

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

**RSA No. 450 of 2002**

**Reserved on : 1.4.2019**

**Decided on: 30.4.2019**

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**Prem Chand**

**...Appellant**

**Versus**

**Babur Ram and others**

**Respondents**

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**Hon'ble Mr. Justice Sureshwar Thakur, Judge.**

Whether approved for reporting? yes

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**For the Appellant : Mr. Rahul Mahajan,  
Advocate.**

**For the respondent(s) : Mr. Ramakant Sharma,  
Senior Advocate with Ms.  
Devyani Sharma, Advocate,  
for respondents No.1(a) and  
1(b) and respondent No. 3.**

**Respondents No. 4 to 7  
exparte.**

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**Sureshwar Thakur, Judge**

The instant appeal is directed against the verdict recorded by the learned first appellate Court, upon Civil Appeal No. 99-N/2000, wherethrough, the first appellate Court rather reversed the judgment and

decree, pronounced by the learned trial Judge, and hence, dismissed the plaintiffs' suit. The plaintiffs are aggrieved therefrom, hence motion this Court, through the instant Regular Second Appeal.

2. Briefly stated the facts of the case are that plaintiff Prem Chand claimed himself to be owner in possession of suit property, consisting of two rooms and verandah, which was previously owned by Nathu Ram, the father of the plaintiff and appellant Babu Ram, father-in-law of defendant No. 2 Rattni Devi and grand father of defendants No. 3 to 6. As per plaintiff, Nathu Ram, was tenant at Willon the land of original owner and had constructed his residential Abadi and acquired the proprietary rights. Nathu Ram had four sons, namely the plaintiff Prem Chand, defendant No.1, Gian Chand and Jaishi Ram. Jaishi Ram and Gian Chand got separated from Nathu Ram, and also constructed their own Abadi and were living separately for more than 38 years. Defendant/appellant Babu Ram also got separated from his father, in the year 1975-76, but he was not having his own house, therefore, he continued to live with Nathu Ram.

Plaintiff used to serve his parents. Defendants No. 1 and 2 Babu Ram and Rattni Devi never served Nathu, and in lieu of the services rendered by plaintiff, Nathu Ram executed a registered Will dated 1.6.1979. It was further alleged that defendants No. 1 and 2, sought permission to live in the house of Nathu Ram from the plaintiff and the plaintiff allowed them to stay in the house. The name of defendant No. 1, in the revenue record as Hissedar alongwith plaintiff was wrong and against the factual position. The entire residential Abadi owned by Nathu Ram, after his death, came to the plaintiff, the plaintiff is entitled to take back the possession of residential house from the defendants No. 1 and 2. The plaintiff and defendants also enters into a compromise on 17.11.1991 and as per the said compromise defendant No. 1, agreed to vacate the disputed portion in favour of the plaintiff and plaintiff agreed to pay compensation of Rs. 5,000/- and also to provide adjacent land for the residence of defendant No. 1 and to deduct Rs. 1200/- from Rs. 5000, as value of the trees. The plaintiff was ready and willing to perform his part of agreement and as such filed a suit

for possession by way of specific performance of the Contract Act.

3. Defendants filed written statement to the effect that defendant No. 1 alongwith plaintiff and defendants No. 3 to 7 purchased the land comprised in Khata No. 105, Khatauni No. 166, 169, Khasra Number 201 min 201, land measuring 20 kanals 10 marlas, vide registered sale deed dated 28.1.1971 from Surjit Singh and thereafter all the parties except the plaintiff and defendant No. 1 separated from each other. The defendant No. 1 constructed the residential house over the said land and Nathu Ram the father of the plaintiff and defendant No. 1 also held defendant No. 1 in the construction of house to the extent of half share as owners. It was denied that the residential Abadi continued to be owned and possessed by Nathu Ram till his death. It was further denied that the defendant No. 1, got separated from his father Nathu Ram since 1977. It is denied that Nathu Ram while in sound disposing state of mind, voluntarily executed a Will dated 1.6.1979 in favour of the plaintiff in lieu of the services rendered by the plaintiff. It was also denied

that the defendant No. 1 entered into any compromise on 17.11.1991 with the plaintiff.

4. Replication has been filed, wherein contentions made in the written statement are denied and those made in the plaint are re-asserted. On the pleadings of the parties, the following issues were framed on 11.3.1996:

- 1) Whether the plaintiff is entitled to recover possession of suit land being owner? OPP
- 2) If ownership of the plaintiff is not proved whether in the alternative the plaintiff is entitled for possession of suit land by way of specific performance of the contract as alleged? OPP
- 3) Whether the suit is not maintainable in the present form? OPD
- 4) Whether the plaintiff has got no cause of action to file the present suit? OPD
- 5) Whether the suit is bad for mis-joinder of the parties? OPD
- 6) Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD
- 7) Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the plaintiffs' suit. In an appeal, preferred therefrom by the defendants/appellants, before the learned First Appellate Court, the latter Court allowed the appeal, and, dis-affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 1.10.2002, admitted the appeal instituted by the appellant(s), against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question(s) of law:-

- (i) Whether the learned appellant Court below has given a contradictory finding and committed error of law on face of record by holding that a valid and proper Will was executed and that it cannot be enforced on account of agreement?
- (ii) Whether the learned appellant Court below has misconstrued and misinterpreted Ext. P1, resulting in wrong and erroneous finding bad in law and facts?

- (iii) Whether the learned appellant Court below has misconstrued and misinterpreted Ext. PW4/A, as agreement instead of a family settlement thus arriving at a wrong finding?
- (iv) Whether the learned appellate Court has erred in law by relying on agreement Ext. PW4/A and holding that it has superseded the Will Ext. P-1?

**Substantial questions of Law**

7. The suit Khasra No. 355, is, in the Jamabandi, appertaining therewith rather reflected to be assigned Khasra No. 201, and, in the column of possession thereof, the names, of, the father of defendant No. 1, and, of defendant No. 2, stand reflected rather, as a non-occupancy tenant(s), hence thereon. The plaintiff averred, that, the afore reflection(s), carried in the Jamabandi, appertaining to Khasra No. 201, being erroneous, and, espoused, (i) qua rendition of a declaratory decree, for hence the afore reflections being quashed and set aside, and, also sought rendition, of, a decree of permanent prohibitory injunction, for, restraining the defendants, from, interfering, in the, peaceful possession of the plaintiff, upon the aforesaid Khasra No. The aforesaid suit Khasra No., is further averred by the plaintiff, to be hence, acquired by him,

through a testamentary disposition, executed vis-à-vis, him by his predecessor-in-interest. The apposite testamentary dispositions, is, comprised in Ext. P-1. The learned trial Court, and, the learned first appellate Court, both concluded qua Ext. P-1, being cogently proven to be validly, and, duly executed by the deceased testator. The recording, of, the afore concurrent findings, vis-à-vis rather cogent proof being adduced, qua valid, and, due execution, of Ext. P-1, do not come under contest, nor obviously any substantial question of law, qua therewith, hence stood formulated by this Court. Consequently, the afore concurrent findings, recorded by both the learned trial Court, vis-à-vis, the afore facet, obviously not require any interference.

8. Be that as it may, the acerbic contest, making visible sprouting(s), interse, the contesting litigants, is, confined, vis-à-vis, suit Khasra No. 355, falling or not falling within the domain of Ext. P-1. Upon an adjudication being, thereon hence meted adversarial, to the plaintiff, (i) thereupon, this Court may affirm the judgment and decree, rendered by



the learned first appellate Court, upon civil appeal No. 99-N of 2000, (ii) contrarily, in case findings, adversarial to the defendants, are, recorded upon the aforestated, *res-controversa*, (iii) thereupon this Court may be prodded to accept the appeal, and, decree the plaintiffs' suit. In sequel, hence the entire fulcrum, whereon the lis stands embroiled, is embodied in, (iv) whether Khasra No 436, as stands delineated in the Will, hence bearing consonance, with, the suit Khasra No. 355, or not. Uncontrovertedly, the plaintiffs, had, acquired Khasra No. 436, through a testamentary disposition, borne in Ext. P-1, (v) wherethrough, he stands rather constituted as a sole legatee, of, one Nathu Ram, (vi) whereas in stark contradiction thereof, Khasra No. 355, stands ascribed, vis-à-vis, the suit land. Prima-facie, on anvil of the afore incongruities, occurring, interse, suit Khasra No., and, vis-à-vis, the Khasra no., as enumerated in Will, borne in Ext. P-1, rather disable the plaintiff, to, contend that the afore espoused, decrees being renderable qua him. (vii) Nonetheless, the plaintiff has, on anvil of Ext.

PW4/A, yet made, as assiduous effort to make an espousal, qua the espoused decrees being renderable qua him. However, to gauge the relevant efficacies, and, effects of Ext. PW4/A, a surgical perusal thereof, is, imperative. However, a perusal of Ext. PW4/A, as propounded by the plaintiff, to, succor his espousal, qua given thereunder, rather defendant No. 1, (a) hence agreeing to vacate the house, situated, on a part of the suit Khasra No. 355, in lieu of the plaintiff, agreeing, to pay compensation of Rs. 5000/- and also, in lieu of plaintiff, providing land adjacent, to the residence/abode of the defendant No. 1, also underscores qua, the suit Khasra No. rather not standing enumerated therein, whereupon, he is, prima-facie, estopped, to, make the afore espousal (vii) Nonetheless, the effects, of, the afore incompatibilities, interse Khasra No., embodied in Ext. P-1, and, as ascribed, vis-à-vis, the suit land, besides, qua no Khasra number(s) being recited in Ext. PW4/A, are qua thereupon, rather the plaintiff being, yet not, estopped to propagate, qua the defendant No. 1, (viii) hence therethrough

abandoning his right, title or interest, vis-à-vis, the residential house, if any, existing on a part of suit Khasra No. 355. The afore contention, also not, in its entirety, hence suffering any erosions qua its worth, given execution thereof, being cogently proven, (ix) their being a recital therein qua parting of sale consideration, and, also possession of property, as enunciated therein, and, when the afore enunciation, as borne in Ext. PW4/A, dehors, no Khasra nos being disclosed therein, is read, in conjunction, with, the testification, rendered by Babu Ram, (x) wherein he voices, qua one disputed residential house, being in existence, since the time of his father, and, the latter being recorded, as non-occupancy tenant, vis-à-vis, Khasra No. 201, and, in part whereof, the afore residential house is situated, and, when it is further testified by him, that, during the lifetime of his father, it was KHAPRAIL, nowat it being a slate-roofed, (xi) besides when the entries appertaining to suit Khasra No. 355, and, as borne in the Jamabandi, prepared qua therewith, are, alike the one appertaining, therewith, and,

appertaining to, the year 1963-64, and, when the afore, concurrent reflections, qua, hence a house existing, upon, Khasra No. 201, thereupon the afore Khasra No. 201 reflected in Ext. P-3, is to be construed, to be the extantly assigned Khasra No., vis-à-vis, the suit land (xii) conspicuously, also when the drawing of Ext. PW4/A, dehors, no Khasra Nos being ascribed/mentioned thereon, is to be concluded, to be drawn, in respect of the afore old Khasra No., whereto, stands ascribed the extant Khasra No., given no revenue record(s) making marked upsurging(s), vis-à-vis, the afore incompatibilities, rather being adduced. The further preeminent reason, for making the afore conclusion, is, rested upon, with defendant Babu Ram, testifying vis-à-vis, the residential house, and, with the dispute engaging, the parties, also appertaining therewith, and, when the defendant Babu Ram, not adducing any further evidence qua the afore deposition, appertaining, to a, Khasra No. other, than, the suit Khasra No. (b) and whereas, upon his making, a, further deposition, and,

whereat, an apt clarification may emerge, especially upon, his being recalled by the counsel, for the defendant, whereas, the afore omission(s), in the making, of, the afore endeavour, (xiii) rather begets a conclusion, qua his deposition appertaining to the suit Khasra No., hence, the decree of permanent prohibitory injunction, as claimed qua therewith rather being renderable, vis-à-vis, the plaintiff. The substantial questions, of law are answered accordingly.

9. Be that as it may, PW4/A, though, may constitute firm evidence, qua it, appertaining to the suit Khasra No., and, also may empower the plaintiff, to only claim rendition of, a decree of permanent prohibitory injunction, (i) yet when no registered deed of conveyance rather stands executed, interse the plaintiff, and, the defendant, whereas, only upon execution, of, the afore registered deed of conveyance, and, thereafter attestation of mutation, in consequence therewith, would erode the efficacy(s) of the relevant entries, appertaining, to, the suit Khasra No. However, when the afore

registered deed of conveyance remains un-executed, interse, the parties, thereupon, want thereof, and, only when thereupon, the plaintiff would stand bestowed, title, vis-à-vis, the suit Khasra No., and, would thereafter be enabled to hence espouse, qua the revenue entries, being amenable, for being quashed and set aside, (ii) hence for afore wants, his afore prayer is rejected, excepting his being only entitled to, a, decree, of, permanent prohibitory injunction.

10. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the appellant/plaintiff, and, against the respondents/defendants.

11. In view of the above discussion, the present Regular Second Appeal is partly allowed. In sequel, the judgment and decree rendered by the learned

first appellate Court, is partly set aside, and, the suit of the plaintiff is decreed, only, for relief, of permanent prohibitory injunction. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

**(Sureshwar Thakur)**  
**Judge**

30.4.2019  
Kalpana