
(2010) 3 ShimLC 156

High Court of Himachal Pradesh

Case No: Regular Second Appeal No. 30 of 2009

Gurdas and Another

APPELLANT

Vs

Devi Singh and Others

RESPONDENT

Date of Decision: Aug. 31, 2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Order 20 Rule 5#Limitation Act, 1963 â€” Article 65

Citation: (2010) 3 ShimLC 156

Hon'ble Judges: V.K. Sharma, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

V.K. Sharma, J.

In this appeal arising out of concurrent findings of fact, challenge is laid by the appellants-defendants against the judgment

and decree dated 23.10.2008, of the learned District Judge, Kullu, H.P., in Civil Appeal No. 91/05-47/08 titled Gurdas and Anr. v. Devi Singh

and Ors., whereby the appeal filed by them against the judgment and decree dated 7.10.2005, passed by the Civil Judge (Senior Division) Lahaul-

Spiti at Keylong, Himachal Pradesh, in Civil Suit No. 39 of 2001 titled Devi Singh and Ors. v. Gurdas and Anr., for grant of a decree of

declaration with consequential relief of injunction and in the alternative for possession, filed by the respondents-plaintiffs, was dismissed, thereby

affirming the findings returned by the learned trial Court.

2. The suit was initially filed by S/Shri Devi Singh, Prem Singh, Prem Lal, Bir Singh and Sham Lal, sons of Shri Roop Dass, son of Shri Parnand

against Shri Gurdas and Shri Devi Dass, sons of Shri Parnand. Later on, on the death of plaintiff No. 3, Shri Prem Lal, his legal representatives,

namely Kiran and others (respondents-plaintiffs No. 3 to 7) were brought on record to represent his estate as involved in the present appeal.

Admittedly, late Shri Roop Dass, father of the original plaintiffs, was real brother of the defendants Shri Gurdas and Shri Devi Dass.

3. The dispute between the parties concerns the land measuring 2-3-0 bighas being ? share of the land measuring 4-6-0 bighas comprising of

Khata No. 108, Khatauni No. 148, Khasra Nos. 67, 76, 96 and 97, plots 4, vide jamabandi for the year 19991-92, situate in village and Kothi

Goshal, Tehsil Lahaul, District Lahaul and Spiti, which shall here-in-after be referred to as "the suit land".

4. Bereft of details the facts pleaded by the parties are that according to the plaintiffs, the suit land was owned by their father Shri Roop Dass and

after his death in the year 1969, it was inherited by them as owners in possession thereof in equal shares on the basis of mutation of inheritance

sanctioned in their favour. However, the defendants in connivance with the revenue officials got mutation No. 148, dated 17.5.1998, sanctioned in

their favour, whereby, they have been recorded as owners in possession of the suit land. Though a review petition was filed against this mutation,

yet since the defendants started interfering in the possession of the plaintiffs over the suit land, they were constrained to file the suit.

5. The suit was contested by the defendants on preliminary objections regarding maintainability, estoppel, limitation and jurisdiction. On merits, the

case set up by the defendants was that Shri Roop Dass, father of the plaintiffs left his native place during his life time and settled as "Ghar Jawain"

at village Kirting, which is far away from the suit land. The plaintiffs also lived with their father in village Kirting. The defendants who are brothers of

Shri Roop Dass, are coming in cultivating possession of the suit land since the marriage of Shri Roop Dass in the year 1952, when he left his native

place and since then their possession is adverse, continuous, absolute, open and peaceful and they have become owners thereof by adverse

possession.

6. The plaintiffs by filing replication refuted the case pleaded by the defendants and instead reiterated the averments set up in the plaint.

7. On the above pleadings the parties went to trial on the following issues:

1. Whether the defendants are owners of suit land by way of adverse possession? - OPD.

2. Whether the plaintiffs are estopped from filing the suit by their act and conduct? -OPD.

3. Whether this Court has no jurisdiction to try this suit? - OPD.

4. Whether the suit is not maintainable in the present form? - OPD.

5. Relief.

8. After the parties led evidence and were heard by the learned trial Court, the suit was decreed for the alternative relief of possession. The matter

was carried in appeal by the defendants to the Court of the learned District Judge, but, without success. Accordingly, they are in second appeal

before this Court.

9. The appeal was admitted on the following substantial questions of law:

1. Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence as also the pleadings of the

parties, particularly, the documents Ext. P-1, D-1 to D-4 as also the statements of DW-1 to DW-3 which has vitiated the findings?

2. Whether on the material on record the only irresistible conclusion which could be drawn was that the defendants-appellants were in adverse

possession of the property being in continuous, open and as of right possession of the property for more than 50 years to the knowledge of the

plaintiffs and their predecessors?

3. Whether on the pleadings of the parties and on the proved facts of the case that Roop Dass having become Ghar Jamai and living with his in

laws in Village Kiriting has lost the title in his fathers property a clear case of continuous, open and hostile possession by way of adverse possession

of the defendants was made out?

4. Whether the judgment of the Id. District Judge is vitiated being not in accordance with Order 20 Rule 5 C.P.C. as also the case reported in Om

Prakash and Others Vs. State of Himachal Pradesh and Others, and failed to consider independently the evidence on record?

10. I have heard the learned Counsel for the parties and perused the record.

11. Before entering into an elaborate discussion and decision on the aforesaid substantial questions of law for determination, it shall be pertinent to

observe that in essence the case set up by the defendants was firstly that they have acquired titled to the suit land by adverse possession. Since the

suit of the plaintiffs is based on title, it shall be governed by Article 65 of the Limitation Act. The law on the subject is by now clearly crystallized by

a catena of authoritative pronouncements rendered by the Hon"ble Apex Court as also this Court.

12. In Karnataka Board of Wakf Vs. Government of India and Others, the Hon"ble Supreme Court has enunciated broad parameters required to

be established by a person who claims adverse possession, vide para 11 of the judgment, which is to the following effect:

In the eye of 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 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 true owner, it is for him to clearly plead and establish all facts

necessary to establish his adverse possession. (Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma).

13. The Hon"ble Apex Court while reiterating the above ingredients has further held in T. Anjanappa and Ors. v. Somalingappa and Anr. (2006) 7

Scc 570 ""that mere possession howsoever long does not necessarily mean that it is adverse to the true owner"", vide para 20 of the judgment,

which goes thus:

It is well-recognized proposition in law that mere possession however long does not necessarily means that it is adverse to the true owner. Adverse

possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse

possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The

classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner"s title must be peaceful,

open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property,

though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

14. In another authoritative and exhaustive pronouncement of law reported as P.T. Munichikkanna Reddy and Ors. v. Revamma and Ors. (2007)

6 Supreme Court Cases 59, the Hon"ble Supreme Court has further emphasized that (1) starting point of adverse possession is of equal

importance; (2) even an unduly long and undisturbed possession does not prove the intention of the person claiming title by adverse possession; (3)

the initial burden lies on the land owner to prove his title and possession, the onus then shifts to other side to prove title by adverse possession and

(4) since right to property is a human right, adverse possession should be considered in that context against the background that Courts around the

world are taking an unkind view to the concept of adverse possession, should be kept in mind.

15. It has further been held by the Hon"ble Supreme Court in Annakili v. Vedanayagam and Ors. AIR 2008 Supreme Court 346, vide para 22 of

the report, as under:

Claim by adverse possession has two elements : (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant

must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse

possession. It is now a well settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose.

Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi

must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the

period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more do not ripen

into a title.

16. The law laid down by this Court in Hari Datt and Ors. v. Sapuran Dass 1987 Sim. L.C. 179 and Devi Chand v. Raj Dulari 1992 (2) Shim

L.C. 248, is also to the similar effect.

17. The substantial questions of law for determination in this case are required to be answered in the light of the above legal principles and I

proceed to undertake the exercise.

Substantial Question of Law No. 1

18. On an appraisal of the oral and documentary evidence led on behalf of the defendants, particularly the depositions of defendant No. 2, Shri

Devi Dass, as DW-1, DW-2 Shri Charan Dass and DW-3 Shri Megh Singh and extracts of family register Ex.D-2 and Voters" list Ex.D-3, the

learned trial Court has come to the conclusion that the plaintiffs were owners of the suit land. However, the same was coming in cultivating

possession of the defendants for the last more than 50 years. The entries in jamabandies Ex.P-1 for the year 1991-92 and Ex.D-1 for the year

1996-97, are identical in nature. Extract of family register Ex.D-4 is indicative of the fact that either late Shri Roop Dass or the plaintiffs were not

residing in their native village Goshal. These aspects of the case have also been duly considered by the learned first appellate Court. Thus, it cannot

be said that the findings returned by the learned court below vide the impugned judgment dated 23.10.2008 are either perverse or based on

misreading of pleadings and oral and documentary evidence. It being so, question No. 1 cannot at all be said to be a question of law what to say of

a substantial question of law.

Substantial Question of Law No. 2

19. It is in evidence that the suit land was self acquired property of late Shri Roop Dass, predecessor-in-interest of the plaintiffs. He had also got a

share in the ancestral property belonging to his father, which was given by him to defendant No. 1 Gurdas, through a registered deed as stated by

defendant Devi Dass, while appearing as DW-1. To this effect is also a suggestion put to PW-1 Devi Singh (plaintiff No. 1) during cross

examination and he has admitted the same to be correct. Thus, it is manifest that even despite the fact that late Shri Roop Dass, had left his native

place and had settled at the house of his in-laws in village Kirting as "Ghar Jawain", he continued being owner in possession of the ancestral land

inherited by him from his father, which he had voluntarily parted with in favour of defendant No. 1 Gurdas. This aspect of the matter is indicative of

the fact that even while living away from his native village, he was continuing to have lien on his ancestral property, may be the same was being

looked after by the defendants. If such was the situation with regard to his ancestral property, it can be safely inferred that the defendants were

holding the suit land under somewhat similar arrangement and circumstances. More so, when it is in evidence that whereas late Shri Roop Dass,

was in the active service of Indian Army, the defendants were looking after the domestic affairs back home. Furthermore, DW-3 Shri Megh Singh,

Up-Pradhan, Gram Panchayat, Goshal, has stated during cross examination that Devi Singh (plaintiff No. 1) was studying with him in village

Goshal and was residing with the defendants.

20. On an appraisal of the materials on record, the inference deduced by the learned Court of the first instance is that the defendants have not

produced any "cogent and convincing" evidence to prove that their possession was adverse against the plaintiffs or their predecessor-in-interest

late Shri Roop Dass. I have also carefully considered the cross examination directed on behalf of the defendants against PW-1 Shri Devi Singh

(plaintiff No. 1) and the depositions of DW-1 Shri Devi Dass (defendant No. 1), DW-2 Shri Charan Dass and DW-3 Shri Megh Singh. There is

nothing therein to establish the ingredients requisite for establishing acquisition of title to the suit land by the defendants by way of adverse

possession, rather a suggestion was put to PW-1 Devi Singh (plaintiff No. 1), who had appeared as a witness before the learned trial Court on

20.9.2004, which he had admitted to be correct that the suit land is in possession of the defendants for the last 4-5 years, meaning thereby that

such possession dates back to the year 1999/2000, that is less than the statutory period of 12 years from institution of the suit on 4.5.2001.

21. Furthermore, as per jamabandies Ex.P-1 (1991-92) and Ex.D-1 (1996-97) the suit land is to the extent of ? undivided share in Khata No.

108. It being so, the possession of the defendants, if any, in the absence of any evidence to show that which part of the joint khata they were

possessing, could at best be said to be merely symbolic. More so when the entry in the column of possession in both the jamabandies is ""khud

kasat ba makbhuj malkaan"" (owners in self cultivating possession).

22. Even otherwise, the entry with regard to mutation No. 748, dated 17.5.1998, incorporated in the column of remarks of jamabandies Ex.P-1

(1991-92) and Ex.D-1 (1996-97), whereby the ownership of the suit land is shown to have been transferred in favour of the defendants is not

based on any corresponding order or judgment of a court of competent jurisdiction, as no such order or judgment has been brought to the notice

of this Court on behalf of the defendants.

23. In view of the above, it cannot be said that the defendants have been able to establish that they have acquired title to the suit land by adverse

possession. The substantial question of law is decided accordingly.

Substantial Question of Law No. 3

24. This question comprises of two parts. Insofar as the first part relating to the status of late Shri Roop Dass, predecessor-in-interest of the

plaintiffs as Ghar Jawain, is concerned, the same is no more res-integra, as the prayer on behalf of the defendants to amend their written statement

to include this plea was rejected by the learned first appellate Court vide order dated 6.8.2007, which was affirmed by this Court vide an order

dated 26.5.2008, passed in CMPMO No. 202 of 2007 titled Devi Dass and Anr. v. Devi Singh and Ors. The second part relating to adverse

possession stands already answered under substantial question of law No. 2.

Substantial Question of Law No. 4

25. It appears that this question has been formulated merely as a ritual. I say so as in the first instance Order 20 Rule 5 CPC relates to suits in

which issues have been framed. In the present case, the learned trial Court has rendered its findings and decision, with reasons therefor, upon each

separate issue. The learned first appellate Court has formulated the points in controversy between the parties and has given its findings on the

same. Thus, it cannot be said that the impugned judgment dated 23.10.2008, is in any way vitiated. Or that on the other, the judgment of this Court

reported as Om Prakash and Others Vs. State of Himachal Pradesh and Others, which arises out of a Regular First Appeal, is in any way

applicable to the facts and circumstances of the present case. In such situation, this question can also not be said to be a question of law, what to

speak of a substantial question of law.

26. The outcome is that the appeal fails and is dismissed with costs throughout.