

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**RSA No. 535 of 2005**

**Reserved on: 15.06.2017**

**Date of decision: 31.08.2017**

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Devinder Kumar & Ors. ... Appellants

**Versus**

Girdhari Lal & Ors. ... Respondents

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***Coram :***

The Hon'ble Mr. Justice Ajay Mohan Goel, Judge.

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

For the appellants: Mr. G.R. Palsra, Advocate.

For the respondents: Mr. Virender Singh Rathour,  
Advocate, vice Mr. Lakshay Thakur,  
Advocate.

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**Ajay Mohan Goel, J.:**

By way of this appeal, appellants have challenged the judgment and decree passed by the Court of learned Presiding Officer, Fast Track Court, Mandi, District Mandi, in Civil Appeal No. 55/2000, 123/2004, decided on 15.03.2005, vide which learned Appellate Court while dismissing the appeal so filled by the present appellants upheld the judgment

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<sup>1</sup>Whether reporters of Local Papers may be allowed to see the judgment?

and decree passed by learned trial Court, whereby learned trial Court vide judgment and decree dated 25.04.2000 passed in Civil Suit No. 132/98 (96) had dismissed the suit filed by the present appellants for permanent prohibitory injunction.

**2.** Brief facts necessary for adjudication of the present case are that the appellants/plaintiffs, hereinafter referred to as the plaintiffs filed a suit for permanent prohibitory injunction against the respondents/defendants, hereinafter referred to as the defendants, inter alia on the ground that the plaintiffs had purchased 1/5th share of one Bresti Devi in the suit land by way of a registered sale deed No. 31, dated 08.06.1995, measuring 2-11-19 Bighas, situated at Muhal Balhari, No. H.B. 42, Tehsil Chachiot, District Mandi and defendants who were joint co-owners in possession with the plaintiffs were causing wrongful interference qua the joint possession of the plaintiffs and were adamant to occupy that portion of the suit land which had better potential and more market value. Accordingly, the plaintiffs prayed for a decree for permanent prohibitory injunction against the defendants.

**3.** The claim of the plaintiffs was denied by way of written statements by the defendants who took the stand that

the sale deed dated 08.06.1995 was merely a paper transaction between Bresti Devi and the plaintiffs and in fact, Bresti Devi who had got the suit land by way of inheritance after the death of her father, never came into possession of the suit land. It was further the case put up by the defendants that in October, 1982 Bresti Devi had come to village Balhari and asked the defendants to deliver the possession qua her share but her title and interest over the suit land was emphatically denied by the defendants, who had refused to hand over the possession of the share of Bresti Devi to her and had asserted their hostile animus to Bresti Devi and denied her title. According to the defendants, they had ousted Bresti Devi from the suit land and thereafter, no action was taken by Bresti Devi against them and since then, they were in open, peaceful, continuous, uninterrupted and hostile possession of the suit land qua the share of Bresti Devi and had thus perfected their title by way of adverse possession. It was further mentioned in the written statement that taking undue advantage of wrong revenue entries, plaintiffs had wrongly and illegally purchased the suit land from Bresti Devi. It was also the stand of the defendants that the plaintiffs had tried to get the mutation of sale attested

in their favour on the basis of said null and void sale deed, however, the said mutation of sale deed had been rejected by the Assistant Collector 2nd Grade, Tehsil Chachiot, District Mandi, vide order dated 04.07.1996, on the ground that the plaintiffs were not in possession of the suit land. It was also the case of the defendants that during consolidation operation Bresti Devi had also filed an application for the partition of the land of her share but her application was also rejected on the ground that she was not in possession of the suit land.

**4.** On the basis of the pleadings of the parties, learned trial Court framed the following issues:-

1. Whether the suit land is joint qua parties? OPP
2. Whether the plaintiffs are entitled for the relief of Permanent, Prohibitory injunction as prayed for? OPP
3. Whether the suit is not maintainable in the present form? OPD
4. Whether the plaintiffs have got no enforceable cause of action? OPD
5. Whether the suit is time barred? OPD
6. Whether the present court has got no jurisdiction to try the present suit? OPD
7. Relief.

**5.** On the basis of evidence led by the parties in support of their respective stands before learned trial Court, the following findings were returned to the issues so framed by it:-

Issue No. 1:	No
Issue No. 2:	No
Issue No. 3:	Yes
Issue No. 4:	Yes
Issue No. 5:	No
Issue No. 6:	No
Relief :	Suit dismissed as per operative portion of judgment.

**6.** Learned trial Court accordingly dismissed the suit filled by the plaintiffs by holding that there was nothing on record placed by the plaintiffs to prove that they were joint owners of the suit land with the defendants. Learned trial Court also held that the factum of the plaintiffs not being in possession also stood affirmed by the revenue authorities vide Ext. D-1 i.e. order vide which mutation of sale deed in favour of the plaintiffs was rejected by the revenue authorities. Learned trial Court also held that Ext. D-2 which was copy of order passed by the Consolidation Officer demonstrated that possession of the defendants on the suit

land was found and not of the plaintiffs. Learned trial Court also held that since it stood proved that since the plaintiffs were not in possession of the suit land, therefore, they were not entitled to the relief of injunction as prayed for. Learned trial Court also returned the findings that as defendants No. 1 and 2 had remained in possession of the suit land for more than 12 years after 1982 and as the said possession of their was in the knowledge of Bresti Devi, they had perfected their title qua the share of Bresti Devi by way of adverse possession. While returning the said findings, learned trial Court took note of the fact that Bresti Devi while in the witness box, in her cross-examination had admitted that in the year 1982 she had demanded her share from the defendants in the suit land and the defendants did not give any share or possession of her share. Learned trial Court also took note of the fact that she did not file any suit for possession or partition against the defendants.

**7.** Feeling aggrieved by the judgment and decree so passed by learned trial Court, plaintiffs preferred an appeal which was dismissed by learned Appellate Court vide judgment and decree dated 15.03.2005. While affirming the findings returned by learned trial Court it was held by learned

Appellate Court that the evidence demonstrated that in 1982 Bresti Devi demanded possession of her share from defendants No. 1 and 2 who had refused to do so. Learned Appellate Court also held that it stood proved from the record that the plaintiffs were not in possession of the suit land and the suit land was in fact in possession of defendants No. 1 and 2. Learned Appellate Court further held that denial of the share of Bresti Devi by defendants No. 1 and 2 in the year 1982 to her was indicative of an animus to exclude, thereby establishing the hostile animus of defendants No. 1 and 2 to oust Brest Devi from the suit land. Learned Appellate Court also held that it was an admitted fact that after 1982 no steps to recover possession of her share from defendants No. 1 and 2 were taken by Bresti Devi. On these basis, it was held by learned Appellate Court that the plaintiffs could not be held to be in joint possession of the suit land as the plaintiffs were neither owners nor in joint possession of the suit land and thus, learned Appellate Court upheld the findings to the effect that the suit for injunction as filed by the plaintiffs was not maintainable. Accordingly, while upholding the judgment and decree passed by learned trial

Court, learned Appellate Court dismissed the appeal so filed by the plaintiffs.

**8.** Feeling aggrieved, this appeal has been filed by the plaintiffs, which was admitted on 10.03.2017 on the following substantial questions of law:-

“(i) Whether both the lower courts have misread, mis-interpreted and mis-construed the oral as well as documentary evidence of the parties as well as the provision relating to adverse possession, which has resulted into grave mis-carriage and failure of justice to the appellants?

(ii) Whether both the lower courts have totally mis-read the provision relating to ouster of one co-sharer of the joint holding, which has caused great miscarriage of justice to the appellants?

(iii) Whether without framing issue with regard to adverse possession, finding can be given about adverse possession in favour of the respondents, which has caused mis-carriage of justice to the appellants?”

**9.** I have heard learned counsel for the parties and have gone through the records of the case as well as the judgments passed by both learned Courts below.



**10.** As all the substantial questions of law are interrelated, I will deal with all of them together.

**11.** There are concurrent findings returned by learned trial Court against the plaintiffs and in favour of the defendants that defendants had perfected their title over the suit land i.e. qua the share belonging to Bresti Devi by way of adverse possession. Now, admittedly no issue was framed by learned trial Court to the effect that as to whether the defendants had perfected their title by way of adverse possession or not. However, it is also a matter of record that in the written statement so filed by the defendants in Para-2 of the same on merit, a specific stand was taken by them that Bresti Devi who was joint owner with defendants No. 1 and 2 in October, 1982, came to the said defendants at village Balhari and asked the defendants to deliver the possession of the suit land qua her share but defendants No. 1 and 2 emphatically denied her right, title or interest over the suit land and refused to give any share or to deliver the possession of the suit land to her. In this para of the written statement, it also stood averred by the defendants that they had perfected their title qua the share of Bresti Dvi i.e. suit land by way of adverse

possession. In Para-3 of the written statement, it was mentioned by the defendants that the plaintiffs had tried to get the mutation of sale attested in their favour on the basis of the sale deed so entered between them and Bresti Devi but the said mutation of sale stood rejected by the Assistant Collector 2nd Grade, Tehsil Chachiot, District Mandi, vide order dated 04.07.1996 passed in Mutation No. 128 on the ground that the plaintiffs were not in possession of the suit land. It stands mentioned in the said Para of the written statement that the Assistant Collector 2nd Grade in his order had mentioned that neither the said Smt. Bresti Devi was in possession nor the plaintiffs were in possession of the suit land and in fact defendants No. 1 and 2 were in peaceful possession and enjoyment of the suit land. In Para-4 of the written statement, it stood mentioned by the defendants that Bresti Devi during consolidation operation in the said Muhal had also moved an application for the partition of the land of her share on the basis of wrong revenue entries in the revenue record, which application of her stood rejected by the Consolidation Officer vide his order dated 04.03.1994 on the ground that Bresti Devi was not in possession of the suit land.

**12.** When one peruses the replication so filed by the plaintiffs, one finds that the averments made in Paras 3 and 4 of the written statement have not been denied in so many words by the plaintiffs. Though there was no specific issue framed by learned trial Court to the effect that the defendants were in adverse possession of the suit land or not but it is apparent and evident from the pleadings of the parties that defendants No. 1 and 2 had taken this specific stand that they had perfected their title by way of adverse possession over the suit land and thus, this defence of the defendants was in the knowledge of the plaintiffs. Now, the suit which was filed by the plaintiffs before learned trial Court was for grant of decree of permanent prohibitory injunction on the ground that the plaintiffs were in possession of the suit land and that the defendants were also joint co-owners in possession of the suit land, who since 15.08.1996 were causing wrongful interference with the joint possession of the plaintiffs. However, as has been held concurrently by both learned Courts below, the plaintiffs miserably failed to prove that they were in possession of the suit land. In my considered view, in order to have had succeeded before learned Courts below it was necessary for the plaintiffs to

have had proved that they were either owners of the suit land or at least in possession of the suit land. However, the plaintiffs even failed to prove that they were in possession of the suit land.

**13.** I have carefully gone through the records of the case and a perusal of the records demonstrate that the findings returned by both learned Courts below to the effect that the suit land was not in possession of the plaintiffs are correct findings which was duly borne out from the records of the case. It is a matter of record that an application filed by the plaintiffs for having the suit land mutated in their favour stood rejected by the competent authority on the ground that the plaintiffs were not in possession of the suit land. It is also a matter of record that an application filed during the consolidation proceedings by Bresti Devi claiming partition of her share was also rejected by the Consolidation Officer on the ground that Bresti Devi was not in possession of the suit land. The factum of defendants No. 1 and 2 being in possession of the suit land stands established even from the statement of Bresti Devi herself who entered into the witness box as PW-2. A perusal of her statement demonstrates that she deposed in her cross-examination

that in the year 1982 she had approached defendants No. 1 and 2 and had called upon them to deliver her the possession of her share and she also admitted it to be correct that defendants No. 1 and 2 did not hand over the possession of the suit land to her. This clearly demonstrates that the suit land in fact was never in possession of Bresti Devi and, therefore, the contention of the plaintiffs that they were in possession of the suit land alongwith defendants No. 1 and 2 was incorrect as has been held by both learned Courts below. Because both learned Courts below found plaintiffs not to be in possession of the suit land, therefore, they correctly denied the relief of permanent prohibitory injunction in favour of the plaintiffs.

**14.** Besides this, learned Courts below have not misread the provisions relating to ouster of one co-sharer of the holdings as has been argued by learned counsel for the appellants because the plaintiffs are not co-sharers of the joint holdings with defendants No. 1 and 2, as has been concurrently held by both learned Courts below.

**15.** Though, it is a matter of record that no issue was framed by learned trial Court as to whether defendants No. 1 and 2 had perfected their title over the suit land by way of

adverse possession or not but this was a specific stand taken in the written statement by defendants No. 1 and 2 and evidence was also led in support of the said contention of their by the said defendants. Moreover, it is not a case wherein the plaintiffs were taken by surprise by the stand so taken by defendants and at the cost of repetition, I say that this was a specific stand by the defendants in the written statement itself. During the course of arguments, learned counsel for the appellants could not point out as to how findings to this effect returned by learned Courts below were either contrary to the records as the factum of defendants No. 1 and 2 having perfected their title by way of adverse possession stood proved by the said defendants by leading evidence in this respect.

**16.** A three Judge Bench of Hon'ble Supreme Court in ***Nedunuri Kameswaramma Vs. Sampati Subba Rao, AIR 1963 Supreme Court 884 (V 50 C 133)***, has held:

"No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of the contentions but in refutation of those of the other side, it cannot be said that the absence of an

issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion.”

**17.** In *Moti Lal Vs. State of H.P., AIR 1996 Himachal Pradesh 90*, this Court has held that mere non-framing of issue will not prejudice any of the parties if both the parties were aware of their respective pleadings and have gone to the trial, being well aware of their respective cases as pleaded.

**18.** Substantial questions of law are answered accordingly.

**19.** In view of the above discussion, as there is no merit in the present appeal, the same is accordingly dismissed. No order as to costs. Miscellaneous application(s) pending, if any, stand disposed of. Interim order, if any, also stands disposed of.

**August 31, 2017**  
(BSS)

**(Ajay Mohan Goel),**  
**Judge**