

(1996) 04 SHI CK 0005

High Court of Himachal Pradesh

Case No: Regular Second Appeal No's. 436 of 1992 and 237 of 1993

Daulat Ram

APPELLANT

Vs

Lachhmi Devi and
Others

RESPONDENT

Date of Decision: April 26, 1996

Citation: (1997) 1 ShimLC 24

Hon'ble Judges: A.K. Goel, J

Bench: Single Bench

Advocate: G.D. Verma, in R.S.A. Nos. 436 of 1992 and 237 of 1993, for the Appellant; K.D. Sood, for Respondent Nos. 1, 9 and 10 in R.S.A. No. 436 of 1992 and for Respondent No. 1 in R.S.A. No. 237 of 1993 and R.S. Parmar, for the Respondent Nos. 2, 3 and 6 to 8 in R.S.A. No. 436 of 1992 and for Respondent Nos. 3 and 5 to 7 in R.S.A. No. 237 of 1993, for the Respondent

Final Decision: Allowed

Judgement

Arun Komar Goel, J.

Vide this common judgment it is proposed to dispose both the above noted appeals as they have arisen out of a common judgment passed by the lower appellate Court.

2. Smt. Lachhmi Devi Respondent-Plaintiff had filed a suit for permanent injunction restraining the Appellant-Defendant from interfering with her possession himself or through his helpers, relatives, friends and members of his family in any manner in land comprised in Khasra Nos. 73, 106 and 138 measuring 4-6 Bighas situate in Chak Barsanu, Pargana Matyanj, Tehsil Arki, District Solan, and for payment of Rs. 3,000 as damages on account of wrongful cutting of three "Tunni" trees and 14 numbers Bamboos from her land. This suit was contested and resisted by the Appellant-Defendant and according to him the Plaintiff was widow of Hiru his father and not Durga, it was further averred that the revenue entries showing her to be the widow of Durga are wrong and case of the Defendant further was that the Plaintiff his father Hiru were living together as husband wife for the last 40 years and

Plaintiff gave birth to two daughters, besides this his own mother Smt. Biharu gave birth to two sons and three daughters. When Sh. Hiru died about 8 years back he was survived by two widows, namely, Biharu and Lachhmi and three daughters and two sons from Biharu. It was admitted that Durga was one of the brother of the father of Appellant who died near about 40 years ago and none was left behind him, his in-heritance should have gone to Hiru and Shivia and his land is in exclusive possession of the Appellant. According to Appellant there was joint Hindu Family of which his father was the Karta and since Durga had no wife and children, therefore, his estate devolved upon his brOrs. , however, taking undue advantage from the wrong entries, Plaintiff started claiming herself to be the widow of Durga, her right, title and interest, if any, stood extinguished because of her marriage with Hiru.

3. Another suit being Suit No. 29/1 of 1986 was filed by Daulat Ram wherein he sought declaration to the effect that the land measuring 4-6 Bighas in village Barsanu and land measuring 6-4 Bighas situate in village Giana, Pargana Matyanj, Teh. Arki is a joint Hindu Family property which is wrongly and illegally inherited by Smt. Lachhmi Devi when she was not legally wedded wife of Sh. Durga and that all entries in the record in her favour are wrong, illegal, false and inoperative and ineffective qua the right, title and interest of the Plaintiff and proforma Defendants who constitute Joint Hindu Family with a consequential relief of permanent injunction against Lachhmi Devi not to alienate i.e. gift, sale, mortgage or create any charge on this Joint Hindu Family property. This suit was contested and resisted by Lachhmi Devi-Defendant as according to her the suit qua 4-6 Bighas of land above mentioned was liable to be stayed in view of her earlier suit concerning that land, suit was stated to be bad for misjoinder of cause of actions, estoppel was pleaded against the Appellant and suit was stated to be barred by time besides its being not maintainable in its present form and also that the Appellant had no cause of action to file the same.

4. In the aforesaid background, the parties went to trial on the following issues in both the cases which were to the following effect:

In Suit No. 38/1 of 1985:

1. Whether the Plaintiff is owner in possession of the suit land, as alleged? OPP
2. Whether the Plaintiff is entitled to the relief of permanent injunction and for damages, as prayed for? OPP
3. Whether the Plaintiff is not widow of Durga and is widow of Hiroo, if so its effect? OPD
4. Whether the Plaintiff is estopped from filing of the suit on account of his act, conduct etc.? OPD
5. Whether the suit land is a Joint Hindu Family property, if so its effect? OPD

6. Whether the suit is bad for non-joinder of necessary parties? OPD

7. Whether no cause of action has arisen to the Plaintiff? OPD

8. Relief.

In Suit No. 29/1 of 1986:

1. Whether the suit property is Joint Hindu Family property, as alleged, if so its effect? OPP

2. Whether the Plaintiff is co-owner, co-sharer of the suit property along with proforma Defendants, as alleged? OPP

3. Whether the entries in the revenue record in favour of Defendant No. 1 in respect of the suit land are illegal, null and void, ineffective, inoperative qua the right title and interest of the Plaintiff and proforma Defendants, as alleged? OPP

4. Whether the Defendant No. 1 is the widow of deceased Hiru, if so its effect? OPP

5. Whether suit is bad for non-joinder of causes of action? OPD

6. Whether the Plaintiff is estopped from the filing of suit on account of his act, conduct etc., as alleged? OPD

7. Whether the suit is barred by time? OPD

8. Whether the suit is not maintainable? OPD

9. Whether the Plaintiff has no cause of action? OPD

10. Relief.

5. After the trial of the case, suit No. 38/1 of 1985 filed by Lachhmi Devi against Daulat Ram was decreed whereby he was permanently restrained from interfering with the possession of Lachhmi Devi qua the land for which he had filed the suit and a decree of Rs. 1,500 on account of damages for having illegally felled trees from her land was also passed against the Defendant-Appellant. At the same time suit filed by the Appellant against Lachhmi Devi was dismissed. Appellant was also burdened with costs in both the suits.

6. Against the decision in both the cases aforementioned Daulat Ram Appellant filed two appeals, i.e. Appeal No. 19-N/13 of 90/88 was filed against the judgment and decree whereby the suit of the Appellant was dismissed and Appeal No. 20 NS/13 of 1990/88 was filed by the Appellant against the decree passed in favour of Smt. Lachhmi Devi respondent. R.S.A. No. 237/93 pertains to the judgment and decree whereby the suit of the Appellant was dismissed and R.S.A. No. 436/92 pertains to the suit and appeal whereby the appeal of the Appellant against the decree is in favour of Lachhmi Devi-Respondent was dismissed.

7. The arguments in this case were heard on 23-2-1993 and 29-3-1996. During the course of arguments Sh. G.D. Verma learned Counsel appearing for the Appellant has urged that the document Ext. PY-1 has been misconstrued by the Courts below. This is a copy of mutation of inheritance of Durga and according to this document, report regarding the date of death of Durga was entered on 18-12-2002 B.K. and mutation No. 156 of inheritance in favour of Lachhmi Devi was attested on 26-12-2002 B.K. corresponding to 12th August, 1947 as such according to him both the Courts have fallen into error by taking the date of death in the year 1954.

8. Next submission of learned Counsel for the Appellant is that Ext.DW 1/A mutation No. 342 dated 15-7-1954 which pertains to the inheritance of Hiru clearly indicates that his estate was inherited by Daulat Rami, Devi Chand, Dropti, Godavari, Niki, Jamna, Kala in equal shares (7 shares) and Bihar, Lachhmi Devi in equal shares (one share). The thrust of his submission was that the lower appellate Court has completely ignored this document from consideration and thus the findings recorded that Lachhmi Devi is not the widow of Hiru are not sustainable. He further goes to say that Lachhmi Devi while appearing as PW 1 has stated that though two daughters Jamna and Kala were born from her womb and loins of Hiru, however, she denied the factum of marriage, she also admits that she and Bihar used to live together, however, she says that she was not living with Bihar as wife of Hiru. Similarly Sh. Verma has referred to statements of P Ws particularly with reference to P Ws 4, 5, Ext.PW 6/A as well as Ext.PX, and has prayed for allowing the appeal.

9. Shri K.D. Sood, learned Counsel appearing for the Defendants When confronted with the aforesaid situation made an attempt by stating that since this is a second appeal as such it calls for no interference and the findings recorded by the Courts below are based on proper and correct appreciation of the evidence produced by the parties and accordingly call for no interference. According to him, there is no question of law much less substantial question of law involved in these cases which may require consideration.

10. An appraisal of the facts in this case reveals that Smt. Lachhmi Devi firstly inherited the estate of Durga vide mutation of inheritance Ext.PY-I referred to hereinabove. Thereafter on the death of Hiru she also inherited the estate of Hiru alongwith his two daughters, namely, Jamna and Kala besides sons and daughters and other widow of Hiru Smt. Bihar. This document has not at all been considered much less referred to by the lower appellate Court. This has material bearing on the merits of the case. It may not be out of place to mention here that the first appellate Court being final Court of fact, was expected to not only refer to this document and other materials on record but before recording the findings, was further required and expected to take into account the entire oral as well as documentary evidence produced before the Courts below by the parties during the course of evidence. Mr. Sood was unable to say anything to the contrary in this behalf. Non-consideration of material evidence which has further bearing on the merits of the case is a question

of law as such it was necessary and incumbent upon the lower appellate Court to have gone into the matter on proper consideration and appreciation of the evidence both oral and documentary on record. Without going into other questions and contention raised by both the learned Counsel for the parties, this is a fit case wherein the judgment and decree passed by the lower appellate Court deserves to be set aside with a direction to the said Court to decide the appeals after due appraisal and consideration of the entire material which is there on the file and thereafter dispose of the appeals according to law.

11. As a result of the aforesaid discussion this appeal is allowed and as a consequence thereof the judgment and decree under appeal passed by the lower appellate Court is set aside. Both the appeals are remanded back to the lower appellate Court with a direction to dispose of these appeals after hearing parties as well as after due consideration of the entire materials on the record case both oral as well as documentary and it is ordered accordingly. Parties are directed to appear in the Court of Additional District Judge Solan on May 24, 1996. Since the matter is old the appellate Court is directed to dispose of the appeals as far as possible within a period of 3 months from the date of appearance of the parties before it. No costs.