

(2011) 10 SHI CK 0015

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal s No. 552 of 2000 and Regular Second Appeal No. 498 of 2001

Judhia Devi and others.

APPELLANT

Vs

State of H.P. and another
 State of H.P. Vs Judhia Devi
and others.

RESPONDENT

Date of Decision : 13-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), Order 41 Rule 20, 100
Himachal Pradesh Tenancy and Land Reforms Act, 1972 — Section 104(4)
Transfer of Property Act, 1882 — Section 106

Citation : (2011) 10 SHI CK 0015

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Ahuja, J.—This judgment shall dispose of two appeals filed by the Appellants Judhia Devi etc. and one filed by State of H.P. u/s 100 CPC against the common judgment and decree, dated 1.8.2000, passed by the learned District Judge, Shimla, H.P.,]modifying the judgment and decree dated 18.11.1997 passed by the learned Sub Judge (3), Shimla, vide which he had decreed the suit of the Appellant/plaintiffs partly for declaration as well as for confirmation of possession and granting the relief of permanent injunction.

2. Briefly stated, the facts of the case are that the original Plaintiff Devi Ram, now represented by Appellants Judhia Devi and Ors. hereinafter also referred to as the Plaintiffs, filed a suit for declaration, confirmation of possession and injunction as against Respondent No. 1 State, hereinafter referred to as Defendant No. 1, and Respondent No. 2, hereinafter also referred to as Defendant No. 2. The allegations made by the original Plaintiff Devi Ram were that he was the grandson of Mohlu. The pedigree table of late Mohlu is given as under:

3. It was alleged that the suit land, as detailed in para 2(i) to 2(iii) of the plaint, at one time was owned and possessed by Mohlu alongwith other co-sharers. The said Mohlu died around Samvat 1974 (1917 AD) and his share in the above property was equally inherited by his three sons, namely, Tulsi Ram, Shibia and Ram Dayal. Ram Dayal died in the year 1930 and his share was inherited by his son Lachhoo, who became the owner in possession of the share of Ram Dayal, including the mortgaged land. Lachhoo vide mutation No. 25, dated Samvat 29.9.1994 (1937 AD), mortgaged the land measuring 5 bigha and 13 biswa with possession for a consideration of Rs. 100/- in favour of Kapura, Datta and Surtia.

4. It was further alleged that the suit land was in "Dhami State". Before the merger of States in the Union of India, Shri Dalip Singh was the Raja of Dhami in 1930-40 and he remained as such till the merger of States in the Union of India. The said Raja of Dhami, by an order, expelled Lachhoo out of Dhami State somewhere in the year 1939-40 and ordered the forfeiture of property of Lachoo in his favour. Thus, Raja of Dhami became owner in possession of the share of Lachoo. Raja of Dhami stepped into the shoes of Lachhoo for all rights and liabilities of property of Lachoo. Thus, he became the owner/mortgagor of land measuring 5 bighas and 13 biswas and full owner of remaining land of the share of Lachhoo.

5. It was further alleged that before the merger of States in the Union of India, the Raja of Dhami inducted Tulsi Ram and Shibia as tenants on payment of Chakota on suit land other than the land which was mortgaged with Kapura, Datta and Surtia. Thus, Tulsi Ram and Shibia became tenants of Raja Dhami on the suit land excluding the land measuring 5 bighas and 13 biswas, which was mortgaged. It was further averred that Dhami State was merged in the Indian Union and became part of State of H.P. The assets and liabilities of Dhami State became the assets and liabilities of the State of H.P. and Tulsi Ram and Shibia became tenants of State of Himachal Pradesh on the terms already settled by the Raja Dhami, other than the land measuring 5 bighas and 13 biswas, which was mortgaged. Tulsi Ram died in the year 1953 issueless and his estate/property rights were succeeded by his wife Dwarki.

6. It was further alleged that in the year 1959, as a result of partition between the co-sharers, the suit land fell to the share of the State of H.P., who became exclusive owner of the entire suit land excluding the other co-sharers. Shibia, father of the Plaintiffs and Smt. Dwarki continued to be the tenants with possession under the State of H.P. on the suit land except the land mortgaged measuring 5 bighas and 13 biswas. It was further alleged that Kapura, Datta, Surtia and Shibia sold with possession their rights of mortgage for a consideration of Rs. 110/- to Shibia of land measuring 5 bighas and 15 biswas in the year 1963, vide mutation No. 138, dated 22.5.1963. Thus, in so far as the mortgaged land is concerned, Shibia stepped into the shoes of Kapura, Datta and Surtia and became mortgagee with possession on the land measuring 5 bighas and 13 biswas. It was further alleged that the State of H.P. or any other person

has not paid the mortgage amount to Kapura, Datta, Surtia, Shibia or their successors. Thus, it was alleged that the State of H.P. is not entitled to redeem the mortgaged land as the same has become time barred. It was also alleged that Kapura, Datta and Surtia have also died.

7. It was further alleged that Lachhoo died in the year 1975-76 and is survived by his one heir and daughter Smt. Vidya, Defendant No. 2. Shibia died in the year 1979 and his estate was succeeded with possession by his sons Mast Ram and Devi Ram (plaintiff), vide Will dated 2.10.1978. Smt. Dwarki also died issueless in the year 1983-84. She had bequeathed her property vide Will dated 20.5.1983 in favour of the Plaintiffs. Thus, the plaintiffs succeeded with possession to the estate of Dwarki Devi after her death. Mast Ram died in the year 1983 issueless and by virtue of Will dated 26.12.1982, he bequeathed his property in favour of the Plaintiff etc., who succeeded to the same with possession. It was further alleged that the Plaintiffs are otherwise entitled to inherit the tenancy rights of Tulsi Ram, Shibia, Dwarki and Mast Ram being the only nearest collateral in the male line of descent from common ancestor of the original tenants Tulsi Ram and Shibia.

8. Thus, the Plaintiffs alleged that they are tenants with possession on the terms settled with the predecessor-in-interest by Raja Dhami on the part of the land in suit. The Plaintiffs are the mortgagee on the land measuring 5 bighas and 13 biswas and the State of H.P. has no right to redeem this land. Thus, the Plaintiffs prayed that he is entitled to declaration that the State of H.P. has lost right to redeem the land measuring 5 bighas and 13 biswas. The Plaintiffs have further prayed for declaration that he is a tenant on the land measuring 13 bighas and 12 biswas in village Ghandal and land measuring 10 bighas and 9 biswas in Village Marwag under the State of H.P. He also pleaded that since he is in possession of whole of the suit land, therefore, he is also entitled to a decree of confirmation of possession of the suit land. The Plaintiffs have also alleged that he is in possession of less land than possessed by Tulsi and Shibia. It was further alleged that the revenue entries not showing the Plaintiffs in possession over the suit land other than the mortgaged land do not depict the correct position and the entries accordingly are wrong. It was further alleged that the State of H.P. on the basis of wrong entries is threatening to interfere in the possession of the Plaintiffs over the suit land to which they have no right, hence the relief of permanent injunction also claimed by the Plaintiffs. The Plaintiffs filed the suit after issuing a notice upon the State of H.P. and prayed for the reliefs as mentioned above.

9. Defendant No. 1/State of H.P. took up preliminary objections in regard to locus standi, limitation, maintainability etc. On merits, they admitted that Mohlu was the predecessor of Tulsi Ram, Shibia and Ram Dayal. Ram Dayal was succeeded by Lachhoo. Lachhoo was in possession of the land which was confiscated by the Raja of Dhami who became owner in possession followed by the State of H.P. It was pleaded that in the land was in the nature of Ghasni which is in the

ownership and possession of Defendant No. 1. It was admitted that Lachhoo succeeded Ram Dayal, who mortgaged 5 bighas and 13 biswas of land in favour of Kapura etc. It was denied that Tulsia and Shibia were inducted as tenants by the then Raja of Dhami and it was pleaded that the land remained in the ownership and possession of Raja of Dhami. It was further pleaded that neither Tulsia and Shibia were the tenants of Raja of Dhami nor they became as such on the merger of the estate with the State of H.P. It was also pleaded that no partition has taken place between the State of H.P. and the Plaintiff and the State of H.P. remained exclusive and independent owner in possession of the suit property. Thus, it was pleaded that the Plaintiff was never a tenant under the Raja of Dhami or State of H.P. and the mortgaged land measuring 5 bighas and 15 biswas never remained in possession of the plaintiff. Therefore, no right devolved upon the plaintiff as an owner and the suit is liable to be dismissed.

10. On the pleadings of the parties, the following issues were settled by the learned trial Court:

1. Whether the Plaintiff is entitled to declaration as prayed? OPP
2. Whether the Plaintiff is entitled for the relief of permanent prohibitory injunction as prayed? OPP
3. If issue No. 1 is proved in affirmative, whether the Plaintiff is entitled for the confirmation of the possession as prayed? OPP
4. Whether the Plaintiff has no locus standi to file the present suit? OPD
5. Whether the suit is barred by limitation? OPD
6. Whether the Plaintiff No. 1 has no cause of action? OPD
7. Relief.

11. Parties led their evidence and the learned trial Court vide its impugned judgment decided issues No. 1 and 3 partly and issues No. 2, 4 to 6 fully in favour of the Plaintiffs and as against the Defendants and consequently decreed the suit of the Plaintiffs partly for declaration and confirmation of possession. An appeal was preferred by the Plaintiffs against the judgment and decree of the learned trial Court and the learned Appellate Court vide its impugned judgment and decree dismissed the appeal filed by the Plaintiffs. The appeal filed by the State of H.P. was partly accepted and the decree of the learned trial Court with respect to the land measuring 7-1 bigha was set aside and the Plaintiffs' suit in respect of the entire property situated in Chak Marwag was dismissed. The decree granted by the learned trial Court in respect of the land measuring 5-13 bigha situated in Chak Ghandal was affirmed.

12. Aggrieved by the said judgment and decree passed by the court of the learned District Judge, both the parties have filed cross appeals, as detailed above, and this judgment shall dispose of all the three appeals.

13. I have heard the Learned Counsel for the parties and have gone through the record of the case.

RSA No. 498 of 2001:

14. This appeal filed by the State of H.P. was admitted on the following substantial questions of law:

1. Whether learned lower courts below are wrong in decreeing the suit in respect of land measuring 5 bighas 13 biswas by holding that right of redemption of the State has lapsed by efflux of time particularly when land has vested in the State of H.P. free from all incumbrances after the merger of Dhami Estate with Union of India.

2. Whether the suit of the Plaintiff was not within limitation?

15. In regard to the findings of both the Courts below holding that the land measuring 5 bighas 13 biswas, as detailed in the plaint, was mortgaged and the State has lost right of redemption after passage of time, I may make a brief reference to the findings recorded by both the Courts below in respect of this part of the land. It was observed by the learned trial Court that Lachhoo in the year 1937 had mortgaged his land measuring 5 bighas 13 biswas in favour of Kapura, Datta and Surtia. It was also observed that in the year 1939-40, the property of Lachhoo was forfeited and Raja of Dhami became the owner of this part of the land which was mortgaged to Kapura, Datta and Surtia. Therefore, the Raja of Dhami stepped into the shoes of Lachhoo and became co-owner of the suit property qua the share of Ram Dayal. However, even though the Raja of Dhami became the owner of this part of the land by forfeiture, the mortgagee rights of the mortgagor continued and their rights cannot be said to have been forfeited and the Raja of Dhami and then State of H.P. became the owner subject to the right of mortgage already created prior to the forfeiture of the property of Lachhoo. The learned District Judge has referred to the documentary evidence in detail in para 11 of the judgment and after referring to the mutation order Ext.P-39 and mutation Ext.P-44 had observed that the mortgage was with possession and a perusal of the jamabandi for the year 1962-63 Ext.D-31 showed that the name of Shibia appeared in the jamabandi as mortgagee. The entries repeated in the subsequent jamabandis for the year 1972-73 Ext.D-29, for the year 1977-78 Ext.D-27 and for the year 1982-83 Ext.D-26. The land was mortgaged sometime in the year 1937 and the period of redemption lapsed in 1967. No steps were taken by the owner i.e. the State of H.P. for redemption and as such both the courts below have held that since Devi Ram deceased Plaintiff being the son of Shibia, who purchased the mortgagee rights, is the mortgagee with possession and the right to redeem the mortgage has lapsed by efflux of time and therefore, no fault could be found with those findings recorded by both the Courts below. No submissions were made as to how those findings are wrong and as such, in so far as the relief in regard to this part of the land measuring 5 bighas 13 biswas is concerned that the Plaintiffs had become owner by passage

of time and were entitled to decree for confirmation of possession, those findings are liable to be upheld. There is no need of reappraisal of whole evidence led by the parties since both the courts below have come to the same conclusion on perusal of the evidence.

16. In regard to the second substantial question of law whether the suit of the Plaintiffs was not within limitation, the suit was for declaration and confirmation of possession with passage of time for redemption and no infirmity could be pointed out in the findings recorded by the courts below as to how the suit of the Plaintiffs was not within limitation. Therefore, there is no merit in the appeal filed by the Appellant State challenging these findings, which findings are liable to be upheld.

RSAs No. 552 of 2000 & 578 of 2000:

17. Both these appeals were admitted on the following common substantial questions of law:

(i) Whether in the facts and circumstances of the case, the lower Appellate Court was right in law in entertaining an appeal and in modifying the decree dated November 18, 1997 passed by the Sub Judge Ist Class (3), Shimla in case No. 5/1of 96/89 without joining original Defendant No. 2 Smt. Vidya as Respondent though she was joined as party before the trial Court and according to the Appellant she was a necessary party?

(ii) Whether in the facts and circumstances of the case, the lower Appellate Court was right in law in interpreting and construing documentary evidence on record and in coming to the conclusion that the Plaintiffs were not tenants under Defendant No. 1?

(iii) Whether in the facts and circumstances of the case, the lower Appellate court was right in law in applying provisions of Sub-section (4) of Section 104 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 and placing burden of proof on the Plaintiffs rather than on the Defendants?

18. Coming to the first substantial question of law that the appeal was entertained and the decree passed by the learned trial Court was modified without joining original Defendant No. 2 Smt. Vidya Devi as Respondent, though she was a party before the learned trial Court. The submissions made by the Learned Counsel for the Appellants were that Defendant No. 2 was not impleaded as a party before the learned First Appellate Court by the State, though in the appeal filed by the Appellants, Defendant No. 2 Vidya Devi was impleaded as a party. It was submitted that this ground has been taken in this appeal filed by the Appellants Judhia Devi etc. and once Defendant No. 2 was not impleaded as a party by the State of H.P., the appeal filed by the State of H.P. could not have been allowed by the learned Appellate Court.

19. To substantiate his above submissions, the Learned Counsel for the Appellants had relied upon the decision in Ch. Surat Singh (Dead) and Others Vs.

Manohar Lal and Others, wherein, while referring to the provisions of Order 41 Rule 20 and the effect of non-joinder, it was observed as follows:

Where the son of the Plaintiff with other persons was brought on record on the death of Plaintiff during pendency of appeal before the High Court and the fact that he was represented by a Counsel was clearly shown in the certified copy of order of the High Court but he was not impleaded as a partying appeal before Supreme Court, the fact that he was so impleaded admittedly being within knowledge of Appellants, and the Appellants failed to show any good ground for not impleading him, the appeal was liable to be dismissed for want of necessary party to the appeal. An application filed on the date of decision to implead him as party-respondent, held being highly belated could not be entertained.

20. On the other hand, Mr. J.S. Guleria, learned Assistant Advocate General, while supporting the impugned judgment, has relied upon the decision in *Kasturi Vs. Iyyamperumal and Others*, . While referring to the provisions of Order 1 Rule 10 CPC in regard to necessary parties, it was held by their Lordships as under:

The question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the Plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. A person is legally interested in the answers to the controversies only if he can satisfy the court that it may lead to a result that will affect him legally. A bare reading of Order 1 Rule 10(2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. Two tests are to be satisfied for determining the question who is a necessary party. Tests are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party. In a suit for specific performance the first test can be formulated in the following manner, that is, to determine whether a party is a necessary party there must be a right to the same relief against the party claiming to be a necessary party, relating to the same subject-matter involved in the proceedings for specific performance of contract for sale.

21. Reliance was also placed upon the decision of this Court in *Tara Chand Vs. Ishwar Dass and Another*, wherein, in a suit for eviction, a plea was raised by the Plaintiff-appellant for the first time in the High Court that even if tenant was held to be tenant-at-will still he could be ejected without notice u/s 106 of Transfer of Property Act. It was held that a new plea cannot be allowed to be taken. Similar observations were made by their Lordships in *C. Mackertich Vs. Steuart and Co., Ltd*, that a new plea should not have been allowed to be raised when the point

was not raised in the written statement.

22. It is true that Defendant No. 2 was a party to the suit filed by the Plaintiffs but no relief was claimed as against her. Defendant No. 2 was proceeded ex parte in the suit and in case such a plea had been raised by the Appellants at any stage before the learned District Judge, he could have considered the question as to whether Defendant No. 2 was required to be impleaded as a party or not in the appeal filed by the State of H.P. However, no such objection was taken at any time before the learned District Judge. Therefore, the learned District Judge had no opportunity to decide this question as to the effect of non-impleadment of Defendant No. 2 Vidya Devi as a party in the appeal filed by the State of H.P. However, the Appellants had impleaded the said Defendant No. 2 Vidya Devi as a party in the appeal filed by them before the learned District Judge and Defendant No. 2 was also represented in the appeal filed by Judhia Devi etc. before the learned District Judge, who also never pointed out this fact to the learned Appellate Court at any time that in the appeal filed by the State of H.P., she has not been impleaded as a party. Both the appeals were decided together and, therefore, Defendant No. 2 had an opportunity to contest the case and make submissions once the judgment was passed in both the appeals together by the learned First Appellate Court. Defendant No. 2 may have been a proper party, but it cannot be said that she was a necessary party once no claim has been put up by her and no relief has been granted as against her. At this stage, after more than 10 years, it will not be proper to remand the case to the court of the learned District Judge to consider this question since the findings have not affected Defendant No. 2 in any manner and at the most she was herself competent to challenge those findings which has not been done by her and at this belated stage, I am of the opinion that it has not affected the merits of the case, once Defendant No. 2 was not impleaded as a party by the State and no objection was taken by the Appellants at any time. The Appellants had impleaded the said Defendant No. 2 as a party in the appeal and as such this plea cannot be allowed to be raised at a belated stage once it was not raised before the learned District Judge.

23. Coming to the findings of the learned courts below that whether the appellate court was right in law in applying the provisions of Sub-section(4) of Section 104 of the H.P. Tenancy and Land Reforms Act, 1972 placing burden of proof on the Plaintiffs rather than on Defendants. A reference to the judgment passed by the learned District Judge clearly shows that the entry in the jamabandi for the year 1949-50 Ext.PW-1/G showed the tenancy in favour of Tulsi Ram etc. but this entry was not repeated in the subsequent copies of jamabandis nor these entries in favour of State of H.P. were ever challenged by the Plaintiffs by filing any application. Therefore, presumption of correctness was attached to the copy of jamabandi entry showing the State of H.P. as owner in possession and the oral evidence in general not referring to the particular khasra numbers cannot be said to be sufficient to rebut the presumption of correctness attached to the entry in the jamabandi. No steps were taken for correction of the

entry and, therefore, the contention of the Plaintiffs that they are the tenants under the State of H.P. in respect of the land situated in Village Marwag was rightly rejected by the learned Appellate Court. The presumption was rightly drawn by the learned District Judge since the entry was not in favour of the tenant which was to be rebutted by the State of H.P. In only one stray entry in the jamabandi for the year 1949-50 Ext.PW-1/G, Tulsi Ram was shown to be in possession of provincial government's 1/3rd share in some of the suit khasra numbers measuring 7-1 bighas on payment of rent, but this entry was not repeated in the subsequent jamabandis till date and as such presumption of truth was attached to the later entries in the jamabandis in favour of the State of H.P. No steps were taken by the Plaintiffs to prove that the subsequent entries were wrongly entered in the name of State of H.P. and no application for correction was filed and, therefore, the findings of the learned Appellate Court holding that the Plaintiffs were not entitled to the relief in respect of this part of the land are liable to be affirmed.

24. In view of the above discussion, I accordingly hold that there is no merit in the appeals filed by the Appellant-plaintiffs and the appeal filed by the State of H.P./defendant No. 1 and the same are liable to be dismissed, which are dismissed and the findings recorded by the learned Appellate Court are affirmed. However, the parties are left to bear their own costs. A certified copy of this judgment be also placed on the record of the other connected appeals.