
**Churago Devi (Deceased) Through Her Legal Representatives Smt.
Parvati Devi And Others Vs Ram Lal**

Regular Second Appeal No. 451 Of 2001

Court: High Court Of Himachal Pradesh

Date of Decision: July 29, 2021

Acts Referred:

Limitation Act, 1963 " Article 65#Code Of Civil Procedure, 1908 " Section 60, 96, 100, 151, Order 2 Rule 2, Order 6 Rule 4, Order 9 Rule 8, Order 14 Rule 5, Order 23 Rule 1, Order 23 Rule 3, Order 23 Rule 4, Order 41 Rule 22, Order 41 Rule 27, Order 41 Rule 33

Hon'ble Judges: Satyen Vaidya, J

Bench: Single Bench

Advocate: G.D. Verma Romesh Verma, Bhupender Gupta, Janesh Gupta

Final Decision: Dismissed

Judgement

Satyen Vaidya, J

1. Appellants have preferred Regular Second Appeal under Section 100 of the Code of Civil Procedure (for brevity "Code" against judgment and

decree dated 07.07.2001, passed by learned Additional District Judge, Solan in Civil Appeal No.41-S/13 of 1999 arising out of judgment and decree

dated 28.9.1999 passed by learned Sub Judge, 1st Class, Arki in civil suit No. 122/1 of 1995.

2. Appellants in present appeal were defendants in civil suit No. 122/1 of 1995 and the predecessor in interest of respondent herein was plaintiff. For

the sake of convenience and clarity the Parties hereafter shall be referred in the same manner as were before the trial court.

3. Plaintiff filed suit for permanent prohibitory injunction against the defendants seeking to permanently restrain them from interfering in the suit land.

In alternative relief of possession qua the suit land was also sought. Suit land was described as land comprised in Khewat No.8/10, Khasra Nos.8, 24

min, 25 min and 47/30 measuring 21-8 bighas as per "Jamabandi" for the year 1989-1990.

4. The premise of the suit was that plaintiff had purchased land comprised in Khewat No.2/2, Khasra Nos.4, 8, 14, 24, 28 and 30, katas 6, measuring

29.11 Bighas from Gulaba Ram, predecessor in interest of defendant No.1. Mutation of sale was attested in favour of plaintiff on 23.1.1972 as

Mutation No.103. Land purchased by plaintiff from Gulaba Ram in subsequent revenue record came to be described as the suit land detailed above.

Plaintiff sold some part of the land purchased from Gulaba Ram to Rati Ram and Mutation No. 104 was attested in that behalf.

5. Plaintiff contended in the suit that Gulaba Ram had moved an application for correction of revenue entries, in respect of suit land, before Assistant

Collector, 2nd Grade, Arki vide case No.16-13/B. This application was decided on 17.03.1983 by Assistant Collector, 2nd Grade, Arki holding that the

land was in self cultivation of Gulaba Ram in the capacity of relative of plaintiff.

6. It was alleged that defendants were interfering in the possession of plaintiff under the garb of wrong revenue entries recorded in the column of

possession. Plaintiff admitted to have filed a Civil Suit earlier which was withdrawn.

7. Defendants by way of written statement raised following preliminary objections to the claim of plaintiff:

(i) Plaintiff had no locus-standi to file the suit;

(ii) Suit was time barred;

(iii) Suit was bad for want of necessary parties;

(iv) Suit was barred by the provisions of order 23 Rule 1 and Order 2 Rule 2 of the Code in view of the earlier suit Nos. 6/1 of 1994 filed by plaintiff

and dismissed on 3.6.1994.

(v) Suit was not maintainable;

(vi) Suit was barred by principle of estoppel and acquiescence etc.

(vii) Suit was without any cause of action;

(viii) Suit was not valued properly and Court fee was not appropriately affixed.

8. On merits, it was contended that at the time of mutation, on the basis of alleged sale, possession of suit land was not delivered to plaintiff. Gulaba

Ram, had refused to deliver the possession and had denied the sale deed. He was never divested from the suit land. There was no legal sale. In

alternative plea of having become owner by perfection of title by adverse possession was also raised on behalf of defendants. It was specifically

pleaded by defendants that possession of plaintiff was wrongly recorded in revenue record on the basis of Mutation No.103. The revenue entries were

subsequently corrected and name of Gulaba Ram was recorded as possessor of suit land. Gulaba Ram had executed Will of his entire movable and

immovable properties in favour of defendant No.2 Devi Ram. Sale deed set up by plaintiff was also alleged to be result of fraud and

misrepresentation.

9. Learned trial court framed following issues:-

Issue No.1 Whether the plaintiff is owner in possession of the suit land as alleged? ...OPP

Issue No.2 Whether the plaintiff is entitled for the relief of permanent prohibitory injunction as prayed for?OPP

Issue No.3 Whether the plaintiff has no locus-standi to file the present suit?... OPD

Issue No.4 Whether the suit is time barred?....OPD

Issue No.5 Whether the suit is bad for want of necessary party?.....OPD

Issue No.6 Whether the suit is barred under provision of order 23 rule 1 and order 2 rule 2 CPC as alleged?...OPD

Issue No.7 Whether the suit is not maintainable?....OPD

Issue No.8 Whether the plaintiff is estopped from filing the present suit. ...OPD

Issue No.9 Whether the plaintiff has no cause of action?....OPD

Issue No.10 Whether the suit is not properly valued for the purpose of court fee and jurisdiction?....OPD

Issue No.11 Whether the defendants have become owners of the suit land by way of adverse possession?....OPD

Issue No.12 Whether the alleged gift is not valid for want of delivery of possession as alleged? ...OPP

10. Parties were put to trial. Plaintiff examined himself as DW-1 besides Sh. Rati Ram and Sh. Daulat Ram as PWs No.2 and 3. Documents Ext. P-1

to P-10 were tendered in evidence. On the other hand, defendant No.2, Sh. Devi Ram, examined himself as DW-1 besides Sushil Kumar, Nathu Ram,

Khajana Ram and Mansa Ram as DWs No.2 to 5. Documents Ex.DW-1/A to Ex.DW-1/D and Ex. DW-2/A were produced on record. Learned trial

court decided issues No.1 to 3, 5 to 10 and 12 in negative whereas issues No.4 and 11 were answered in affirmative. Suit of plaintiff was dismissed.

Specific findings with respect to defendants having perfected title over the suit land by way of adverse possession were recorded.

11. Aggrieved against the judgment and decree passed by learned trial court, plaintiff filed an appeal under Section 96 of the Code. The said appeal

came to be decided by learned Additional District Judge, Solan as Civil Appeal No.41-S/13 of 1999 vide judgment and decree dated 7. 7.2001.

Learned lower Appellate Court after setting aside the judgment and decree passed by learned trial court passed a decree of possession of the suit land

in favour of plaintiff by holding that the defendants had failed to prove adverse possession and hence plaintiff having proved his title was entitled to the

possession of suit land. Relief of permanent prohibitory injunction was consequently denied.

12. The judgment and decree dated 7.7.2001 passed by lower Appellate Court in Civil Appeal No.41-S/13 of 1999 is under challenge in the present

appeal. This appeal has been admitted on following substantial questions of law:-

1. Whether suit filed by the plaintiff was barred under Order 2, Rule 2 CPC in view of the dismissal of his early suit No.6/1 of 1994 on 3.6.1994.

2. Whether the present suit filed by the respondent was not maintainable, in view of the provisions of order 23 CPC because earlier suit No.6/1 of

1994 with respect to same subject was dismissed on 3.6.1994.

3. Whether due to non- consideration of Exhibit DW1/B Mutation No.103 and copy of order passed by the Ld. Assistant Collector-II Grade, Arki in

application for correction Ex.P-10 dated 17.3.1983 and Ex.DW 1/A order dated 3.6.94 passed by Sub Judge, Arki the findings are vitiated.

4. Whether despite sale deed Ex. AW1/A registered on 1.1.1970, Gulaba continued to hold, occupy and possess the suit land during his life time to the

knowledge of plaintiff and in view of the plea of adverse possession having been raised and proved, he and his successors have acquired ownership

rights over the suit land.

13. Questions Nos 1 and 2, as noted above, are being taken up together for discussion as well as disposal, as the same set of facts and law is involved.

14. In their written statement, the defendants had taken specific objections to the effect that suit of plaintiff was barred under Order 2 rule 2 and also

under Order 23 rule 1 of the Code. These objections were raised on the basis that plaintiff had earlier filed Civil Suit No.6/1 of 1994, which was

dismissed on 3.6.1994. Issue No.6 was also framed on such objections.

15. A copy of order dated 3.6.1994 passed by learned Sub Judge, First Class, Arki in case No.6/1 of 1994 was produced on record as Ext. DW-1/A.

As per this order, suit titled Devi Ram Vs. Parago widow of Gulaba Ram and others was ordered to be dismissed in default under Order 9 rule 8 of

the Code on account of non-appearance of plaintiff or his counsel. Besides this, no other evidence was produced by defendants to prove their

objections.

16. Order 2 rule 2 of the Code mandates that all claims which plaintiff is entitled to make in respect of the cause of action should be included in one

suit and where plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not be entitled to sue subsequently in

respect of portions so omitted or relinquished. It means that in order to hold a suit to be barred by order 2 rule 2 of the Code, cause of action and

claims made in earlier suit must be ascertained with certainty, which can only be gathered from the pleadings in earlier suit, therefore, in order to

prove issue No.6, it was incumbent upon defendants to have placed and proved on record the pleadings in Civil Suit No.6/1 of 1994.

17. Similarly, Order 23 rule 4 of the Code prescribes legal bar precluding a person from instituting any fresh suit in respect of such subject matter or

claim which was either abandoned as a whole or in part or had withdrawn from such suit or part of its claim without the permission of the Court

granting liberty to institute a fresh suit in respect of such subject matter of the suit or such part of the claim under rule 3 of Order 23.

18. In order to take benefit of Order 23 Rule 4 of the Code again the least requirement is to place and prove on record the pleadings in the earlier suit.

In absence of which, the Court is precluded from forming an opinion on the objection as to suit being barred under order 23 rule 4 of the Code.

19. In the case in hand, as noted above, a copy of order Ext. DW-1/A has only been placed on record. On the basis of this document alone neither the

cause of action nor subject matter and claims in the previous suit can be ascertained. Learned trial court had also decided Issue No.6 against the

defendants by holding that in absence of pleadings in earlier suit, the defendants could not succeed in proving issue No.6. Defendants had accepted

such findings and had not challenged or assailed the same before learned lower Appellate Court either by way of filing cross-objections under Order

41 rule 22 or by seeking indulgence of the Code under Order 41 rule 33 of the Code.

20. In absence of any evidence to substantiate the objections under order 2 rule 2 and under order 23 rule 4 of the Code and also in absence of any

challenge to findings on Issue No.6 by defendants, this Court is unable to differ from the findings returned by learned trial court on Issue No.6 and the

same are affirmed.

21. The next substantial question of law framed in this appeal poses a question as to whether non-consideration of Ext. DW-1/B, Mutation No.103 and

Exhibit P - 10 order dated 17.3.1983 passed by Assistant Collector, Second Grade, Arki and order dated 3.6.1994 passed by Learned Sub Judge, First

Class, Arki Ext. DW-1/A vitiates the findings?

22. Learned Trial Court had considered Ext DW-1/A while deciding issue No.6 but had found itself unable to hold issue No.6 as proved in absence of

the pleadings in the earlier suit. As noted above, these findings had attained finality as were not assailed before learned Lower Appellate Court by

defendants, therefore, said Court had no occasion to consider Ext DW-1/A.

23. With regard to non-consideration of Ext DW-1/B and Ext P-10, it is evident from the records that these documents were duly considered by

learned Trial Court while returning findings on issues No.1 and 11. It can also not be said that learned Lower Appellate Court had avoided or omitted

to consider such piece of evidence. It is made out from paras 25 to 27 of the judgment passed by learned Lower Appellate Court that the factum of

Exhibit P-10 was taken into account and due consideration was given to its contents.

24. In any case perusal of document Ext DW-1/B, Mutation No.103, reveals that though the objection was raised by Gulaba Ram with respect to the

sale deed as well as delivery of possession in favour of plaintiff, the mutation, nevertheless, was attested in favour of plaintiff vide order dated

23.1.1972. There is nothing on record to suggest that this mutation Ext DW-1/B was assailed or challenged by defendants before the competent

authority. Though, it is settled that mutation does not confer title yet having attained finality, its contents become relevant for collateral purposes.

25. There is yet another piece of evidence on record i.e. an application submitted by Gulaba Ram, on 2nd February, 1983 before Assistant Collector,

Second Grade, Arki seeking correction in the revenue records of suit land. This document has been proved on record by defendants themselves as Ext

DW-1/C. Contents of this document clearly reveal that Gulaba Ram had admitted the factum of sale deed having been executed by him in favour of

plaintiff. It was further admitted that plaintiff had sold half share out of suit land in favour of Ratti Ram and thereafter had left Gulaba Ram and his

wife. Gulaba Ram only claimed himself to be in possession of suit land. Assistant Collector, 2nd Grade, Arki passed order dated 17.3.1983, Ext P-10,

on application Ext DW-1/C and returned specific findings that though Gulaba Ram, was in possession of the land but his possession was not as tenant

but was as relative of plaintiff. Undisputedly Gulaba Ram was the maternal uncle of plaintiff.

26. From the conjoint reading of Ext DW-1/C and Ext P-10, it comes out that Gulaba Ram had admitted to have sold suit land to plaintiff. He raised

dispute about the possession, which was ordered to be recorded in his favour on 17.3.1983 by Assistant Collector, Second Grade, Arki. Therefore,

Exhibit DW-1/C and Exhibit P-10 attained finality, hence defendants being successors of Gulaba Ram, are estopped from challenging the title of suit

land in favour of plaintiff.

27 The matter can be looked into from another angle. The fact that plaintiff had set up his title under a transaction of sale from late Sh. Gulaba Ram,

was in the knowledge of the defendants at least on 13.4.1971 i.e. the date of recording of an order by Assistant Collector, Second Grade, Arki in

mutation proceedings of Mutation No.103, Exhibit DW-1/B. Once Gulaba Ram was aware of this fact it was for him to avoid the consequences of

said transaction by getting it declared null and void. The contract of sale set up by plaintiff against Gulaba Ram was voidable at the option of Gulaba

Ram, but the record reveals that he had chosen not to challenge the title set up by plaintiff in himself by taking appropriate steps/remedy before the

appropriate forum. The defendants cannot subsequently be allowed to deny the title of plaintiff in the suit land especially when they had raised the plea

of adverse possession.

28. Defendants while framing the substantial question No.7 in the list of questions so filed along with the memorandum and grounds of appeal before

this Court have specifically admitted that despite registration of sale deed Exhibit AW-1/A on 1.1.1970 late Sh. Gulaba Ram, continued to hold, occupy

and possess the suit land during his life time to the knowledge of plaintiff and hence legal requirements to prove adverse possession in his favour were

fulfilled. The tone and tenor of substantial question of law so framed by defendants leaves no manner of doubt that the defendants never had any

misgiving about the execution of sale deed by late Sh. Gulaba Ram, in favour of plaintiff. This can also be inferred from an half-hearted attempt of

raising a plea in the written statement to the effect that late Sh. Gulaba Ram was rustic, illiterate and aged person and if there was any sale deed it

was a result of fraud and misrepresentation. No further details as required under Order 6 Rule 4 of the Code were provided, not only the plea of fraud

and mis-representation was not raised as per mandate of law, defendants led no evidence to prove this assertion. It can be said that defendants had

taken all sorts of defences just to confuse the issue.

29. Next substantial question of law on which present appeal has been admitted is reproduced as under:

Whether despite sale deed Ex. AW1/A registered on 1.1.1970, Gulaba continued to hold, occupy and possess the suit land during his life time to the

knowledge of plaintiff and in view of the plea of adverse possession having been raised and proved, he and his successors have acquired ownership

rights over the suit land.

30. Defendants had raised the plea of adverse possession and thereby having perfected the title over the suit land. Specific issue was framed as issue

No.11. Learned trial court decided issue No.11 in favour of defendants and held them to have perfected title over the suit land by way of adverse

possession. Learned Lower Appellate Court has set aside such findings by holding that defendants had failed to prove their adverse possession.

31. The findings recorded by learned lower Appellate Court on the issue of adverse possession cannot be faulted as neither there were pleadings nor

proof in accordance with law of the plea of adverse possession by the defendants. In the written statement the defendants had averred as under:-

....“moreover in the alternative the defendants and their predecessor since the alleged sale deed continued in possession of the suit land, as owner,

openly, peacefully, continuously to the knowledge of all including the plaintiff and thus have perfected the title by way of adverse possession. Hence

the suit is time barred.”

32. From the above noted contents of written statement, it cannot be inferred that from which date the defendants were claiming their hostile

possession on the suit land. There is no evidence on this point led by the defendants. Specific pleading followed by proof as to commencement of

hostile possession is sine qua non for establishment of adverse possession. The continuity, openness, peaceable enjoyment of such hostile possession

have to follow. In absence of proof of commencement of hostile possession, the rest of the factors like openness peaceable enjoyment and continuity

in possession become inconsequential. Hon’ble Supreme Court in Karnataka Board of Wakf Vs Govt. Of India, (2004) 10 SCC 779, vide para 11

has held as under:

“11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non- use of the property

by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession of the property and

asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well

settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open

and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It

must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See S.M.

Karim v. Bibi Sakina, Parsinni v. Sukhi and D.N. Venkatarayappa v. State of Karnataka.) Physical fact of exclusive possession and the animus

possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of

adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show:

(a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other

party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no

equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish

his adverse possession. [Mahesh Chand Sharma (Dr.) vs. Raj Kumari Sharma.]

33. Learned Trial Court, without any pleading or proof, to this effect, had clearly erred in holding that since Gulaba Ram had denied delivery of

possession to plaintiff vide Exhibit DW-1/C as recorded in order dated 13.4.1971, his adverse possession would start from the said date. Leaving apart

non-consideration of settled legal principles, learned Trial Court did not even take into account contents of documents Exhibit DW-1/C and Exhibit P-

10, which clearly proved that no case of possession of Gulaba Ram being adverse to the true owner was either claimed or made out.

34. Another fact cannot be ignored that none of the heirs or legal representatives of Gulaba Ram had stepped into witness box. DW-1 Sh. Devi Ram

(Defendant No.2) had represented defendant No.1 as a witness on the basis of power of attorney executed by defendant No.1. Devi Ram

(Defendant No.2) was claiming independent right to the suit land under a Will alleged to have been executed by Gulaba Ram, in his favour. There is

nothing on record to show that DW-1 (Defendant No.2) had any personal knowledge with respect to the facts of the case material for adjudication.

35. It is trite that possession howsoever long, if permissive, will not be a bar for a person having title to seek the decree of possession. Reference can

be had from para 14 of the judgment in Chatti Konati Rao and others Vs Palle Venkata Subba Rao, JT 2010 (13) SC 578 :

“14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said is that mere possession

however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the

title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to

show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property.

The plaintiff is bound to prove his title as also possession within twelve years and once the plaintiff proves his title, the burden shifts on the defendant

to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the

defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of twelve years thereafter. 36. The only bar of limitation is created under Article 65 of the Limitation Act, according to which the suit for possession on the basis of title has to be

filed within 12 years from the date the possession becomes adverse. As held earlier the defendants have failed to prove adverse possession qua the

suit land in their favour, therefore, the suit cannot be held to be barred by limitation.

37. At the time of hearing, learned Senior Advocate, representing defendants-appellants has laid stress with vehemence on the issue that learned

Lower Appellate Court had accepted sale deed Exhibit AW-1/A by way of additional evidence against the specific mandate of Order 41 Rule 27 of

the Code, hence, a substantial question of law arises to this effect and may be decided accordingly. Reliance has been placed on Union of India Vs

Ibrahim Uddin and another (2012) 8 SCC 148 and Satish Kumar Gupta and others Vs State of Haryana and others (2017) 4 SCC 760.

38. There is no dispute with legal proposition that appellate Court can exercise jurisdiction under Order 41 rule 27 of the Code for allowing additional

evidence only on satisfaction of one or more of the requirements prescribed therein. Learned Lower Appellate Court had allowed the admission of

document Exhibit AW-1/A by way of additional evidence on the ground that such document was found necessary by Court to enable it to pronounce

the judgment and also to do substantial justice.

39. Keeping in view the facts of the case, it can be said that the learned lower Appellate could pass the judgment even in absence of document Ext

AW-1/A (Sale Deed) for the reason that there was sufficient material on record, as detailed above, to prove the admissions of Gulaba Ram with

respect to sale of suit land in favour of plaintiff. The exercise of jurisdiction by learned lower Appellate Court cannot be said to be illegal or materially

irregular because it had also considered the additional evidence necessary for the purpose of doing substantial justice between the parties. No

prejudice was caused to the defendants and they were afforded opportunity to rebut such evidence.

40. The fate of this appeal will not change even if the document Ext AW-A/1 is ignored. This Court, thus, is not in agreement with the contention

raised on behalf of defendants.

41. It has also been argued on behalf of defendants that there was clear contradiction between the contents of sale deed Ext. AW-1/A and the

statement of AW-1, Daulat Ram with respect to payment of consideration amount and hence the sale could not be considered to be complete as

against Gulaba Ram. This contention is also being noted only to be rejected. Defendants have not uttered even a single word in this behalf either in the

pleadings or in evidence. Moreover, the settled principle of law is that in case of consideration amount remaining unpaid to the seller in transactions of

sale of immovable property, the transaction as such will not be rendered void. The seller can always claim consideration amount from the purchaser.

In the present case the defendants have never claimed such amount from plaintiff much less making any endeavour to avoid sale transaction through

process of law. Reference can be had from paras 26 to 28 of judgment rendered by this Court in Amar Chand Vs Madan Lal Latest HLJ 2019 (HP)

1014:

“26 The real test is the intention of the parties. In order to construe a sale, the parties must intend to transfer the ownership of the property and

they must also intend that the price would be paid either before or after the sale. The conduct of the parties and the evidence on record need to be

examined to ascertain the intention of the parties.

27. This Court in Shri Kripa Ram and others vs. Maina (2002 (2) Shimla Law Cases 213) has held:

“That presumption of the due execution of the document arises from the endorsement of the Sub Registrar under Section 60 of the Act.”

28. In Kanwarani Madna Vati and another vs. Raghunath Singh and other, (AIR 1976, HP 41), it has been held that in view of the provisions of the

Registration Act, Registration of a document leads a presumption of the correctness of the endorsement made on the document of registering

officer.”

42. It has also been contended on behalf of defendants that the suit was bad for non-joinder of necessary parties. It was argued that Gulaba Ram was

survived by a daughter named Parwati besides defendant No.1 and in her absence no effective and executable decree could be passed. This plea also

deserves rejection. From the cause of action pleaded by plaintiff in the plaint it cannot be said that he had any grievance against the daughter of

Gulaba Ram. He apprehended injury from defendants as arrayed by him in the suit. In any case, Parwati did not raise any grievance in this regard

before trial court or first appellate court. No further ground has been made out that the decree as sought by plaintiff could not be passed in absence of

Parwati. She never claimed possession of the suit land. Otherwise also the objection now becomes redundant as Parwati is already on record as

appellant.

43. No other substantial question remains to be answered in present appeal.

44. The appeal is accordingly dismissed with no orders as to costs.

CMP No.9850 of 2018

45. Defendants, during the pendency of RSA No.451 of 2001, have filed an application under order 14 Rule 5 read with Section 151 CPC for framing

the additional issues and has made a prayer in following terms:

“It is therefore, prayed that this application may kindly be allowed and the necessary issues on the points and pleadings referred to above may

kindly be ordered to be framed.”

46. In the application, defendants have reproduced all the objections raised in the written statement and have alleged that all the issues arising out of

the pleadings were not framed.

47. Response was filed by plaintiff to the said application and was opposed being belated. It was also submitted that defendants, by way of the

application under reference, were trying to rake up new issues which was not permissible. It was further contended that defendants did not make such

prayer either before the Trial Court or lower Appellate Court.

48. On perusal of the contents of application, it transpires that the defendants have made vague averments without specifying as to which issue was

not framed. Total 12 numbers of issues were framed by learned Trial Court and on their perusal this Court is unable to find as to which of the plea on

the defendants was not covered.

49. The parties have been litigating since 1995 and it is not the case of defendants that at any stage of the litigation they were taken by surprise. The

settled proposition of law is that where the parties are fully aware about the case of each other and have contested each other's case by availing

opportunity to lead evidence, the question of framing or non-framing of issue becomes insignificant. In the case in hand, the defendants have contested

the litigation for more than 25 years and were fully aware about the case set up by the plaintiff. The defendants have contested the case of plaintiff on

all accounts, hence, no prejudice can be pleaded by defendants at the stage.

50. Having no merits, the application is also dismissed.