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## Ashok Kumar Chauhan Vs Kanwar Singh and Others

### Regular Second Appeal No. 265 of 2001

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**Court:** High Court of Himachal Pradesh

**Date of Decision:** Sept. 7, 2001

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) " Order 2 Rule 2, Order 32 Rule 3, Order 32 Rule 7, Order 32 Rule 8, 100#Hindu Minority and Guardianship Act, 1956 " Section 12, 8, 8(1), 8(2), 8(3)#Limitation Act, 1963 " Article 60, 60

**Citation:** (2002) 1 ShimLC 152

**Hon'ble Judges:** Arun Kumar Goel, J

**Bench:** Single Bench

**Advocate:** Ajay Kumar and N.D. Sharma, for the Appellant; S.S. Chauhan, R.S. Jamalata, Advocatefor Respondent Nos. 1 and 2 and B.K. Sood, Advocatefor Respondent No. 3, for the Respondent

**Final Decision:** Dismissed

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### Judgement

Aran Kumar Goel, J.

Appellant (hereinafter referred to as the "Plaintiff") is aggrieved by the judgment and decree dated 3.4.2001 passed

by the learned District Judge, Shimla in C.A. 109-S/13 of 1998, whereby the decree passed by Sub-Judge, 1st Class, Court No. 3, Additional

Charge Court No. 2, Rohm in civil suit No. 49-1 of 1993 dated 13.5.1998 has been upheld and the appeal filed by the Plaintiff has been

dismissed.

2. With a view to properly appreciate what was argued at the time of hearing of this appeal contents of the plaint are extracted here in below:

1. That the Plaintiff is the absolute owner of land comprised in khata khatauni 148/259 old khasra No. 805 and new khasra No. 1061 measuring 2

bighas 11 biswas situated at Chak Gawas Tehsil Chirgaon, District Shimla, which property was purchased by the Plaintiff, when he was minor,

through his father Defendant No. 3 from Sh. Het Ram son of Sh. Lakhu vide deed of sale dated 27.10.1975 duly registered in the office of the

Sub-Registrar, Rohru on the same date for a consideration of Rs. 500. The Plaintiff was put in possession of the suit property at the time of

registration of the afor esaid deed of sale in favour of the Plaintiff through his father. As submitted, at that time the Plaintiff was a minor and as such

the transaction of the sale etc. was done by the father of the Plaintiff namely, Defendant No. 3. The property was purchased in the name of the

Plaintiff with the funds of the Plaintiff which had received on account of gifts in cash on various occasions from his relatives. The date of birth of the

Plaintiff is 3.3.1969. Needless to say with the sale of the said property coupled with delivery of possession, the said Sh. Het Ram ceased to have

any right, title or interest in the said land and the Plaintiff became its owner in possession.

2. That after the afor esaid sale, the Plaintiff was put in possession of the property by Sh. Het Ram through his father and continued to be in

possession of the said property through his father till the month of September/October, 1984. Thereafter, it appears that the Defendant Nos. 1 and

2 unlawfully and for cibly dispossessed the Plaintiff from the said property in September/ October, 1984 either in connivance with Defendant No.

3 or the Defendant No. 3 on account of his acts of omission, commission and negligence and mis-management allowed the Defendant Nos. 1 and

2 to occupy the said property by dispossessing the Plaintiff from the same. Since the Plaintiff was a minor at the time when he was unlawfully

dispossessed from the suit property in the month of September/October, 1984 he could not do anything and his father does not seem to have

acted in a prudent manner to reclaim the possession of the suit property from the Defendant Nos. 1 and 2 who illegally dispossessed the Plaintiff

therefrom on the basis of sale deed dated 4.11.1982 allegedly executed by Sh. Het Ram in their favour. The alleged sale in favour of the

Defendant Nos. 1 and 2 by Sh. Het Ram was illegal nul and void because at that time he had no right, title or interest in the suit land and could

transfer none.

3. That the possession of the Defendant Nos. 1 and 2 over the suit property is unlawful. They have no right to possess the property as the lawful

owner thereof is the Plaintiff and he alone is entitled to possess the same at any rate the Plaintiff was unlawfully dispossessed therefrom in

September/October, 1984 because of the Plaintiff had been put in possession of the said property of Sh. Het Ram at the time of sale in the year,

1975 in favour of the Plaintiff and continued to be in lawful possession thereof till September/October, 1984. If at all, the Plaintiff could only be

dispossessed from the suit land in due process of law. The Defendant Nos. 1 and 2 do not have any right or title to possess the said property or at

any rate better right or title than the Plaintiff to the suit property. The Plaintiff is entitled to the possession of the suit property on the basis of title or

at any rate on the basis of illegal dispossession by the Defendant Nos. 1 and 2 in September/October, 1984.

4. That in the circumstances, the Plaintiff is entitled to a decree for possession with respect to the suit property on the basis of title or at any rate on

the basis of unlawful dispossession by the Defendant Nos, 1 and 2.

5. That the cause of action accrued to the Plaintiff against the Defendant Nos. 1 and 2 in September/October, 1984 when the Plaintiff was illegally

dispossessed from the suit property.

6. That this learned court has jurisdiction to try and determine the suit as the suit property is situated within the jurisdiction of this Court.

7. That the value of the suit for the purpose of Court fees and jurisdiction fixed at Rs. 3,000 for the relief of possession.

It is, therefore e, prayed that a decree for possession with respect to the land comprised Khata Khatauni No. 148/259 old Khasra No. 805 and

New Khasra No. 1061 measuring 2 bighas 11 biswas situated in vill. Chak Gawas, Tehsil Chirgaon, District Shimla be passed in favour of the

Plaintiff and against the Defendant Nos. 1 and 2. Cost of the suit be also allowed to the Plaintiff against the Defendant Nos. 1 and 2.

3. In this suit, Respondents 1 and 2 were arrayed as Defendants 1 and 2 and Respondent No. 3 was arrayed as Defendant No. 3 and are being

referred to as "Defendants" hereinafter.

4. While contesting the claim of the Plaintiff Defendants 1 and 2 specifically pleaded that the suit land had been transferred in their favour by Satya

Nand Chauhan, Defendant No. 3 (who is admittedly father and was the natural guardian of the Plaintiff at the relevant time). This position is even

admitted by the Plaintiff in the plaint. It is a different matter that the Plaintiff now alleges that his father has not properly protected his interest. After

the sale of property, Defendant No. 1 continued to be in possession of the suit land. His further case is that he was in possession of the same even

prior to the sale dated 27.10.1975 in favour of the Plaintiff as detailed in the plaint. It was only keeping in view this fact that in the interest of the

Plaintiff, sale of the property in question was effected. Case of the Defendants 1 and 2 was that an earlier suit was filed by the Plaintiff through his

father and natural guardian wherein the matters was compromised and photostat copy of that order is Ext. DB. This order was in the following

terms:

This is a suit for permanent injunction restraining the Defendant from interfering with the possession of the Plaintiff in land comprised in Khata

Khatauni No. 148/259 Khasra No. 805 measuring 2-11 biswas situate in Chak Gawas Teh. Rohru.

Today the Plaintiff has recorded a statement that since the suit has been compromised, he withdraws the same. As such, the suit is hereby

dismissed as withdrawn. The file after completion be consigned to the Record Room.

Statement was made on behalf of the Plaintiff in this case by his learned Counsel Shri B.L. Kuthiala, Advocate and when it is translated into English

it reads that the parties have sorted out the matter. therefore e, it is not intended to prosecute the suit. In this background, Defendants 1 and 2

refuted the claim of the Plaintiff. Pleas of res-judicata, bar under Order II Rule 2 Code of Civil Procedure Plaintiff having no cause of action and

suit being also barred by time were also raised. Defendant No. 3 conceded the claim of the Plaintiff and prayed for the suit being decreed.

5. In replication filed by the Plaintiff, claim of the Defendants which was contrary to the averments made in the plaint was denied. On the pleadings

of the parties, trial court framed the following issues:

- (1) Whether the Plaintiff is owner of the suit land, as alleged? OPP
- (2) Whether the Plaintiff has been dispossessed by the Defendant in the year 1984? OPP
- (3) Whether the Plaintiff is entitled for the relief of possession, as alleged? OPP
- (4) Whether the Plaintiff has no locus standi to file the present suit? OPD
- (5) Whether the suit is barred by principle of res judicata? OPD
- (6) Whether the suit is hit by Order 2 Rule 2 CPC as alleged? OPD
- (7) Whether there is no cause of action in favour of the Plaintiff to file the present suit? OPD
- (8) Whether the suit is barred by limitation? OPD
- (9) Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD
- (10) Relief.

6. Trial Court after considering the entire material before it, dismissed the suit. Appeal preferred by the Plaintiff against the judgment and decree of

the trial court was also dismissed by the learned lower appellate court below. Hence, this second appeal at the instance of Plaintiff.

7. Notice pending admission was issued to the Defendants to show cause why the appeal be not admitted.

8. At the time of hearing, it was not disputed that the Plaintiff attained majority in somewhere 1987 and at that point of time, he came to know that

the land in question has been sold by his father. He denied that in the year 1982-83, Kanwar Singh had become owner of the land in question as

per revenue record. While showing ignorance, Plaintiff also stated that he is not aware as to whether any dispute arose between his father and

Kanwar Singh, Defendant No. 1 and his father as his legal guardian filed a suit on his behalf. He admitted Exts. DA and DB dated 20.5.1985, but

hastened to say that his father did not protect his interest properly.

9. Plaintiff shows that under the guise of suit for possession, the Plaintiff wants to get the sale deed declared nullified which was executed by his

father in favour of Kanwar Singh Defendant No. 1 pursuant to which the latter became the owner, though he claimed to be in possession of the suit

land even prior to the sale deed having been executed in his (Plaintiff's) favour in 1975.

10. At the time of hearing of this appeal, learned Counsel for the Plaintiff forcefully urged that the sale made by the father of the Plaintiff is void ab

initio since it was in violation of the provisions of Order XXXII Rules 7 and 8 CPC and it is not binding on him. According to him, since the

Plaintiff had based his claim on title, therefore, the suit was maintainable without seeking declaration to the effect that compromise as well as sale

deed were bad in law and may be declared as such.

11. After having heard the learned Counsel for the parties and after having examined the record of the case, it is clear that both the courts below

have concurrently come to the conclusion that the suit had been filed after expiry of period of limitation. This is not a suit simpliciter for possession

so as to give the benefit of the provisions of Limitation Act whereunder period prescribed is larger as was argued on behalf of the Plaintiff. At the

risk of repetition, it may be observed that the sale in favour of Kanwar Singh Defendant No. 1 by the father of the Plaintiff is not void ab initio but

is voidable and steps having not been taken as per law, dismissal of the suit as well as the said decree being upheld in the appeal was the natural

consequence. Thus, suit had to be filed within the time prescribed under Article 60 of Limitation Act. Admittedly, suit was filed on 11.5.1993 long

after attaining majority by the Plaintiff.

12. Another fact that emerges from the record is that father of the Plaintiff filed a suit when according to the record of the case, an attempt was

made to interfere with his possession by Kanwar Singh Defendant No. 1. It was during the pendency of the suit that the transfer was made by the

father of the Plaintiff. How it was not in the interest of the Plaintiff, there is no legal evidence produced by the Plaintiff.

13. Findings recorded by the Courts below are pure findings of fact based on proper appreciation of evidence as well as correct application of

law. On examination of the entire record of this case, it cannot be said that those are based on either inadmissible evidence or such evidence has

been taken into account which could not have been legally looked into. Similarly, findings recorded by the trial Court are not contrary to any legal

provision. Those also cannot be said to be perverse.

14. In addition to this simply because this Court would take a contrary view of the matter is no ground to interfere with the concurrent findings of

fact recorded by the courts below. Even erroneous findings of fact do not call for interference in an appeal u/s 100 of the CPC unless those fall in

any of the above grounds. After its amendment vide Central Act No. 104 of 1976, unless the appeal involves substantial question of law, this

Court will be committing a grave error by interfering with such concurrent findings recorded by the Courts below.

15. Mr. Ajay Kumar, learned Counsel for the Plaintiff referred to three decisions which will be referred to hereinafter.

16. First case relied upon by him is Indira Vs. Arumugam and Another, According to him, period of limitation for seeking possession was 12

years. This was so held by the Supreme Court where possession of immovable property is based on title unless Defendant proves adverse

possession, limitation would be 12 years as per Article 65 of Limitation Act. This case has no applicability to the facts of the present case. Reason

being that in case of Plaintiff, he was not dispossessed. Rather his father had transferred the right, title and interest of the suit land in favor of

Kanwar Singh long back during the pendency of the earlier suit when the said suit was compromised. Without overcoming the transfer in favor of

Defendant No. 1, no relief is available to the Plaintiff.

17. In *Tikk Raj v. Bhagat Ram and Anr.* 1997 (1) ShimLC 281, it was held that suit for possession needs to be filed within 12 years of the

dispossession and thus, it cannot be dismissed being time-barred. As already observed, this decision also does not apply to the present case.

18. Similar is the position regarding the decision relied upon on behalf of the Plaintiff in the case of *Joy Nath Goala and Others Vs. Bhabani Prasad*

*Choudhary and Others*, Kanwar Singh does not claim the suit property on the basis of the adverse possession. He claims his possession prior to

1975 and thereafter on the basis of its transfer by the father of the Plaintiff followed by compromise in the earlier suit. In these circumstances,

without getting such transfer declared not binding on the Plaintiff, no relief could be sought for by him in suit as framed (supra). There is no such

prayer made in the suit seeking declaration to set aside the sale and/or to declare the compromise null and void.

19. How the matter is to be dealt with in such a situation, reference can be made to what was observed by the Supreme Court in *Vishwambhar*

and *Others Vs. Laxminarayana (Dead) through L.Rs. and Another*, In this case, it was held that the alienations made by the Plaintiffs which were

under challenge in the suit were voidable at the instance of the Plaintiffs and the Plaintiffs were required to get the alienations set aside if they

wanted to avoid the transfers and regain the properties from the purchasers.

20. In *Hamida and Others Vs. Md. Kahlil*, it was held that findings of fact recorded by the first appellate Court based on evidence could not be

interfered with by the High Court, that too in the absence of any substantial question of law that arose for consideration between the parties.

21. In *Chandra Bhan v. Pamma Bai and Anr.* 2001 AIR SC 2295, it was held as under:

6. We have heard learned Counsel for the parties and we have also gone through the judgments passed by the lower Courts as also by the High

Court. Since the trial Court and the lower appellate Court had recorded concurrent findings of fact that Ram Nihore was not in possession at any

time over the land in question and that the Defendant had acquired the bhumiswami rights under the M.P. Land Revenue Code on account of the

long uninterrupted possession, it was not open to the High Court to reverse those findings, particularly when the findings were supported by the

own admission of Ram Nihore that at the age of 13 he had left the village and returned after 16-17 years which indicated that he was not in

possession over the land in question. The appeal is, accordingly, allowed. The judgment passed by the High Court is set aside and those of the

lower Courts are restored. There shall be no order as to costs.

22. So far the consent of the father of the Plaintiff in the earlier suit to withdraw it is concerned, it is purely a question of fact and in this behalf

reference can be made to AIR 2002 SC 2416 . In this case it was held lack of consent by mother was essentially a question of fact and first

Appellate Court was final Court of, fact.

23. In *Amirtham Kudumbah v. Sarnam Kudimban* AIR 1991 SC 1256, amongst other things, Supreme Court held that where transfer of property

by a natural guardian of minor made without permission of court and legal necessity, a purchaser of the property from minor three years after the

minor attained majority, would be entitled to file a suit for setting aside the sale by the guardian of the minor within three years after the minor

attained majority. The transfer made by the father during his son's minority was voidable at the instance of his son who was the real owner, and

any person purchasing such property from the natural guardian obtained only a defensible title. The minor retained a right in the property to defeat

existing adverse claims, and such right is an assignable right. Even a bare perusal of Article 60 of the Limitation Act is to this effect. For ready

reference Article 60 is extracted here in below:

60. To set aside a transfer of

property made by the

guardian of a ward-

by the ward who has Three When the ward has

attained jority; years attained majority.

(b) by the ward"s legal

representative-

(i) When the ward dies within Three When the ward attains

three years from the date years. majority,

of attaining majority;

(ii) when the ward dies befor e Three When the ward dies.

attaining majority. years.

24. In *Roop Singh (Dead) Through LRs Vs. Ram Singh (Dead) Through LRs.*, it was held as under.

7. It is to be reiterated that u/s 100 of the CPC juris diction of the High Court to entertain a second appeal is confined only to such appeals which

involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising

its jurisdiction u/s 100 Code of Civil Procedure.

25. In *Divya Dip Singh and others Vs. Ram Bachan Mishra and others*, what was held while dealing with a case under Order XXXII, Rule 3 CPC

and is relevant for the purpose of this appeal was in the following terms:

7. We do not think that Mr. B.B. Singh was right in his submission. He failed to take note of the important factor, namely, the appointment of

guardian in the Title Suit was one under Order XXXII, Rule 3 of the Code of Civil Procedure, which will not take away the right of the natural

guardian for ever. Once the guardian appointed during the tendency of the suit was properly discharged, the rights of the natural guardian revive.

The case cited by the learned Counsel for the Appellant was under the Guardians and Wards Act, 1890, which will have no application to the

facts of the present case. As a matter of fact, Section 8(3) of the Hindu Minority and Guardianship Act, 1956 expressly provides that any disposal

of immovable property by a natural guardian in contravention of Sub-section (1) or Sub-section (2) of Section 8 inter alia bars the natural guardian

from encumbering or selling the immovable property without the previous sanction of the Court. under the circumstances and in view of the

admitted position that the minors have not challenged the sale within three years from their attaining majority, have no right to ignore the sale as

void. Further as noticed earlier, the Appellants themselves have accepted the said sale by their father by writing a letter to the Collector of Bhojpur

at Arrah and requesting to collect the loan arrears advanced against the suit lands, from the purchaser first Respondent. Still further, it is again

common ground that the Appellants have not filed any objections to the Statements published u/s 9A and the scheme published u/s 12 of the Act

within the prescribed period. All these factors, as already noted, were taken due note of by the High Court, while passing the judgment under

appeal.

26. Applying the tests laid down by the Supreme Court of India in the afor esaid cases and after examining the record of the case, I am satisfied

that there is no question of law much less substantial question of law so as to warrant interference in this appeal.

27. In view of the afor esaid discussion, there is no merit in this appeal calling for interference. The same is accordingly dismissed.