it was for the plaintiff to explain in what capacity the defendants were in possession of the land. The plaintiff has miserably failed to give any explanation in this regard. The silence of the plaintiff from 1963 when the alleged gift deed was made in his favour till the suit was filed in the year 1986 is itself evidence of the fact that he took no steps for all these years to get back possession of the land from the defendants.
16. There is material on record to show that the defendants were not only in possession of the land but they were cultivating the same and harvesting crops on the same. There is no material on record to support the stand of the plaintiff that the land in question is ghasnee land and therefore uncultivable.
17. In view of the above discussion, I am of the considered view that both the Courts below have gravely erred in deciding the case. There has been total misreading of the oral and documentary evidence which has led to perverse findings calling for interference in second appeal. The three questions of law are decided in favour of defendants No. 1 and 2 and against the plaintiff. In view of the above discussion, the judgement and decree of both the Courts below are set-aside and the suit of the plaintiff is dismissed. The counter claim of the appellants-defendants No.1 and 2 is allowed and it is declared that the appellants-

defendants No. 1 and 2 are owners in possession of the suit land and consequently the plaintiff is restrained from interfering in the same. No order as to costs.

**31<sup>st</sup> December, 2010**  
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**( Deepak Gupta )**  
***Judge.***