
Dewana and Another Vs Gian Chand Malhotra and Others

Regular Second Appeal No. 101 of 2011

Court: High Court of Himachal Pradesh

Date of Decision: Oct. 18, 2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Order 22 Rule 3, Order 22 Rule 4, Order 22 Rule 6, Order 22 Rule 9

Citation: (2012) 1 ShimLC 218

Hon'ble Judges: Rajiv Sharma, J

Bench: Single Bench

Judgement

Rajiv Sharma, J.

This Regular Second Appeal is directed against the judgment and decree dated 12.01.2011, passed by the learned

District Judge, Kullu, H.P. in Civil Appeal No. 84 of 1998/35 of 2010. Material facts necessary for the adjudication of this Regular Second

Appeal are that the respondents-plaintiffs (hereinafter referred to as ""the plaintiffs"" for convenience sake), had instituted a suit for permanent

prohibitory injunction in the Court of learned Senior Sub Judge, Lahaul & Spiti at Kullu, Exercising the Powers of Sub Judge, Ist Class, Kullu.

Learned Senior Sub Judge, Lahaul & Spiti at Kullu dismissed the suit on 03.08.1998. Plaintiff preferred an appeal before the learned District

Judge, Kullu. The same was accepted by the learned District Judge, Kullu and the findings of the learned trial Court were reversed. The decree of

permanent prohibitory injunction was passed against the appellants-defendants (hereinafter referred to as ""the defendants"" for brevity sake)

restraining them, their successor, agents and servants from interfering in the peaceful possession of the plaintiffs over the suit land in any manner.

Hence, this Regular Second Appeal by the defendants.

2. The appellants-defendants moved an application bearing C.M.P. (M) No. 586 of 2011 for bringing on record the L.Rs./legal representatives of

respondent No. 5, Suraj Prakash, who has died on 26th January, 1995 during the pendency of case before the trial Court.

3. Mr. Ajay Kumar, learned Counsel for the appellants has vehemently argued that the judgments and decrees passed by both the Courts below

against a dead person are nullity.

4. Mr. Bhupender Gupta, learned Senior Advocate for respondents No. 1, 2, 4 and 6 has supported the judgments and decrees passed by both

the Courts below

5. The learned Single Judge of this High Court in *Sher Singh and Others v. Raghu Ram and Others* 1981 S.L.C. 25 has held that an application for

setting aside the abatement and substituting heirs of deceased defendant should have been made and dealt with by the trial Court in which the

abatement occurred. The learned Single Judge has held as under:

On the facts narrated above and which are not in dispute, I find that the learned Additional District Judge had no jurisdiction to entertain or dispose

of the plaintiffs application under Order 22, Rules 4 and 9 of the Code and the impugned order is liable to be quashed as a whole on this short

ground alone. The proceedings under Order 22, whether these be for bringing on record the legal representatives of a deceased party or for setting

aside the abatement, must, in my view, be initiated in the Court where the lis was pending at the time of the death of the party and such Court alone

has the jurisdiction to entertain such proceedings. The reason is obvious and is not far off to seek. It is only when a party to a lis or appeal dies be,

that the necessity of substituting the legal representatives of such deceased party can arise and an application under Order 22, Rules 3, 4 or 9, as

the case may be would lie. In case the death occurs prior to the institution or after the disposal of such a list, no question would arise for bringing

on record the legal representatives of the deceased, inasmuch as the legal representatives are to be impleaded on the record of a pending lis only.

The only exception to this can be conceived where proceedings under Order 22 are initiated in the appellate Court in respect of an appeal against

a judgment to which the provisions of Order 22, Rule 6 can be attracted. It, therefore, follows that if a party was already dead on the

commencement of the lis, the provisions of Order 22 would not be attracted except in the case where the provisions of Order 22, Rule 6 are

applicable.

6. Similar view has been taken by the learned Single Judge in *Ram Rakha and Others v. Brahma Nand and Others* 1994 (Supp.) S.L.C. 29. The

Learned Single Judge has held as under:

One of the grounds of appeal pertaining to the aforesaid preliminary substantial question of law so raised by Shri Kapil Dev Sood, appearing on

behalf of the appellants that the impugned judgment passed by the learned District Judge is a nullity inasmuch as it has been passed against one of

the dead landowners. It is well settled that ordinarily a decree passed against a dead person is a nullity except in those cases where the person died

after the hearing of the arguments but before pronouncing of the judgment by the Courts below. Another established principle is that the question

whether the suit is bated in toto or in part, has also to be decided by the same Court where during the pendency of the appeal one of the parties

had expired before hearing the arguments and where he being a necessary party to the lis, his legal representatives have not been brought on

record.

7. Similarly, this Court in Jagdish v. Ram Karan and Others 2002 (1) CLJ (H.P.) 232 has held that whether there was sufficient cause for setting

aside the abatement or whether the legal representatives of the deceased are to be brought on record or not in relation to a suit or appeal at the

first instance, is to be decided by the Court in which the suit or appeal was pending at the time of the death of the party and the abatement took

place. Consequently, in view of this settled position, there is no alternative but to set aside the judgments and decrees passed by both the Courts

below and to remand the case to the trial Court.

8. Accordingly, in view of the observations and discussions made hereinabove, the impugned judgments and decrees dated 03.08.1998 and

12.01.2011 are set aside and Civil Suit No. 29 of 1995 is remanded back to the learned trial Court. Learned trial Court after restoring the Civil

Suit to its original number and date, permit the parties to take such steps as are permissible to them under law. The appeal is disposed of in terms

of above order. Since the matter is old, to avoid the delay, the trial Court is directed to dispose of the same as expeditiously as possible, preferably

within a period of three months. The parties through their learned Counsel are directed to appear before the trial Court on 8th November, 2011.

There will, however, be no order as to costs. The pending application(s), if any, also stands disposed of.