

(2022) 09 SHI CK 0060

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 49 Of 2007

Roshni Devi

APPELLANT

Vs

Dolima Devi And Others

RESPONDENT

Date of Decision : 21-09-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 35A, Order 7 rule1
Hindu Adoption And Maintenance Act, 1956 — Section 19
Transfer Of Property Act, 1882 — Section 6

Citation : (2022) 09 SHI CK 0060

Hon'ble Judges : Satyen Vaidya, J

Bench : Single Bench

Advocate : G. D. Verma, Sr. Advocate With Sh. B. C. Verma, K. D. Sood, Rahul Gathania

Final Decision : Disposed Of

Judgement

Satyen Vaidya, J

1. Appellant is in appeal against the judgment and decree dated 18.12.2006, passed by learned District Judge, Hamirpur, H.P. in Civil Appeal No. 10 of 2003, whereby the judgment and decree dated 30.12.2002, passed by learned Sub Judge, 1st Class, Barsar in Civil Suit No. 73/1998/92 has been reversed and the suit of the plaintiff has been dismissed.

2. Parties herein shall be referred by their names for the reason that due to long pendency of litigation, the original defendants have been substituted by number of legal representatives. Roshni Devi (appellant herein) was the plaintiff, whereas Khajana Ram and Man Chand were defendant No.1 and defendant No.2 respectively in civil suit before learned trial Court. Khajana Ram died and he was represented by his daughters Harbanso Devi and Narato Devi (respondents No. 2 and 3 before learned lower appellate Court). Man Chand was survived by legal representatives, who were the appellants before learned lower appellate Court.

4. Roshni Devi claimed herself to be wife of Jagat Ram, son of Khajana Ram (defendant No.1). Jagat Ram, husband of Roshni Devi had predeceased his father. Roshni Devi had filed Civil Suit No. 266 of 1992 against Khajana Ram for maintenance being his daughter-in-law. In Civil Suit No. 266 of 1992, Roshni Devi had obtained injunction against Khajana Ram, restraining him from alienating, encumbering or charging the suit property.

5. During the pendency of Civil Suit No. 266 of 1992, Man Chand filed Civil Suit No. 219 of 1991 against Khajana Ram, seeking declaration that he had become owner of suit property by way of adverse possession. Khajana Ram was represented in said suit by his attorney Kishan Singh. By way of written statement filed in Civil Suit No. 219 of 1991, the claim of Man Chand was admitted on behalf of Khajana Ram. Kishan Singh (attorney of Khajana Ram) also made a statement before Civil Court that he had no objection in case the suit was decreed. Accordingly, a decree was passed by Civil Court on 26.12.1991 in Civil Suit No. 219 of 1991 and Man Chand was declared owner of suit property by way of adverse possession.

6. Roshni Devi filed another Civil Suit against Khajana Ram and Man Chand, challenging the decree dated 26.12.1991, passed in Civil Suit No. 219 of 1991 being result of collusion and fraud. The suit was numbered as Civil Suit No. 73/1998/92. It was alleged that Man Chand had colluded with Khajana Ram with a purpose to defeat the rights of Roshni Devi in pending Civil Suit No. 266 of 1992. Khajana Ram died on 24.7.1993. Roshni Devi amended here plaint by including her claim of inheritance as daughter-in-law of Khajana Ram and accordingly made additions to the prayer clause also.

7. The suit land in Civil Suit No. 266 of 1992, Civil Suit No. 219 of 1991 and Civil Suit No. 73/1998/92 was the same i.e. khata No. 124, khatauni No. 132, Khasra Nos. 819, 821, 836, 883, 884, 927 and 937, kita-7, measuring 36 kanals, 2 marlas, situated in Tikka Thana, Tappa Bani, Tehsil Barsar, District Hamirpur, H.P.

8. In defence, jointly raised by defendants Khajana Ram and Man Chand, the status of Roshni Devi as wife of Jagat Ram was denied. The right of Roshni Devi claiming maintenance from Khajana Ram was contested. The decree dated 26.12.1991, passed in Civil Suit No. 219 of 1991 was stated to be a perfectly legal document.

9. During the pendency of Civil Suit No. 73/1998/92, Roshni Devi withdrew her suit for maintenance being Civil Suit No. 266 of 1992 on 27.3.1995.

10. Learned trial Court framed the following issued:

(1) Whether the judgment and decree dated 26.12.91 are a result of fraud and collusion etc. as alleged and not binding upon the plaintiff? OPP

(2) Whether the Plaintiff is entitled to the declaration prayed for? OPP.

(3) Whether the Plaintiff is entitled to a decree for possession asclaimed? OPP

- (4) Whether the suit is not maintainable in the present form? OPD.
- (5) Whether the Plaintiff has a cause of action? OPP.
- (6) Whether the Plaintiff has the locus standi to sue? OPP.
- (7) Whether the suit is bad for non-joinder and misjoinder of the necessary parties? OPD
- (8) Whether the Plaintiff is estopped from filing the present suit by her act and conduct? OPD.
- (9) Whether the defendants are entitled to special costs under section 35A CPC as claimed. If so, their quantum? OPD.
- (10) Whether this Court has no jurisdiction to decide the present suit? OPD.
- (11) Whether the suit is time barred? OPD.
- (12) Whether the suit is hit by the Principle of res judicata as alleged. If so its effect? OPD.
- (13) Whether the plaint has not been filed in accordance with order 7 rule 1 CPC as alleged. If so, its effect? OPD.
- (14) Whether the plaintiff is the daughter in law of late Sh. Khazana Ram? OPD.
- (15) Whether late Sh. Khazana Ram executed a valid will in favour of Sh. Rakesh Kumar etc. as alleged. If so, its effect? OPD.
- (16) Relief.

Issue Nos. 1, 2, 3, 5, 6 and 14 were answered in affirmative and issue No. 4 was answered in negative and all other issues were answered as not pressed. Learned trial Court decreed the suit to the following effects: -

"As a sequel of my findings on the various issues, the instant suit succeeded and the same is, therefore, decreed. I, accordingly, declare that the plaintiff is the owner of 1/3 share of the suit land (total measuring 36.2 kanals). A decree for possession of the land is also passed in favour of the plaintiff (who is its owner) and against the defendants. Further, the Judgment and decree dated 26.12.1991 rendered in Civil Suit No. 219 of 1991 titled as Man Chand Versus Khazana Ram are held to be a result of fraud and collusion, etc. The same do not bind the plaintiff or affect her rights. Keeping in mind the relations between the parties, they are left to bear their costs. Decree sheet be drawn."

11. In first appeal, learned lower appellate Court reversed the findings recorded by learned trial Court and dismissed the suit of plaintiff. It was held that Roshni Devi had no right to claim maintenance under Section 19 of Hindu Adoption and Maintenance Act, 1956, as there was no pleading and proof that the suit property was ancestral/coparcenary in the hands of Khajana Ram. On such count, Roshni Devi was held to be having no locus-standi or cause of action. According to

learned lower appellate Court, Roshni Devi could have right to challenge the decree in Civil Suit No. 219 of 1991, had she been able to prove her right of maintenance. It was also held that collusion or fraud had also not been proved on record.

12. The instant appeal was admitted by this Court on 14.3.2008, on following substantial questions of law:-

1. Whether the claim of the appellant stands established on record for right of recovery of maintenance from the property in suit which admittedly belongs to father-in-law of the appellant late Sh. Khajana Ram?

2. Whether learned lower appellate Court having found and held that she is widow of late Sh. Jagat Ram, son of late Shri Khajana Ram, therefore, she has the right of succession in the estate of late Sh. Khajana Ram, especially in view of the fact that the respondents have already given up their claim on the basis of Will Exhibit DW-1/A, the alleged Will of late Sh. Khajana Ram in favour of contesting-respondents.

3. Whether suit filed by appellant bearing suit No. 266/92 having been filed on 9.7.1991, therefore, the subsequent suit as filed by Sh. Man Chand, son of Sh. Khajana Ram against Shri Khajana Ram on 9.7.1991 which was decided on 26.12.1991 on the admission of Shri Jagat Ram, therefore, this decree is collusive, void and no reliance could be placed thereon and therefore, upon the death of Sh. Khajana Ram, his natural legal heirs including appellant being widow has succeeded him?

13. I have heard learned counsel for the parties and have also gone through the records carefully.

14. Both the courts below have concurrently held Roshni Devi to be the wife of Jagat Ram and resultantly, the daughter-in-law of Khajana Ram. Such finding needs to be upheld, as nothing has been shown to term the same as perverse.

15. Perusal of contents of plaint filed by Roshni Devi reveals that she sought the declaration regarding decree dated 26.12.1991, passed in Civil Suit No. 219 of 1991 in favour of Man Chand on the premise that Man Chand and Khajana Ram had colluded with a purpose to defeat her rights in pending Civil Suit No. 266 of 1992. She did not make specific pleadings as to the base of her claim of maintenance against Khajana Ram or of his property, obviously for the reason that Civil Suit No. 266 of 1992 was already pending before Court of competent jurisdiction. Roshni Devi had relied upon the fact that Khajana Ram had been restrained by way of an interim injunction, passed in Civil Suit No. 266 of 1992 from alienating the suit land by way of sale, gift, exchange and mortgage etc. to any person and despite said order, he had suffered a decree by colluding with Man Chand. She had further averred that Khajana Ram was fully aware about the pendency of Civil Suit No. 266 of 1992 and interim order passed therein. It was specifically pleaded that Man Chand was son-in-law of Khajana Ram and the

judgment and decree dated 26.12.1991 in Civil Suit No. 219 of 1991 had been obtained from the Court of Sub Judge 1st Class, Hamirpur by collusion, fraud and concealment of material fact on the ground of adverse possession. It was asserted that Khajana Ram was in possession of the suit land till his death. It was also submitted that Khajana Ram had already gifted some other land to Man Chand.

16. At this stage, it will be apt to make a reference to the lineage of Khajana Ram. He had one son namely Jagat Ram and three daughters namely Harbanso Devi, Narato Devi and Sarla Devi. Man Chand was the husband of Sarla Devi, who had predeceased her husband and father. Man Chand had remarried with Dolima Devi and had respondents No. 2 to 7 herein, as children from Dolima Devi. As noticed earlier also, Jagat Ram had also predeceased of his father.

17. The question arises whether learned District Judge was right in non-suiting Roshni Devi on the ground that she had not pleaded and proved her right of maintenance from Khajana Ram or his property?

18. The view taken by learned District Judge cannot be subscribed. At the time of passing of decree in Civil Suit No. 219 of 1991, admittedly Civil Suit No. 266 was pending. In said suit i.e. Civil Suit No. 266 of 1992, Roshni Devi had sought a decree of maintenance from Khajana Ram and the suit property. The matter was pending before the Court of competent jurisdiction. It is in the context of pendency of Civil Suit No. 266 of 1992 that the challenge to decree in Civil Suit No. 219 of 1991 is to be seen.

19. It was not the case of Khajana Ram and Man Chand that they were not aware about the pendency of Civil Suit No. 266 of 1992. Khajana Ram had suffered an interim injunction order, whereby he was restrained from alienating the suit land by way of sale, gift, lease, mortgage and sale etc. In view of this, the novel idea appears to have been propounded to transfer the suit land in the name of Man Chand by suffering the decree.

20. Collusion in judicial proceedings is a secret arrangement between two persons that one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceeding, the claim put forward is fictitious. The contest over it is unreal and the decree passed therein is a mere mask having the similitude of a judicial determination and borne by the parties with the object of confounding third parties. These observations extracted from the judgment passed by Hon'ble Supreme Court in Nagubai Ammal and others vs. B. Shama Rao and others, AIR 1956, SC 593 are apt to be noticed.

21. Another facet of the challenge by Roshni Devi was allegation of fraud and misrepresentation. In Nagubai Ammal (supra), it was further observed that when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the Court in his favour and against the opponent by practicing fraud on the Court.

Such a proceeding is started with a view to injure the opponent and there can be no question of its having been instituted as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham in a fraudulent suit it is real and earnest.

22. In view of above exposition, the plea of collusion and fraud could not co-exist, nonetheless one of the pleas if proved could have its own independent bearing on the merits of the case.

23. Some total of the pleadings raised by Roshni Devi reveals that her assertion was clear and unambiguous that Khajana Ram had suffered decree in Civil Suit No. 219 of 1991 only to defeat her claim in Civil Suit No. 266 of 1992. It being so, it will not be out of place to assess the merits of the claim of Man Chand in Civil Suit No. 219 of 1991. Admittedly, Man Chand was son-in-law of Khajana Ram. There is also no dispute that till passing of aforesaid impugned decree, Khajana Ram was shown to be owner in possession of the suit land. The pre-requisite of plea of adverse possession is holding of possession by a person other than owner with hostile animus towards the owner. In cross-examination of Roshni Devi while she appeared as her own witness, a suggestion was made to her that Man Chand was "GharJawain" of Khajana Ram. Similarly, when Man Chand appeared as DW-3, he specifically stated in his examination-in-chief that Khajana Ram was his father-in-law and he had been kept as "GharJawain". In the context of Indian society, "GharJawain" is daughter's husband and is taken to be substitute for a son. One who lives in the house of his in-laws to take their care and survive on their assets. It being so, there could not be any hostile animus between the "GharJawain" (Man Chand) and his father-in-law (Khajana Ram).

24. There is another glaring fact on record, which negates the existence of hostile animus of Man Chand towards Khajana Ram. A Will was propounded by Man Chand as having been executed by Khajana Ram in respect of suit property in favour of sons of Man Chand. In case Man Chand had hostile animus to own the property of his father-in-law, there was hardly any need for creation of a Will or a claim on its basis. Though, subsequently, the claim on the basis of Will was given up by Man Chand, yet the fact remains that a claim was setup to the property of Khajana Ram on the basis of Will.

25. The material as observed above, clearly suggests the nonexistence of basic ingredients of adverse possession. Had the merits of the claim of Man Chand on the plea of adverse possession been assessed at the touch stone of legal principles, the same would have failed in all probabilities. It was only on the basis of admission made by the attorney of Khajana Ram that a decree was passed. In such circumstances, there cannot be any denial to the fact that had the decree not been collusive, it would not have been passed. It is also evidently probable that such a method was adopted to circumvent the injunction order suffered by Khajana Ram in Civil Suit No. 266 of 1992.

26. It is the collusiveness of a decree that makes it bad in law. Fair play is the

hallmark of every law and legal system. No adjudication can survive which is actuated by illegitimate means. Whether Roshni Devi had right to maintenance from Khajana Ram or his property could not be the determinative factor to hold existence of cause of action in her favour.

27. The existence of cause of action is to be seen at the time of filing of the suit. The institution of a suit by Roshni Devi could not be refused on the ground that she had no decree in her favour, declaring her right to have maintenance against Khajana Ram. It is equally true that suit has to be decided on the basis of cause of action, as existed on the date of filing of the suit.

28. Roshni Devi subsequently withdrew her suit No. 266 of 1992 on 27.3.1995, as Khajana Ram had died on 24.7.1993 and her cause of action in Civil Suit No. 266 of 1992 had ceased to exist.

29. In light of above discussion, learned District Judge had erred in dismissing the suit of Roshni Devi on the grounds that she did not have cause of action to file the suit in absence of right of maintenance in her favour. The pendency of civil suit No. 266 of 1992 at the time of passing of decree in Civil Suit No. 2019 of 1991 was sufficient to afford cause of action to Roshni Devi.

30. The view subscribed by learned District Judge cannot be sustained for another reason that after the death of Khajana Ram, Roshni Devi would be one of his legal heirs, as wife of his pre-deceased son. The concept of *spes- successionis* under Section 6 of the Transfer of Properties Act bars the transfer by an heir apparent. This, however, cannot be construed to mean that an heir apparent will not have cause of action to challenge any illegal action of the person from whom the heir apparent is entitled to inherit, on the ground that it affected his/her rights available on inheritance. Since Roshni Devi was held to be wife of pre-deceased son of Khajana Ram, she being heir apparent would have another source of cause of action to assail the decree in Civil Suit No. 219 of 1991.

31. In light of above discussion, the substantial questions of law Nos. 2 and 3, as noticed above, are answered accordingly and question No.1 is rendered infructuous. The appeal succeeds. The impugned judgment and decree dated 18.12.2006, passed by learned District Judge, Hamirpur, H.P. in Civil Appeal No. 10 of 2003 is set aside. The judgment and decree dated 30.12.2002, passed by Sub Judge, 1st Class, Barsar in Civil Suit No. 73/1998/92 is upheld, however, with the modifications that Roshni Devi will be entitled to inherit the estate of Khajana Ram strictly in accordance with Hindu Succession Act and will be held entitled to joint possession of the suit land till she gets her share partitioned.

32. The appeal is accordingly disposed in the aforesaid terms. Pending applications, if any, also stand disposed of. Records be sent back forthwith.