

(2009) 11 SHI CK 0026
In the High Court Of Himachal Pradesh

Devi Singh and Others

APPELLANT

Vs

Chairman, Managing Committee, D.A.V. Public School and Others

RESPONDENT

Date of Decision : 19-11-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 80

Citation : (2010) 1 ShimLC 334

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—This Regular Second Appeal is directed against the judgment of the learned District Judge, Chamba in Civil Appeal No. 27 of 2004 decided on 1.11.2004 whereby he has dismissed the appeal filed by the appellants (hereinafter referred to as the plaintiffs) against the judgment of the Civil Judge (Junior Division), Chamba dismissing the suit of the plaintiffs.

2. Briefly stated the facts of the case are that the plaintiffs who are residents of Mohalla Hardaspura, Chamba Town, Tehsil and District Chamba, H.P. filed a suit in the Court of learned Senior Sub Judge, Chamba. In this suit it was alleged that the land comprising Khasra No. 632 min, Khatta No. 479 min, Khatauni No. 584 min, measuring 42-10 bighas situated in Mohal Mugla, Pargana Panjla, Tehsil and District Chamba is owned by the State of Himachal Pradesh. According to the plaintiffs they and other residents of a number of villages have bartandaran rights in the said land. These include the right of grazing, right to use portion of land for burial of children etc. It is not disputed that this land has now fallen within the Municipal area of Chamba Town. The suit was purportedly filed by the plaintiffs on behalf of the entire body of bartandarans and an application under Order 1 Rule 8 CPC was also filed seeking permission of the Court to file the suit in representative capacity. The plaintiffs allege that the respondents started digging the suit land and laying foundation of the school building without their

consent and have thus invaded their rights.

3. The defendants contested the suit on various grounds. It was alleged that notice u/s 80 CPC had not been served upon the proforma defendant State of Himachal Pradesh. It was further prayed that no permission was granted by the Court to prosecute the suit in a representative capacity. Various other grounds were raised including the ground that the construction is not being carried out on the suit land but is being carried out in the land belonging to the defendants.

4. The learned trial Court held that the plaintiffs have failed to establish who were the Bartandarans who have the rights, if any, on the land and further went on to hold that the plaintiffs have failed to prove that the defendants had raised construction on the suit land. The trial Court also held that since no notice u/s 80 CPC had been issued, the suit could not have been instituted against the State of Himachal Pradesh.

5. The plaintiffs thereafter filed an appeal which has been dismissed by the impugned judgment. The learned District Judge held that the suit had not been instituted properly since notice u/s 80 had not been given to defendant No. 3- State of Himachal Pradesh. He also held that the provisions of Order 1 Rule 8 CPC had not been complied with and as such the suit filed in the representative capacity was not maintainable. Even on merits it was held that the plaintiffs have failed to prove that the defendants in any manner encroached upon the rights of the plaintiffs.

6. Aggrieved by the said judgment the appellants have filed the present appeal which was admitted on the following questions of law:

1. Whether the learned Courts below are right in dismissing the suit as not maintainable by holding that notice u/s 80 CPC having not been served upon the State of H.P. more particularly when the appellants had claimed no relief against the State of H.P.?

2. Whether the impugned judgment and decree is the result of complete misreading, mis-interpretation as well as misappropriation of the provisions of Order 1 Rule 8 CPC?

3. Whether the learned lower appellate Court being last Court of fact was right in not taking into consideration the entire oral as well as documentary evidence as expected of it in view of the law laid down by the Apex Court in (2000) 5 SCC 653, State of Rajasthan. v. Harphul Singh?

7. As far as question No. 1 is concerned, the same has to be decided in favour of the appellants. The suit could not have been dismissed only on the ground that no notice u/s 80 CPC has been issued to the State. In this suit the plaintiffs have not claimed any relief whatsoever against the State. The State was only a proforma defendant in the suit and the plaintiffs had only prayed that the defendant No. 3 is the owner of the suit land but defendants 1 and 2 are raising construction thereon. No relief was claimed against the State. The State was only

a proper party and not a necessary party. The suit in fact had not been filed against the State and therefore both the Courts below erred in holding that the suit was not maintainable in the absence of a notice issued u/s 80 CPC.

8. Even the findings of the learned Courts below that the suit must be dismissed because the provisions of Order 1 Rule 8 CPC have not been complied with are not correct. Order 1 Rule 8 CPC deals with suits filed in representative capacity and a person filing a suit in representative capacity is supposed to file a list along with his application giving the names, parentage, and details of all persons on whose behalf the suit is purported to be filed.

9. In the present case, though an application for permission to file the suit in representative capacity was filed the plaintiffs did not make any effort to have this application decided and no orders of the Court were obtained permitting the plaintiffs to file the suit in representative capacity. The learned lower Appellate Court has totally mis-read the record in holding that no list of persons was filed. List of persons was filed but that was not a proper list since only names were given and no details as required by law were given. In a claim relating to Bartandari rights the plaintiffs should have also given the details of the residence of each of the claimants since only the persons residing in particular villages would have Bartandari rights in the land. In a suit filed under Order 1 Rule 8 CPC the Court before granting permission must give notice of the institution of the suit to all the persons so interested though it is not necessary that such notice must be by way of personal service. This notice can be given by public advertisement also. The purpose of giving such a notice is that the persons on whose behalf the suit is stated to be filed have a right to apply to the Court to be made parties to the suit. A suit which has been filed under Order 1 Rule 8 and where permission has been sought cannot be withdrawn or abandoned unless notice is given to all the persons for whose benefit the suit was stated to have been filed. A decree passed in such a representative suit virtually operates like a decree in arm.

10. In the present case, it appears that though an application was filed the plaintiffs never obtained orders of the Court on the said application nor took any steps to ensure that notice is issued to the persons for whose benefit the suit was purported to be filed. Therefore, the provisions of Order 1 Rule 8 CPC have not been complied with.

11. Having said so, in case of non-compliance with the provisions of Order 1 Rule 8 CPC the suit itself cannot be dismissed. At best, the suit can be treated to be a suit filed by the parties in their individual or personal capacity. It may not be treated as a representative suit but it cannot be said that the suit itself has to be dismissed; To this extent the findings of both the Courts below are wrong. Therefore, question No. 2 is also decided in favour of the appellants.

12. Even with regard to question No. 3, I find that the learned lower Appellate Court has virtually not discussed any evidence while dismissing the case. The

first appellate Court is the last Court of fact. It must discuss the evidence led before the trial Court and then decide the matter. The judgment in this case is totally sketchy and there is virtually no discussion on the merits of the case. However, I feel that since the litigation started in the year 1999 and we are in the year 2009 it would not be in the interest of justice to remand the case to the lower Appellate Court. Therefore, I have myself gone through the evidence.

13. The case of the plaintiffs is that the respondents have raised construction on Khasra No. 632 which is owned by the Government. The defendants denied this fact. PW-1 Nek Ram while appearing in the witness box has admitted that no demarcation was got done to ascertain the fact as to on which land the defendants were raising the construction. He no doubt denies the suggestion put to him that the defendants are raising construction on their own land but admits that adjoining the suit land the defendants own property.

14. The case of the defendants is that they have raised construction on their own land. DW-1 Vipin Kumar, Principal of DAV School has stated that the School has purchased 36 biswas of land in Hardaspura from Dr. Suman Vyas and that the school building has been raised on the said land.

15. It was for the plaintiffs to have proved that the defendants have raised construction on the disputed land. This could have been only done by getting the land demarcated. Only after such demarcation could it have been ascertained as to where the defendants are raising the construction. The plaintiffs have miserably failed to discharge the onus which lay upon them to prove the fact that the construction of the School building was being raised on the land belonging to the Government over which they had Bartandari rights, if any. Therefore, the suit of the plaintiffs must fail.

16. In view of the above discussion, though the questions of law are decided in favour of the appellants, on merits the appeal is decided against the appellants and is dismissed accordingly. No order as to costs.