IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 582 of 2000

Reserved on: 31.12.2009

Date of decision: 26.02.2010

Damodar Dass and another ... Appellants

Versus

Fateh Chand and others … Respondents

Coram :

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

Whether approved for reporting?[1] No.

For the appellants: Mr. Ramakant Sharma, Advocate.

For the respondent: Mr. Surender Saklani, Advocate.

V.K. Ahuja, J. :

This is a Regular Second Appeal under Section 100 C.P.C. filed by the appellants against the judgment and decree of the Court of learned Additional District Judge, Mandi, dated 31.7.2000, vide which he dismissed the appeal filed by the appellants and the judgment and decree passed by the Court of learned Sub Judge Ist Class, Sarkaghat, dated 1.11.1995, dismissing the suit of the appellants for permanent injunction was affirmed.

Briefly stated, the facts of the case are that the appellants hereinafter also referred to as 'the plaintiffs' filed a suit for permanent injunction as against the respondents hereinafter also referred to as 'the defendants'. The plaintiffs alleged that the suit land

[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

comprised in Khasra No. 1073 measuring 0-80-62 hectares is in the ownership of State of H.P. but is in the possession of the plaintiffs as they have been conferred grass cutting rights in respect of the suit land. It was further alleged that the defendants have no right, title and interest in the suit land and they forcibly entered into their suit land grazing their cattle and also cut the grass from the suit land without any right. It was further alleged that the defendants cut the grass from the suit land on 27.6.1993. In the proceedings under Section 107/150 Cr.P.C., defendant Fateh Chand made a statement that he shall not interfere in the suit land i.e. Khasra No. 1073. The plaintiffs filed the suit since the defendants are interfering in their possession by forcibly cutting the grass from the suit land, hence the suit filed by them.

Defendants in their written statement denied that the plaintiffs have been conferred any grass cutting right or are in possession of the suit land. Defendant Fateh Chand is in possession of Khasra No. 1073 shown as 1073/1 measuring 0-32-04 hectares for the last more than 40 years, which possession is adverse, open, peaceful and hostile to everybody including the State of Himachal Pradesh. It was further pleaded that defendant Fateh Chand has made fields therein and is in cultivating possession. Hence, the suit for injunction is liable to be dismissed.

On the pleadings of the parties, the following issues were settled by the learned trial Court:-

1. Whether the plaintiffs are entitled to the relief of permanent injunction? O.P.P.
2. Whether suit is bad for non-joinder necessary party? O.P.D.

3. Whether Fateh Chand in possession of suit property i.e. khasra No. 1073/1? O.P.D.
4. Whether suit is not maintainable? O.P.D.
5. Relief.

The learned trial Court vide its impugned judgment decided Issues No. 1 to 3 as against the plaintiffs and in favour of the defendants, while Issue No.4 was decided in favour of the plaintiffs and against the defendants and accordingly, the suit for permanent injunction was dismissed.

On appeal, the learned Additional District Judge vide its impugned judgment upheld the findings recorded by the learned trial Court.

I have heard the learned counsel for the parties and have gone through the record of the case.

The appeal was admitted by this Court on substantial questions of law No. 1 and 2 filed alongwith the grounds of appeal. The first substantial question was whether both the learned Courts below are right in not taking into consideration Ext. P-2, the statement made by respondent No.1 Fateh Chand dated 20th July, 1987. The second question was whether both the Courts below are right in dismissing the suit of the appellants on the ground of non-identification of land especially when the land in dispute is identified by Khasra No. 1073 as per Ext. P-1, which contains the right of the plaintiffs fore grass cutting from the land in dispute.

The submissions made by the learned counsel for the appellants were that the identity of the land in question stood established from the Tatima filed in Court and once the defendants have not claimed possession over whole of the land but have claimed

possession over part of it, the suit for permanent injunction ought to have been decreed for the remaining land.

On the other hand, learned counsel for the respondents had supported the impugned judgments for the reasons given therein.

The learned counsel for the respondents in support of his submissions had relied upon the decision of the Apex Court in **Anathula Sudhakar** Vs. **P. Buchi Reddy (Dead) by L.Rs. & Ors.**, **AIR 2008 Supreme Court 2033**, where their Lordships had considered the question that in case the plaintiffs came on the basis of title, this question of title can be decided in title suit for declaration and not in the suit simplciter, which has to be decided on the basis of the possession of the plaintiffs.

On appraisal of the evidence led by the parties and reasoning given by both the Courts below, I am of the opinion that there is no merit in the appeal filed by the appellants, which deserves to be dismissed for the reasons given below.

The plaintiffs had filed the suit in regard to whole Khasra No. 1073 measuring 0-80-62 hectare being in possession of the plaintiffs who were allegedly conferred grass cutting rights in respect of the suit land. The copy of the jamabandi proved in evidence Ext. P-1 for the year 1989-90 shows that the State of H.P. is recorded as owner, while in column of possession, the possession is entered "Malik Tabe Hakook Bartandaran Mutabik Naksha Bartan". The land is recorded as 'Charagah' i.e. for grazing purpose. According to the note in the remarks column, the plaintiffs have got the grazing right as per the order of D.C., Mandi and S.O., Dharamshala. Copies of

these orders have not been placed on record to show as to whether these rights were given to the plaintiffs exclusively or these were in addition to the rights of other Bartandarans who had also grazing right, which has been recorded in the possession column. These rights cannot be said to be exclusive in the absence of any order placed on record, though these do prove that the plaintiffs were conferring the grazing right.

PW-1 Damodar, plaintiff, has stated that these rights were granted to his father, who is now dead and thereafter, he got these rights. No order of any revenue officer conferring these rights upon the plaintiffs' father have been placed on record. He stated that the defendants forcible cut the grass from the suit land, for which he filed a complaint before the S.D.M. and the defendant made a statement that he will not cut the grass. In cross-examination, he admitted that out of the suit land over 5 Bighas land Fateh Chand i.e. defendant No.1 had sown wheat crop, which clearly proves that the plaintiff admits exclusive possession of the defendant over part of the suit land.

PW-2 Chet Ram has also stated that the plaintiff's father was cutting the grass from the suit land. He also stated that defendant No.1 has forcibly taken possession over the part of the land and is in possession since 1976-77 over the land measuring 5 Bighas.

To rebut the above evidence, DW-1 Fateh Chand has stated that he had raised fields over the land measuring 4 Bighas for the last 23-24 years, which statement has been corroborated by DW-2 Tara Chand. The plaintiff has placed reliance upon the statement allegedly made by the defendant in the proceedings under

Section 107/150 Cr.P.C. that he will not interfere in possession over the remaining part of the land. The photo copy of the said statement was produced in evidence of the plaintiff in his statement as PW-1, which was objected when the same was tendered in evidence. A perusal of the said statement shows that it is only a Photostat copy of the statement allegedly made by the defendant, which has not been proved. According to law, certified copy should have been tendered in evidence and should have been proved that it was made by the defendant who was not also put the said statement to show that if he made any such statement before the S.D.M. in those proceedings. The said statement cannot be relied upon in the absence of the said statement having been proved legally.

From the above discussion it follows that the plaintiffs claimed possession over the whole of the land and referred to their grazing right which were not proved to be exclusive in their favour. Plaintiff admitted possession over the part of the suit land by defendant No.1, but it was not proved by him as to over which portion of the land the defendant was in possession. Copy of Tatima Mark-X has not been proved in evidence. According to law and once the plaintiff admits that the defend mat was in possession over the part of the suit land he was entitled to the relief of injunction in regard to remaining land only if the identity of the land in possession excluding the possession of the defendant was established on record, in which the plaintiff had failed. The decree for permanent injunction can be granted only when it is capable of execution. Once the land in possession of the defendant has not been proved and the remaining land in possession of the plaintiff has not been proved or identified, no

relief of permanent injunction can be granted in favour of the plaintiffs for the remaining land , which decree if granted was not executable since the land in question was not proved which was in possession of the plaintiffs.

From the above discussion, it follows that the findings of both the Courts below are liable to be affirmed declining the relief of injunction and as such, the appeal filed by the appellants is liable to be dismissed and the same is dismissed. However, the parties are left to bear their own costs. Decree sheet be prepared accordingly.

(V.K. Ahuja),
Judge

February 26, 2010
(BSS)