

(1996) 12 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 230 of 1988

Khazur Singh and Others

APPELLANT

Vs

Bachittar Singh and Others

RESPONDENT

Date of Decision : 09-12-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 8, Order 9 Rule 9

Citation : (1997) 2 ShimLC 153

Hon'ble Judges : A.L. Vaidya, J

Bench : Single Bench

Advocate : D.V. Sharma and D.K. Khanna, for the Appellant; Kuldeep Singh, for the Respondent

Final Decision : Allowed

Judgement

A.L. Vaidya, J.—The present Appellants filed a suit against the present Respondents for declaration that they were owners in possession of the suit land as described in the plaint and Defendants have no right, title and interest in the said land. According to Plaintiffs, the names of Defendants had been wrongly recorded in possession of the suit land in the capacity of non-occupancy tenants and actually they were neither tenants nor had been in possession of the suit land at any time whatsoever. It was pleaded by the Plaintiffs that Defendants on 25-5-1976 had instituted Suit No. 126/1976 against the Plaintiffs in the Court of Sub-Judge, Narpur and Defendants had claimed a permanent injunction restraining the Plaintiffs from interfering with the possession of the Defendants, since the Defendants claimed themselves to be in occupation as non-occupancy tenants under the Plaintiffs. Plaintiffs' further case has been that during the pendency of this earlier suit which was alleged to have been filed on wrong facts, the Defendants realised the futility of the alleged suit and accordingly they entered into a compromise with the Plaintiffs on 28-10-1977 and in the said compromise, the Defendants very specifically admitted the possession of the Plaintiffs over the suit land and on the basis of the said compromise, Defendants

got their Suit No. 126/1976 dismissed under Order 9, Rule 8, CPC on 16-12-1977. Plaintiffs also pleaded that even after the dismissal of the suit, Defendants continued to be recorded in possession and these wrong entries were got corrected in 1981 by the Plaintiffs but the Defendants with some ulterior motive, started interfering with the possession of the Plaintiffs over the suit land. Thus, the Plaintiffs, on the basis of the aforesaid pleas, sought declaration that they were owners in possession of the suit land and as a consequential relief, permanent prohibitory injunction has been sought for.

2. Defendants contested the suit and it was pleaded by them that they had been non-occupancy tenants in possession of the suit land and on the enforcement of H.P. Tenancy and Land Reforms Act, they had acquired rights of ownership in the suit land. According to Defendants, Plaintiffs, as such, lost title in the said land. Plaintiffs' possession has been denied. They also denied that they have entered into any compromise with the Plaintiff regarding the suit land in the previous suit. The Defendants admitted the factum of filing of the previous suit against the Plaintiffs, which, according to Defendants, was filed as the Plaintiffs had been interfering in their possession. According to Defendants, as Plaintiffs later on stopped interfering with the possession of the Defendants, therefore, Defendants had got their suit dismissed in default.

3. Parties were put to trial on the following issues by the trial Court:

1. Whether the Plaintiffs are owners in possession of the suit land? OPP.

2. Whether the Defendants are not tenants of the suit land? OPP.

3. Relief.

4. The trial Court decided both the issues in favour of the Plaintiffs and decreed the suit.

5. The original suit was filed against seven Defendants, namely, S/Sh. Bachittar Singh, Dalipa, Ranja, Chand, Rania, Chain Singh and Jai Karan. Out of the seven Defendants, only four i.e. S/Sh. Bachittar Singh, Dalipa, Chand and Rania assailed the judgment and decree of the trial Court before District Judge, Kangra at Dharamshala while the remaining Defendants, i.e., Ranja, Chain Singh and Jai Karan did not file any appeal against the judgment and decree of the trial Court and probably accepted the decree passed against them.

6. The first appellate Court, after hearing the parties, formulated the following points for determination in the appeal:

(i) Whether the finding of the Court below debarring the Defendants-Appellants from claiming tenancy in the instant suit on the basis of earlier civil suit No. 126/76 having been dismissed in default under Order 9, Rule 8, CPC is legal and valid?

(ii) Whether writing Ex. P-I dated 28-10-1977 (Ex. P-I) amounts to relinquishment deed requiring registration?

(iii) In case point No. 2 is answered in the negative, whether it amounts to admission on the part of the Defendants demolishing their claim of tenancy?

(iv) Whether the finding of the Court below holding the Plaintiffs to be owners in possession of the suit land, is borne out from the record?

(v) Relief in Appeal.

7. The first appellate Court decided the aforesaid points of determination in the negative and as a consequence thereof accepted the appeal and set aside the judgment and decree passed by the trial Court and the suit of the Plaintiffs for declaration and injunction was dismissed.

8. The aforesaid judgment and decree passed by the first appellate Court have been assailed in the present appeal on various grounds.

9. Learned Counsel for the parties have been heard and the record has been scrutinised.

10. The case of the parties mainly rests upon documentary evidence, which is, at first instance, being referred.

11. Ex. P-1 is the compromise, alleged to have been executed by the Defendants in the previous suit. This document was alleged to have been executed by Dalip Singh S/o Tulsi Ram, Jela Ram S/o Punjabu, Chand Singh S/o Kishan Singh, Bachittar Singh S/o Beli Ram, Karan Singh S/o Sh. Punjabu and Ran Singh S/o Sh Ghasita Singh. Dalip Singh, Jela Ram, Chand Singh, Karan Singh and Ran Singh were alleged to have thumb marked this document while Bachittar Singh affixed his signatures in Hindi. This document is in Hindi and its translation into English runs as under:

We the six persons mentioned above, are having a civil dispute with Shri Khazur Singh and other owners with respect to the land which is pending in the Court of Sub-Judge, Nurgur. That be dismissed. Besides this, any case prior to today, be also dismissed on the basis of this compromise. We do not cultivate any land of Khazur Singh and this is our compromise from today. This decision has been taken in the presence of Pradhan and other respectables. It has been heard and is correct.

One Joginder Singh, Lumberdar, is the scribe and Pradhan, who has also signed the same by affixing his stamp. There are five witnesses to this document, who are S/Sh. Piar Singh, Banwari Lal, Amin Chand, Gillo Chowkidar and Lal Singh. Except Gillo Chowkidar, other witnesses have signed the document. The Chowkidar has affixed his thumb impression. This document was executed on 28-10-1977.

12. PW 2 Chhaju Ram Sarpanch proved this document who deposed on oath, that Khazur Singh has been cultivating the suit land and he never saw Defendants cultivating the same. He further added that compromise Ex. P-1 took place in his presence and he has signed this as one of the witness. He further

added that Joginder Singh scribed this document and the parties affixed their thumb-impressions/signatures on the same. He further added that whatever the parties asked, the same was scribed in this document.

13. PW 3 is Joginder Singh, the scribe of this document Ex. P-I. He stated that he has seen the suit land and regarding this, he scribed Ex. P-I. He also stated that it was read over to the parties and after admitting the same to be correct, they affixed their signatures/thumb-impressions on the same. He also stated that the Plaintiffs were cultivating this land and Defendants never cultivated the same. During cross examination, this witness has been very specific in deposing that at that time Defendants had disclosed that they were not cultivating any land of the Plaintiffs and according to this witness, this aspect was referred in Ex. P-I.

14. Ex. P-5 is the certified copy of the order dated 16-12-1977 passed by Sub-Judge Ist Class, Nurpur in the previous suit which was filed by Bachittar Singh S/o Beli, Dalipa S/o Tulsi, Ranja S/o Punjabu, Chandu S/o Kishanu, Rania S/o Ghasitu and Jai Karan S/o Punjabu, who are the present Defendants. The suit was filed against the present Plaintiffs. In this earlier Suit No. 126/1976 decided on 16-12-1977, the present Defendants had sought declaration that they were in cultivating possession of the suit land as tenants for the last more than 15 years and as a consequential relief, permanent prohibitory injunction was asked for. The order passed on 16-12-1977 is being reproduced hereunder for the sake of convenience:

Present: Counsel for the Plaintiff: Counsel for Defendant No. 1. Defendant No. 5 ex parte.

Counsel for the Plaintiffs has withdrawn himself from the suit after pleading no instructions from the Plaintiffs. Plaintiffs are also not present. Suit of the Plaintiffs is dismissed under Order 9, Rule 8, Code of Civil Procedure. File after completion be consigned.

Announced

Seal of the Court: Sd/- Sub-Judge Ist Class, Nurpur.

15. The other documents pertained to the entries in the record of right. Latest entry in the record of right pertaining to the suit land is Ex. P-3, the jamabandi for the year 1976-77 wherein the Plaintiffs have been recorded as owners of the suit land while the Defendants have been recorded in possession as non-occupancy tenants on payment of 1/4th of the produce. In Ex. P-2, which is the copy of Misal Hakiyat pertaining to a part of the suit land which has been recorded in occupation of the owners. Ex. P-4 is the Khasra Girdawari w.e.f. 14-10-1977 to 15-10-1980. In this copy, before Kharif 1980, the land is recorded in the occupation of the tenants, but thereafter in the self cultivation of the owners, Through Exs. P-6, P-7 and P-8 which are the certified copies of mutation Nos. 502, 503 and 50(sic), Plaintiffs have been recorded in occupation of the suit land. These were attested and sanctioned in November 1981. The aforesaid

mutations attested in favour of the owners were so entered and sanctioned on the basis of the earlier civil suit which was dismissed in default.

16. Copies of record of right were also filed on behalf of the Defendants, which pertained to the years 1970-71, 1971-72, 1976-77 and Khasra Girdawaris upto 1980. Those copies on record are Ex. D-1 to D-13. In these copies, the Defendants have been recorded in occupation as non-occupancy tenants.

17. This is the entire documentary evidence examined by the parties.

18. Plaintiff examined himself as PW 1 and supported his case. PW 2 and PW 3 were the witnesses of Ex. P-1 and also to this effect that Plaintiffs have been in occupation of the suit land and these witnesses never saw Defendants occupying any part of the suit land.

19. On the other hand, Defendants also examined three witnesses in support of their case. DW 1 is Ram Singh, one of the Defendants, who stated that he alongwith other Defendants have been in occupation of the suit land since their fore-fathers. He further stated that this land was jointly owned by the owners. According to this witness, this land was purchased by Mulkh Raj and Khazur Singh present Plaintiff was son of Mulkh Raj. He further added that Defendants have not left over their rights of tenancy. He denied to have executed any compromise. This witness admitted that previously they had filed a suit against the present Plaintiffs. He also admitted the previous suit to be pertaining to the suit land. He denied the suggestion that the earlier suit was dismissed, but then volunteered to state that the suit was withdrawn. He also stated that the withdrawal was made without any statement. He denied that any compromise was effected pertaining to the previous suit. He also stated that Ex. P-1 was not having his thumb-impression. He further stated that at the time of compromise, his son Chain Singh was present.

20. DW 2 is Ghunka Ram who stated that the suit land was situated about two furlongs from his house and this was in occupation of the Defendants. The witness further added that he had been seeing the Defendants to be in occupation of this land for the last 40 years. During cross-examination, the witness deposed that his house was situated at a distance of 4 kms. from the suit land. He also stated that his land was situated two furlongs from the suit land which land was owned by him.

21. DW 3 is one Chando. He also made a general statement that for the last 45 years, Defendants were in occupation of the suit land. According to him, the suit land was about-4 to 5 kms. from his village. He denied the suggestion that he has not seen the suit land.

22. It may be pointed out at this stage that Ex. P-1 has been proved to have been executed by six persons referred therein and out of those persons, Ranja S/o Punjabu and Chain Singh S/o Rania, Defendants 3 and 6 were not the signatories to Ex. P-1. The trial Court decreed the suit against all the Defendants

including Defendants 3 and 6. The appeal before the District Judge was filed by S/ Sh. Bachittar Singh, Dalipa, Chand and Rania. This Rania died during the pendency of the litigation and this Chain Singh who was already one of the Defendants was transposed as one of the Appellant, being the legal representative of Rania deceased. Otherwise, Chain Singh in his individual capacity alongwith Jai Karan did not prefer any appeal against the judgment and decree passed by the trial Court. Defendant No. 3 also did not prefer any appeal before the learned District Judge. This only reflected that these Defendants were probably satisfied with the judgment and decree passed by the trial Court.

23. The validity of this document Ex. P-1 has been assailed on behalf of the Defendant-Respondents on the main ground that on record, it has been proved that the Defendants were in occupation of the suit laad as tenants and Ex. P-1, being relinquishment deed, was required to be compulsorily registered and, therefore, this document has to be ignored. It has also been submitted that the dismissal in default of the previous suit will not create any bar for the Defendants to raise plea of tenancy in the present suit. It has also been contended that Ex. P-1 did not amount to admission on the part of the Defendants and as such, it will not rebut the entries in the record of right, to which legal presumption of truth is attached.

24. It is correct that the latest entries in the record of right which is the copy of jamabandi for the year 1976-77 recorded Defendants to be in actual occupation as non-occupancy tenants, to which legal presumption of truth is attached. It may be referred here that in the previous suit, the present Defendants sought declaration that they were in occupation of the suit land as tenants. Ex. P-1 was some compromise effected between the parties. Needless to say, in the compromise which has been reproduced earlier, the present Defendants only admitted that they were not cultivating any land owned by Khazur Singh and Ors. . It has come in evidence that the previous suit pertained to the suit land and that suit was dismissed in default, that too, after the execution of Ex. P-1. Ex. P-1 only stated that the present Defendants were admitting the possession of the owners over the suit land and very specifically recorded that Defendants were not cultivating the same. To describe this document as a relinquishment deed, would be a misnomer. It could have been described as a relinquishment deed in case owners had admitted the Defendants to be in occupation of the suit land, as tenants and thereafter the Defendants had left their tenancy rights on the basis of this Ex. P-1. It is not the case of that nature here. It has been the case of the Plaintiffs, as pleaded in the suit, that actually they were in actual occupation of the suit land and entries in the name of Defendants in the revenue record in occupation of the suit land, were wrong. With this background, the Plaintiffs" claimed that they were owners in occupation of the suit land, in a way, was not contested through Ex. P-1 wherein the Defendants admitted that they were not cultivating the land of the present Plaintiffs. At the cost of repetition, it may again be pointed out that in Ex. P-1 which was executed on 28-10-1977, the Defendants agreed to get their suit dismissed and as a consequence thereof, it

was got dismissed in default on 16-12-1977. Again, it may be stated that after 28-10-1977, when this Ex. P-1 was executed, the Defendants never assailed that document in any proceedings to be the result of fraud, undue influence etc., but remained silent till the present suit was filed, wherein the Defendants denied the execution of such a document. The conduct of the Defendants, in this view of the matter, is not worth appreciation.

25. The admission in Ex. P-1 and the conduct of the Defendants legally rebutted the entries in the record of rights which have been corrected in favour of the owners later on, as discussed above.

26. The right of tenancy being pleaded on behalf of the Defendants, in the context of the aforesaid circumstances, has not at all been legally proved. The evidence examined on behalf of the Defendants, except for the statement of one of the Defendants, only reflected that they were in actual occupation of the suit land for the last so many years, which fact will not inspire any legal confidence, in view of Ex. P-1. Simply because one of the Defendants stated that the document did not contain his thumb-impression will not amount to be so, especially when the scribe and the Pradhan of the Panchayat, who were the signatories to the document, have proved the execution of the same. In case the thumb impression was not that of the Defendants that fact could have been proved by examining expert witness, especially when the science identifying the thumb-impression is stated to be almost perfect.

27. Another limb of argument advanced on behalf of the Defendants assailing Ex. P-1 has been that the genuineness of this document is rendered very much doubtful, especially when it has not been produced in the previous litigation. It may not be out of place to mention here that definitely the document was not produced in the previous litigation, but the fact remains that the document recorded that the Defendants would get their suit dismissed which was pending before Sub-Judge, Nurpur pertaining to the land and which had been filed against Khazur Singh and Ors. -owners. The Defendants did not present themselves and got the suit dismissed in default. This aspect of the matter, moreso, when this document has been proved by the witnesses, as discussed above, supports the validity and genuineness of this document.

28. The earlier suit was dismissed in default under Order 9, Rule 8, Code of Civil Procedure. Under Order 9, Rule 9, Code of Civil Procedure, it has been very specifically provided that where a suit is wholly or partly dismissed under Rule 8, the Plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. This provision barred the present Defendants to file a suit of earlier nature on the same cause of action. Admittedly, the present suit has not been filed by the present Defendants and as such, as per Order 9, Rule 9, Code of Civil Procedure, the bar was not there so far as the Defendants were concerned. However, one fact is very much relevant to be considered that on the basis of the bar provided under Order 9, Rule 9, Code of Civil Procedure, the present Defendants could not claim the tenancy rights, they had claimed in the

earlier suit by filing a fresh suit, but the fact remains that those very rights were being claimed in defence. Technically speaking, as per provisions of Order 9, Rule 9, Code of Civil Procedure, the bar for taking such a defence which was the plea taken in the earlier suit, is not there, but the conduct of the Defendants while appreciating this plea would be taken note of which cannot be ignored.

29. No other point has been stressed.

30. In view of the foregoing reasons, the present appeal succeeds and is accordingly allowed. As a consequence thereof, the judgment and decree passed by the first appellate Court are set aside and the judgment and decree passed by the trial Court are maintained. Parties are, however, left to bear their own costs.