

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. : 661 of 2005

Reserved on : 08.08.2024

Decided on : 30.08.2024

Sanjay Kumar & Others

...Appellants

Versus

Siri Ram (deceased) through LRs

...Respondents

Coram

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

Whether approved for reporting?¹ Yes

For the appellants : Mr. Ashok Sood, Senior Advocate,
with Ms. Pooja, Advocate.

For the respondents : Mr. G.D. Verma, Senior Advocate,
with Mr. Sumit Sharma, Advocate.

Virender Singh, Judge

Appellants have preferred the present Regular Second Appeal, against the judgment and decree dated 19.09.2005, passed by the Court of learned Additional District Judge (Presiding Officer, Fast Track Court), Solan, District Solan, Himachal Pradesh (hereinafter referred to as

¹ *Whether Reporters of local papers may be allowed to see the judgment? Yes.*

the 'learned First Appellate Court'), in case No.3FT/13 of 2005/2004, titled as 'Siri Ram Versus Sanjay Kumar & Others'.

2. Vide judgment and decree dated 19.09.2005, the appeal, preferred by the predecessor-in-interest of the respondents, namely Siri Ram, was allowed, by granting the following relief:-

"40. It has been held above that at least on the ground of re-marriage Vidya is divested of her right to the property of her husband Jai Ballabh. Thus in the revenue record she was wrongly being shown as co-owner with the defendant. The defendant is son of Vidya's husband's brother. On her re-marriage her husband's estate had reverted to the defendant's father and on his death now the defendant has the title. The defendant thus is owner of the land comprised in Khata No.3 Khatauni No.3 Khasra No.9 kitas total measuring 32 bighas 15 biswas situated in mauza Thana Pargana Gharsiang, Sub-Tehsil Krishangarh. The defendant is entitled to declaration to this effect. As such, his counter-claim is hereby decreed, while the suit of the plaintiffs/respondents is dismissed. Parties are left to bear their own costs. Decree be drawn."

3. The said appeal was preferred, by the predecessor-in-interest of the respondents, against the judgment and decree dated 17.08.2004, passed by the Court of learned Civil Judge (Junior Division), Kasauli, District Solan, Himachal Pradesh (hereinafter referred to as

the 'learned trial Court') in *Civil Suit No.41/1 of 2000/94*, titled as '*Master Sanjay Kumar (minor) & Others Versus Siri Ram*'.

4. Vide judgment and decree dated 17.08.2004, the learned trial Court has decreed the suit of the appellants and dismissed the counter-claim, filed by the predecessor-in-interest of the respondents, by granting the following relief:-

"25. Keeping in view my discussion above issues, the suit of the plaintiff is hereby decreed and thereby, defendant restrained from cutting the trees, removing, making and waste or changing the nature of the land comprised in Khewat Khatauni No.3 min/3min, Khasra No.3, measuring 16 bighas 7 biswas, situated in Mauja Thana, Sub Tehsil Krishangarh, Tehsil Kasauli, Distt. Solan, either by himself, through his agents, servants, assignees, family members etc. The counter-claim filed by the defendant is hereby dismissed. No order as to the costs. Decree sheet be drawn accordingly. The file after due completion be consigned to the record room."

5. For the sake of convenience, the parties to the present *lis* are, hereinafter referred to, in the same manner, as were, referred to, by the learned trial Court.

6. Brief facts, necessary for the adjudication of the present appeal, as borne out, from the record, are as under:-

6.1. Plaintiffs have filed the suit for permanent prohibitory injunction, against the defendant, restraining him from causing interference, cutting trees, removing the same and making any waste or changing the nature of the land comprised in Khata Khatauni 3/3 min, Khasra No.3, measuring 16 bighas 7 biswas, situated in Mauja Thana, Pargana Gharsiang, Sub-Tehsil Krishangarh, District Solan, Himachal Pradesh (hereinafter referred to as the 'suit land'). The said relief has been sought on the ground that the plaintiffs and the defendant are co-owners in possession of the suit land.

6.2. It is the case of the plaintiffs that Mutation No.134 dated 24.03.1992 has been entered and sanctioned in the revenue record and thereafter, they became the exclusive owners of 1/2 share, out of the total land. According to them, the defendant has no right, title or interest in the suit land. However, according to them, he has started giving threats to the plaintiffs regarding cutting of all the valuable trees and also changing the nature of the suit land forcibly. Some trees are stated to have been cut by him from the suit land on 31.01.1994.

6.3. According to the plaintiffs, the suit land is joint between the parties and as such, defendant, with an intention to grab the best piece of land, has started interfering in the possession of the plaintiffs.

7. On the basis of above facts, the plaintiffs have sought the relief, as claimed.

8. When put to notice, the suit has been contested by the defendant by filing the written statement, in which, he has challenged Mutation No.134, sanctioned in favour of the plaintiffs, as, the same is wrong, illegal, null and void and not binding upon the rights of the plaintiffs.

8.1. It has also been denied that the plaintiffs have become owners to the extent of 1/2 share, out of the suit land. According to the defendant, the plaintiffs have no right, title or interest in the suit land. Hence, a prayer has been made to dismiss the suit.

9. Along with the written statement, defendant has also filed the counter-claim, alleging therein that Parma Nand was owner in possession of the suit land. After the death of Parma Nand, his property had been

inherited by both his sons, namely, Kamla Balabh and Jai Balabh.

9.1. It is the case of the defendant that Jai Balabh was married to Vidya Devi. According to him, Vidya Devi had murdered Jai Balabh, in which, she was sentenced to undergo imprisonment by Mehlog State. According to the defendant, since, Jai Balabh was murdered in the year 1940-41, as such, his widow Vidya Devi, being murderer of her husband, was not entitled to succeed his property.

9.2. It is the further case of the defendant that said Vidya Devi had again solemnized marriage in the year 1991-92 with one Paras Ram.

9.3. All these facts have been pleaded to show that Vidya Devi was not entitled to inherit the estate of Jai Balabh, being his murderer. However, according to the defendant, after the death of Jai Balabh, a wrong mutation of inheritance was sanctioned in favour of Vidya Devi, but, the suit land remained in possession of the defendant and he is still in possession as owner. He has challenged Mutation No.134 dated 24.03.1992, sanctioned in favour of Vidya Devi.

10. On the basis of above facts, defendant has sought the following relief:-

“(i) that the defendant is owner in possession of land comprised in Khata No.3 min, Khatauni No.3 min, Khasra-Kita 9, measuring 16-7 bigha i.e. part of total land measuring 32-15 bighas and land comprised in khata No.1, Khatauni No.1, Khasra No.38,50 and 116/60, measuring 13-12 bighas, and the plaintiffs have no right, title or interest whatsoever in the land in question.”

11. The plaintiffs have filed the replication to the written statement, as well as, written statement to the counter-claim, by denying the stand, as taken, by the defendant, in the written statement.

12. The counter-claim has been contested, by denying the stand, as taken, by the defendant, in the counter-claim. It has specifically been denied that Vidya Devi had murdered Jai Balabh, as such, she was not entitled to inherit the property of Jai Balabh. According to the plaintiffs, Vidya Devi was in possession of the suit land, after the demise of Jai Balabh and mutation has rightly been entered and attested in her favour.

12.1. It has also been denied that Vidya Devi has solemnized marriage in the year 1991-92. The daughter of

Vidya Devi, namely Shanti Devi, is stated to be mother of the plaintiffs. Other contents of the counter-claim have been denied. Thus, a prayer has been made to dismiss the counter-claim.

13. From the pleadings of the parties, following issues were framed, by the learned trial Court, vide order dated 25.04.1996:-

“1. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed? OPP

2. Whether the revenue entries qua the suit land are wrong and the mutation attested in favour of Smt. Vidya Devi is illegal, void and wrong, as alleged? OPD

3. Whether the deceased Vidya Devi has executed a valid Will qua suit land in favour of the plaintiff Sanjay Kumar and others, as alleged? OPD

4. Whether the defendant has no locus standi to file the counterclaim, as alleged? OPP

5. Whether the defendant is estopped from filing the suit by his own act and conduct, as alleged? OPP

6. Whether counter-claim is barred by limitation? OPP

7. Whether this court has got no jurisdiction to entertain the counter claim, as alleged? OPP

8. Relief.”

14. After framing of the issues, parties to the *lis* were directed to adduce evidence.

15. After closure of the evidence and upon hearing learned counsel for the parties, the learned trial Court has decreed the suit of the plaintiffs and dismissed the counter-claim, filed by the defendant, vide judgment and decree dated 17.08.2004.

16. Feeling aggrieved from the said judgment and decree, passed by the learned trial Court, by virtue of which, the learned trial Court has decreed the suit of the plaintiffs and dismissed the counter-claim, filed by the defendant, the same has been assailed by the unsuccessful defendant, before the learned First Appellate Court, by way of a single appeal.

16.1. The learned First Appellate Court has allowed the said appeal by dismissing the suit of the plaintiffs and by decreeing the counter-claim, filed by the defendant, vide judgment and decree dated 19.09.2005.

17. Dissatisfied with the said judgment and decree, plaintiffs have preferred the present Regular Second Appeal, before this Court, on the ground that the learned First Appellate Court has committed an error in law by relying upon the documents Ex.D-1 to D-6, as, according

to the appellants, these documents were neither proved in accordance with law, nor, the same were tendered in evidence, in accordance with law, giving opportunity to the appellants to challenge the same.

18. The findings have further been assailed on the ground that the learned First Appellate Court has wrongly relied upon these documents and assumed and presumed that Vidya Devi had re-married with some Paras Ram and to further presume that Shanti Devi was not conceived from the loins of Jai Ballabh.

19. The findings have further been assailed on the ground that the learned First Appellate Court has wrongly relied upon the oral statements, made by the witnesses, on approximation of the age of Shanti Devi.

20. In addition to the challenging of the documents Ex.D-1 to D-6, the appellants have also challenged the document Ex.D-7. According to them, the same is a forged document. The learned First Appellate Court, according to the appellants, has wrongly assumed the conviction of Vidya Devi, under Section 325 of Indian Penal Code,

which, according to the appellants, is not proved, by leading any reliable evidence.

21. On the basis of above grounds, Sh. Ashok Sood, Senior Advocate, assisted by Ms. Pooja, Advocate, appearing for the appellants, has prayed that the appeal may be accepted by setting aside the judgment and decree, passed by the learned First Appellate Court. It has also been prayed that the judgment and decree, passed by the learned trial Court may be restored, as prayed for, as, the appeal, before the learned First Appellate Court, was not maintainable, since, the defendant, by way of single appeal, has challenged the judgment and decree, passed by the learned trial Court, by virtue of which, the suit of the plaintiffs was decreed and the counter-claim of the defendant was dismissed.

21.1. Relying upon the decision of this Court in '**Ramesh Chand Versus Om Raj and Others**', reported in **2022(2) SLC 1145**, it has been prayed that the substantial question of law, framed on 16.09.2023, may be decided in favour the appellants, as, the single appeal was not maintainable before the learned First Appellate Court.

22. *Per contra*, Sh. G.D. Verma, Senior Advocate, assisted by Mr. Sumit Sharma, Advocate, appearing for the respondents, has argued that there is no substance in the appeal. Hence, a prayer has been made to dismiss the same.

23. The present appeal has been admitted, by this Court, on 16.11.2006, on the following substantial question of law:-

“Whether the First Appellate Court has committed an illegality in relying upon certain entries in the Panchayat record and in concluding that Vidya Devi had remarried one Paras Ram prior to coming into force of Hindu Succession Act, 1956, particularly when no evidence was led with regard to the performance of marriage ceremonies?”

24. Thereafter, the following additional substantial question of law has been framed, by this Court, vide order dated 16.09.2023:-

“Whether a single appeal was maintainable before learned First Appellate Court against the judgment and decree passed by learned Trial Court in decreeing the suit and dismissing the counter claim?”

25. Since, the additional substantial question of law, which has been framed, vide order dated 16.09.2023, goes to the root of the case, as such, the same is required to be decided first.

26. Admittedly, in this case, the judgment and decree, by virtue of which, the civil suit has been decreed and the counter-claim, preferred by the predecessor-in-interest of the respondents, has been dismissed, has been assailed by way of single appeal.

27. In this case, the plaintiffs had filed the suit for permanent prohibitory injunction, whereas, the defendant had filed the counter-claim, as referred to above. The learned trial Court had decreed the suit, filed by the plaintiffs and dismissed the counter-claim, filed by the defendant. Against the said judgment and decree, defendant-Siri Ram has admittedly filed one appeal and the learned First Appellate Court has allowed the appeal by dismissing the suit of the plaintiffs and by decreeing the counter-claim of the defendant.

28. The Division Bench of this Court in '**Ramesh Chand Versus Om Raj and Others**', reported in **2022(2)**

Shim. L.C. 1145, has elaborately discussed different proposition of law and laid down certain principles. Relevant paragraph 42 of the said judgment is reproduced, as under:-

“42. The principles deducible from the afore-discussed law can be summarized as follows:-

(i) When two suits are consolidated and tried together with common issues framed and common evidence led by the parties, resulting in a common judgment and decree, the same can be subjected to challenge by way of a single appeal at the instance of the aggrieved party;

(ii) Where a single appeal is filed questioning the judgment and decree passed in two suits, which were consolidated and decided by a common judgment, decision of such single appeal, by a common judgment, reversing or modifying the claim in one suit out of the two, can be challenged by the aggrieved party also, in a single appeal.

(iii) When two suits though not consolidated but are decided by a common judgment, resulting into preparation of two separate decrees, the aggrieved party would be required to challenge both of them by filing separate appeals;

(iv) When both the suit and the counter claim are decreed by a common judgment, regardless of whether separate decree has been prepared in the counter claim, both would be required to be challenged by separate appeals;

(v) In a case where two separate appeals are required to be filed against judgment

of the suit and the counter claim and if appeal is filed only against one and not against the other, non filing of appeal against such judgment and decree would attach finality thereto and would attract not only the principle of res judicata but also waiver and estoppel and the judgment and decree not appealed against would be taken to have been acquiesced to by the party not filing appeal;

(vi) When however, two appeals are filed against a common judgment passed by the trial Court, both by the plaintiff and the defendant, and are disposed of by the first appellate Court by modifying/reversing/affirming judgment of the trial Court, the aggrieved party, would be required to challenge both by two separate appeals, in absence of which, non-filing of appeal against one shall attract bar of the principles of res-judicata against another.

(vii) Where more than one appeals are required to be filed or are filed and one or more of them are dismissed for default, delay or any other similar reason, any such situation would attract res judicata and such dismissal would satisfy the requirement of appeal being heard and finally decided on merits "in a former suit" for the purpose of attracting principles of res judicata."

29. Judging the facts and circumstances of the case and in view of the decision of the Division Bench of this Court in **Ramesh Chand's** case (supra), the principles, as enumerated, under Clauses (iv) and (v) of para 42, are fully

applicable to the facts and circumstances of the present case, as, non-filing of the appeal, against the counter-claim, not only amounts to *res judicata*, but, also waiver and estoppel.

30. The appeal, preferred before the learned First Appellate Court, is held to be not maintainable, as, the defendant was required to file two separate appeals, as, he had set up his counter-claim by seeking the relief that he has become owner in possession of the suit land and he had also sought the consequential relief of permanent prohibitory injunction restraining the plaintiffs from interfering in his ownership and possession.

31. The learned trial Court, by way of the judgment and decree, had decreed the suit of the plaintiffs and dismissed the counter-claim of the defendant. As such, the defendant was required to file two separate appeals by challenging the dismissal of his counter-claim and decree of the suit, which was in favour of the plaintiffs.

32. Not only this, applying the principle of waiver and estoppel, the learned First Appellate Court ought to have dismissed the appeal of the defendant, which was

preferred against the judgment and decree, passed by the learned trial Court.

33. Accordingly, the substantial question of law, framed on 16.09.2023, is decided in favour of the appellants and as such, the present appeal is liable to be allowed.

34. Since, the substantial question of law, framed on 16.09.2023, has been decided in favour of the appellants, as such, other substantial questions of law become redundant and are not liable to be decided. Consequently, the present appeal is allowed, by setting aside the judgment and decree, passed by the learned First Appellate Court and by restoring the judgment and decree, passed by the learned trial Court.

35. Decree sheet be prepared accordingly.

36. Pending miscellaneous application(s), if any, shall also stand disposed of.

37. Record be sent down.

(Virender Singh)
Judge

August 30, 2024
(Gaurav Thakur)