

(2016) 09 SHI CK 0072

High Court of Himachal Pradesh

Case No: RSA No. 524 of 2014

Lajya Devi

APPELLANT

Vs

The District Cooperative Union
Ltd.

RESPONDENT

Date of Decision: Sept. 1, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Specific Relief Act, 1963 - Section 34

Citation: (2016) 4 HimLR 2532

Hon'ble Judges: Mr. Rajiv Sharma, J.

Bench: Single Bench

Advocate: Mr. R.K. Sharma, Senior Advocate with Mr. Navlesh Verma, Advocate, for the Appellants; Mr. Bhuvnesh Sharma and Mr. Ramakant Sharma, Advocates, for the Respondent

Final Decision: Disposed Off

Judgement

Rajiv Sharma, J. - This Regular Second Appeal has been instituted against judgment and decree dated 30.7.2014 rendered by the learned District Judge, Hamirpur (HP) in Civil Appeal No. 120 of 2011.2. "Key facts" necessary for the adjudication of the present appeal are that the appellants-plaintiffs (hereinafter referred to as "plaintiffs" for convenience sake) filed a suit against the respondent defendant (hereinafter referred to as "defendant" for convenience sake) for declaration to the effect that the ex parte judgment and decree obtained by the defendant in Civil Suit No. 43/96 decided on 26.12.2001 titled as District Cooperative Union v. Munshi Ram, was illegal, null and void and not binding upon the plaintiffs as they are owners-in-possession of the land comprised in Khata No. 323, Khatauni No. 533 Khasra No. 1379 measuring 97.5 square metres with the consequential relief of permanent prohibitory injunction restraining the defendant from causing any interference over the suit land. Suit land as per Jamabandi for the year 1997-98 was

wrongly and illegally recorded in the name of defendant against factual position. Predecessor-in-interest of the plaintiffs, Munshi Ram had purchased the suit land from one Jayanti Das vide registered sale deed dated 6.7.1965 pertaining to Khata No. 32 Khatauni No. 53 min. Khasra No. 646 min. 624 min. Bakadar 4 Marla 654 whole Khasra No. 969/660, 971/660, 812/655 Salam Kita 7 area 4 K 7 M share 1/3rd measuring 1 K 9 M. pertaining to the Jamabandi for the year 1960-61 and mutation No. 275 dated 18.3.1967 was sanctioned in the name of Late Major Munshi Ram and possession was given to him. It was further averred that in the year 1965, a boundary wall was raised by Munshi Ram. A gate was also installed by the plaintiffs and a house was constructed over the suit land purchased by Munshi Ram. Building was given on rent to Central Government office. Possession of the plaintiffs' predecessor-in-interest and that of the plaintiffs was never objected by anyone, which is hostile, uninterrupted, peaceful and adverse to the knowledge of all concerned. It was also averred that the ex parte proceedings against Late Major Munshi Ram dated 1.12.1999 were illegal since he was not duly served and decree had been obtained in fraudulent manner by mis-representation and suppression of material facts. Gift deed executed by Prithi Chand in favour of the defendant vide which mutation No. 387 had been sanctioned on 26.8.1994 in favour of the defendant was also illegal, null and void and not binding upon the plaintiffs.3. Suit was contested by the defendant. On merits, the defendant stated that it is in possession of the suit land, which was gifted to the defendant vide gift deed dated 7.7.1994. It was denied specifically that the land was in possession of the plaintiffs' predecessor-in-interest. It was also denied that the ex parte judgment and decree obtained by the defendant in Civil Suit No. 43 of 9 dated 26.11.2001 titled as District Cooperative Union v. Munshi Ram was illegal, null and void and Munshi Ram was wrongly proceeded ex parte and no notice under law was served upon him.4. Plaintiffs filed replication. Learned Civil Judge (Junior Division) framed issues on 17.5.2006 and an additional issue was framed on 12.5.2011. He dismissed the suit on 22.9.2011. Plaintiffs filed an appeal against judgment and decree dated 22.9.2011 before the District Judge, Hamirpur. He also dismissed the appeal on 30.7.2014. Hence, this Regular Second Appeal.5. The Regular Second Appeal was admitted on 3.12.2014, on the following substantial questions of law:

"1. In Exhibit P-4 Civil Suit 43/1996, the defendant Major Munshi Ram was shown as resident of Ward No. 3. The report of the Process Server dated 22-23 February 1996 in C.S. No. 43/1996 clearly mentions that there is no person in name of Major Munshi Ram in Ward No. 3 Hamirpur. However his house is situated in Ward No. 4, but on inquiry at that house, it revealed that this house in Ward No. 4 is given on rent to Tar Ghar (Telegraph Office) and he himself is residing in Jammu. Still Notice (with wrong address of Ward No. 3 Hamirpur) under Order 5, Rule 20 was published in Himachal Time which has no circulated in Jammu and was proceeded ex parte on 01-12-1999. Whether such service is legal and whether such ex parte order have not been obtained by fraud and misrepresentation and such decree is not liable to be

set aside in collateral proceedings?<Ã¢>

2. Vide Exhibit P-8 dated 10-01-1995 the Learned Settlement Officer competent authority ordered the correction of Khasra No. 1379 measuring 97.50 Square Meters from the name of Prithi Chand to the name of Major Munshi Ram. The nature of this land was also changed from Banjar Kadim to Gair Mumkin Sehan (Courtyard). The entry to this effect was made vide Rapat No. 233 Exhibit P-3 dated 12-1-1995 by the Patwari in the Revenue record. Whether the Learned Civil Court vide Exhibit P-4 Civil Suit No. 43/1996 dated 26-12-2001 was justified to set aside the entries of Rapat No. 233 without examining the order of the competent authority Exhibit P-8 and whether the defendant ahs not committed the fraud by obtaining the decree Exhibit P-4 without placing the present Exhibit P-8 on record and whether such a decree can not be set aside in the collateral proceedings?<Ã¢>

3. Exhibit P-4 Civil Suit 43/1996 was instituted on 27-1- 1996. The sole defendant in that case Major Munshi Ram was proceeded ex-parte on 01-12-1999. Major Munshi Ram expired on 08-08-2000 at Jammu. His LRs were never brought on record. Thereafter the case was listed and was proceeded effectively on various dates. Ultimately the suit was decreed on 26-12-2001 vide Exhibit P-4. Whether the judgment and decree Exhibit P-4 against a dead person is not a nullity and whether such decree can not be set aside in the collateral proceedings?"<Ã¢>

6. Mr. R.K. Sharma, learned Senior Advocate, on the basis substantial questions of law framed, has vehemently argued that the Munshi Ram was served under Order 5, Rule 20 CPC in Himachal Time, which had no circulation in Jammu and was proceeded ex parte on 1.12.1999. He also contended that the entries of Rapat No. 233 could not be set aside in Civil Suit No. 43/1996. He lastly contended that the legal representatives of Munshi Ram were not brought on record. Munshi Ram expired on 8.8.2000.7. Mr. Bhuvnesh Sharma, Advocate, has supported the judgments and decrees passed by both the learned Courts below.8. I have heard the learned counsel for the parties and also gone through the record carefully.9. Since all the substantial questions of law are interconnected and interlinked, the same are taken together for determination to avoid repetition of discussion of evidence.10. PW-1 Suman Kumar, Superintendent testified that with effect from 1.6.1999 to 28.2.1980, the building of Lajya Devi was leased out to the Deputy Director Agriculture for a rent of `6,300/-11. PW-3 Rattan Chand is Field Kanungo. He has proved Ext. PW-3/A. In his cross-examination, he has stated that no demarcation was carried out by him on the spot. Self stated that he had prepared the report by visiting the spot as per factual position on the spot.12. PW-4 Mangat Ram deposed that the HPSC & ST Development Corporation remained tenant with effect from 9.1.1980 to 31.3.1981.13. PW-5 Bishamber is the official of Telegraph Department. He testified that from 1990 onwards, building was rented to the Telegraph Department for a monthly rental of `2700/.14. PW-7 Ishwar Dass testified that the plaintiff's father Munshi Ram had purchased the land in Ward No. 4 in the year

1965 and house was constructed by him and boundary wall was also raised. Possession over the land was of Lajya Devi and her heirs. He was conversant with the signatures of Naib Tehsildar, Sharuti Prakash. Ext. PW-7/A was signed by him. Plaintiff constructed house in 1965. Boundary wall was also raised.15. PW-8 Prakash Chand testified that land over which house of plaintiff was constructed, was purchased by Major Munshi Ram from Jayanti in 1965 and area was about 1 ½ Kanal. Plaintiffs were in possession of the land.16. PW-11 Suresh Kumar is the son of Major Munshi Ram. He did not know that the house was situate over Khasra Nos. 1361, 1362, 1363 and 1380. According to him, old Khasra number was 812. He also admitted that the land was never demarcated in his presence. He has pleaded his ignorance about the fact that the suit land was gifted to the defendant by Prithi Chand on 7.7.1994. He has pleaded ignorance that the defendant had instituted a suit on 27.1.1996 against his father bearing Suit No. 43/1996. He denied that the summons were received by his father during the proceedings and that he deliberately did not appear before the Court.17. DW-1 Pratap Singh testified that Khasra number of the suit land is 1379 measuring 5 Marla and Prithi Chand was its owner. The suit land was never in the possession of Munshi Ram. Munshi Ram was wrongly shown to be in possession in the revenue record. Suit was filed for correction of revenue entries, in which Munshi Ram was proceeded ex parte and suit was decreed in favour of the District Cooperative Union.18. DW-2 Pratap Chand testified that the suit land in Khasra No. 1379 was gifted by Prithi Chand to District Cooperative Union.19. DW-3 also deposed that the suit land over Khasra No. 1379 was in possession of Prithi Chand.20. Collector Settlement passed an order on 10.1.1995 and entries of Khasra No. 1379 in the column of nature of the suit land were changed from Banjar Kadim to Gair Mumkin Sehan in favour of Major Munshi Ram and Rapat Rojnamcha Ext. P3 recorded change of possession in favour of Munshi Ram. Defendant challenged this entry by filing civil suit by stating that Munshi Ram was wrongly recorded as Kabiz by way of Sehan over the land in Khasra No. 1379. In that suit, Munshi Ram was proceeded ex parte and suit was decreed on 26.12.2001. Revenue entries of Khasra No. 1379 were changed vide judgment/order dated 26.12.2001.21. Plaintiff has not led any cogent proof that the decree obtained by the defendant was obtained by playing fraud upon the Court. Civil Suit No. 43/1996 was instituted by the defendant. He was served by way of publication. Munshi Ram was proceeded ex parte on 1.12.1999. He did not appear to contest the suit. He had not furnished written statement. Though, admittedly, he died on 8.8.2000. Plaintiffs should have moved an application under Order 9, Rule 13 CPC for setting aside ex parte judgment and decree or they could file appeal against the ex parte judgment and decree. Plaintiffs have taken plea of adverse possession. However, fact of the matter is that initially Prithi Chand was owner of the suit land. He has gifted this land to the defendant on 7.7.1994. Plaintiffs could not file suit based on the plea of adverse possession. Even PW-3 Rattan Chand and PW-5 Bishamber have not deposed that the building in question was situated over Khasra No. 1379.22. Their Lordships of the Hon"ble Apex Court in *Gurdwara Sahib v. Gram*

Panchayat Village Sirthala reported in (2014)1 SCC 669, have held that even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Their Lordships have held as under:

"8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."²⁴

23. Courts below have correctly appreciated the oral and documentary evidence. The substantial questions of law are answered accordingly.²⁴ Accordingly, in view of the discussions and analysis made herein above, the present appeal has no merits and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs..