

(2019) 09 SHI CK 0142

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 603 Of 2015

Shastra

APPELLANT

Vs

Kimtu

RESPONDENT

Date of Decision : 12-09-2019

Acts Referred:

Transfer Of Property Act, 1882 — Section 43, 106
Himachal Pradesh Tenancy And Land Reforms Act, 1972 — Section 118
Code Of Civil Procedure, 1908 — Order 41 Rule 27, Order 1 Rule 10

Citation : (2019) 09 SHI CK 0142

Hon'ble Judges : Sureshwar Thakur, J

Bench : Single Bench

Advocate : Rita Goswami, Komal Chaudhary, S.S. Mittal, Surender Prakash Sharma, Sanjeev Kuthiala, Sonia Saini

Final Decision : Dismissed

Judgement

Sureshwar Thakur, J

1. The instant appeal, is, directed against the impugned concurrently recorded verdicts, by both, the learned Courts below, (a) wherethrough(s) the plaintiffs' suit, for rendition, of decree, of, possession, vis-à-vis, the suit property, and against the defendants, and also, for recovery, of, mesne and profits, stood hence decreed. However, the verdict(s) rendered by the learned first appellate Court, made some modification, in the verdict(s), and, decree, pronounced rather by the learned trial Judge, inasmuch as, the decree, for, realization of Rs. 18,26,000/-, and appertaining to mesne profits, being modified, to a declaration, being pronounced, vis-à-vis, the plaintiff, being entitled, for recovery of Rs. 1, 25,000-w.e.f. April, 2006 to September, 2006, alongwith interest @ 9% per annum, till its realization.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for recovery of Rs. 3,25,000/- i.e. a sum of Rs. 1,25, 000/- being arrears of rent at the rate of Rs. 20,833.33 paise per month, w.e.f. 1.4.2006, till 30.9.2006 and Rs.

2,00,000/- as mesne profit at the rate of Rs. 50,000/-per month, w.e.f. 1.10.2006 till January, 2007, alongwith interest at the rate of Rs. 12% per annum till possession of the premises is handed over to the plaintiff. It transpires from the averments as projected in the plaint that plaintiff is recorded as owner in possession of land comprising Khasra No. 56 and 55/2, situated in UP Muhal Ghordour, Phati Nathan, Kothi Naggar, Tehsil and District Kullu, upon which the plaintiff has construed a building shown in the site plan and adjacent to the said building, vacant land of the plaintiff also exists. The aforesaid building with vacant site (hereinafter referred to be the suit premises) was leased out in favour of defendant vide lease agreement dated 4.11.1999 at the rate of Rs. 20,833.33 paise per month to be paid annually as an advance. The plaintiff had handed over the possession of the suit premises in favour of the defendant as per the terms and conditions of the lease agreement and the defendant is in possession of the same as lessee. As the defendants failed to make the payment of aforesaid monthly rent to the plaintiff, the arrears of rent w.e.f April, 2006 to 31.7.2006 came to Rs. 83,333, hence on 11.8.2006, plaintiff issued notice under Section 106 of the Transfer of Proper Act to the defendant informing the defendant being in arrears of rent as per the terms and conditions of the lease agreement and also about the termination and determination of tenancy w.e.f. mid night of end of September, 2006 but the defendant despite of the aforesaid notice failed to make the payment of aforesaid arrears of rent and also failed to vacate the suit premises. The defendant after termination and determination of the tenancy w.e.f. October 2006 at the rate of Rs. 50,000/- per month till January 2007 and the plaintiff is entitled to recover the said arrears of mesne profit till the defendant has actually handed over the possession of the suit premises to the plaintiff. The defendant was requested to admit the claim of plaintiff several times but the defendant failed to do so, hence the suit. The defendant resisted the suit, filed written statement inter-alia taking preliminary objections of maintainability, estoppel, bad for mis-joinder of cause of action and suppression of facts. On merits, admitted that the suit premises was rented out to the defendant vide agreement dated 1.7.1999. It is further alleged that lateron another agreement was executed between the parties under which the defendant society was to construct an entirely new, additional and independent portion on the first floor of the building at its own cost and expenses and as per its need and requirements and the plaintiff had agreed not to change any rent qua this additional portion for a period of eight years w.e.f 1.7.2006 to 30.6.2008 and after that rent for this portion was fixed at Rs. 7,333 per month for the next two years ending on 30.6.2010. The defendant society constructed this portion in good faith and spent more than Rs. 20,00,000/- on it. This new portion has also been made subject matter of the present suit wrongly despite of the fact that it was not part of the aforesaid lease involved in the suit qua this portion which has been constructed by the defendant an independent and separate lease agreement was arrived at between the parties and in part performance of the contract, the defendant society was put in possession. It is further alleged that in fact even major portion of the old building of the suit

premises was constructed by the defendant society. The possession of the suit premises was not handed over to the defendant society under aforesaid lease agreement dated 4.11.1999. An advance of Rs. 4,50,000 was already paid by the defendant society to the plaintiff for carrying out the construction on the spot as per its requirement. The possession of the suit premises alongwith the building was agreed to be given on lease by 1.7.1999 and on the same day the parties executed documents styled as Lease Deed MOU for lease of the suit land alongwith building thereon as well as building to be raised later on for a period of five years w.e.f. 1.5.1999 till 30.4.2004 at the annual rent of Rs. 2,10,000/-. Vide agreement dated 4.2.1999 which was wrongly dated 4.1.1999, the basement of the building on the suit land was also agreed to be given on rent to the defendant society w.e.f. 1.4.2000 till 30.4.2004. The suit premises was given on lease to the defendant society for a period of ten years on a monthly rent of Rs. 20,833.33 and the handing over the possession of basement was deferred till 1.10.1999. On 4.2.1999 Lease Deed MOU was executed with respect to basement qua which tenancy was stipulated to commence w.e.f. 1.4.2000 at an annual rent of Rs. 35,000/-. In case this Court holds that aforesaid lease deeds are not valid in that even plaintiff is estopped by her act and conduct from claiming possession of suit premises unless she pays damages to the tune of Rs. 1,00,00,000/- to the defendant society for improvement of the suit premises made by it. It is further alleged that the parties were negotiating for 99 years lease of the suit premises for running hospital therein and to this effect document dated 16.4.2002 was prepared whereby the plaintiff agreed to lease out the suit premises for hospital purposes only for a period of 99 years in favour of defendant society on payment of consolidated amount of Rs. 40,00,000/-. A requisite application was made by the parties to the Government of H.P. for grant of necessary permission under Section 118 of the H.P. Tenancy and Land Reforms Act but the plaintiff has been delaying the matter on one pretext or the other. In good faith, the defendant society constructed an operation theatre for gynecology work and had furnished eight bed rooms and further purchased machinery worth Rs. 25,00,000/- so that maternity home-cum-hospital could be made functional. All the aforesaid work could have not been done by the defendant society, had the plaintiff not agreed to lease out the suit premises for 99 years to the defendant. Vide undertaking dated 4.4.2008 the plaintiff had agreed to lease out the suit premises for 99 years subject to the alteration in the consolidated lease amount from Rs. 40,00,000 to Rs. 50,00,000. The defendant society filed an inter pleader suit bearing No. 43 of 2009 against the plaintiff and others in the Hon'ble High Court inter-alia seeking determination the adverse claims and rights of the defendant but the same was dismissed vide order dated 26.10.2010 and against the said order the defendant has filed appeal before the Division Bench of the Hon'ble High Court which has been admitted and the parties have been directed to maintain status-quo. In these manners, the present suit is liable to be stayed.

However, during the pendency of the suit the Hon'ble High Court has passed a

decree in RSA No. 127 of 1994 and RSA No. 269 of 1993, whereby it has been held that plaintiff Kimtu Devi is not daughter of Gehru and Gehru was a sane person. In replication the plaintiff re-asserted the claim put forth in the plaint by denying the defence taken in written statement by the defendants.

3. On the pleadings of the parties, the learned trial Court framed the following issues, on 25.2.2008 and, also an additional issue 9-A, stood framed, on 5.3.2013

(i) Whether the tenancy of defendant stood terminated vide notice dated 11.8.2006? OPP

(ii) Whether the plaintiff is entitled to the relief of possession, as prayed for? OPP

(iii) Whether the plaintiff is also entitled to recover Rs. 3,25,000/- alongwith future interest at the rate of 12% per annum, as prayed for? OPP

(iv) Whether there was an agreement between the parties, dated 14.11.1999, if so, its effect? OPD

(v) Whether it was agreed between the parties not to charge any rent qua the additional portion, w.e.f. July, 2000 to June, 2008? OPD

(vi) Whether rent to the tune of Rs. 7,333.33 was fixed for the next two years ending June, 2010? OPD

(vii) Whether for addition/renovation etc. there was an agreement between the parties dated 15.10.1998? OPD

(viii) Whether lease deed dated 4.2.1999 was executed fixing the annual rent to the defendant of Rs. 35,000/ per annum w.e.f. 1.4.2000? OPD

(ix) Whether vide agreement dated 16.4.2002 plaintiff has agreed to lease out suit property in favour of defendant for 99 years on payment of consolidated lease amount of Rs. 40,00,000/-? OPD (ix-A) Whether the defendant has also given an undertaking dated 4.4.2008 to lease out the suit property for a period of 99 years on payment of consolidated lease amount of Rs. 50,00,000/-OPD

(x) Whether the suit is not maintainable in the present form? OPD

(xi) Whether the present suit is not competent? OPD

(xii) Whether plaintiff is estopped by her act and conduct to file the present suit? OPD

(xiii) Whether the suit is bad for mis-joinder of necessary party? OPD

(xiv) Whether the plaintiff has not affixed proper court fee? OPD

(xv) Whether the plaintiff has not come with clean hands? OPD

(xvi) Whether plaintiff has no cause of action? OPD

Relief.

4. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the plaintiffs' suit. In an appeal, preferred therefrom, by the aggrieved defendant, hence before the learned First Appellate Court, the latter Court also dismissed the apposite appeal, and, affirmed the findings recorded, by, the learned trial Court. However, the apposite cross-objections, filed by the plaintiff/respondent, were partly allowed

6. Now the defendant/appellant herein, have instituted the instant Regular Second Appeal before this Court, wherein it assails, the, findings recorded in its impugned judgment, and decree, by the learned first Appellate Court. When the appeal, came up, for admission, this Court, on 25.2.2016, admitted the appeal instituted, by the appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial question(s) of law:-

(i) Whether on account of misreading, misappreciation and misconstruction of law and facts as well as the oral and documentary evidence available on record, the judgment and decree under challenge in the main appeal being perverse and vitiated is not legally sustainable?

Substantial questions of law

7. The learned counsel appearing for the aggrieved defendant, has made a fervent endeavor, for, dislodging, the, concurrent findings, as, pronounced against the aggrieved defendant, (a) respectively, upon, Civil Suit No. 28 of 2007, and, upon Civil Appeal No. 28 of 2014, (b) and the afore endeavour, is, anvilled upon, the disentitlement, of, the plaintiff/respondent herein, to successfully acquire, the, afore impugned rendition(s), (c) and, the afore submission, is, centralized, upon, a verdict pronounced, upon, Civil Suit No. 35 of 1987, wherein the plaintiff herein, hence also occurs in the array, of, plaintiffs, in the afore suit, hence instituted by her, against the arrayed defendants, and, who are other other, than the aggrieved defendant, in the instant proceedings,(d) and rather wherein, a, declaration, stands pronounced, vis-à-vis, one Kimtu, the plaintiff herein, not being born from the lions, of, her purported predecessor-in-interest, one Gehru, (c) and with the afore declaration also standing affirmed, in a verdict pronounced, hence by the learned Additional Sessions Judge, Kullu, upon Civil Appeal No. 58, of, 1990, and, upon cross-objections No. 2 of 1990, as stood carried, therefore, against the verdict, rendered in the afore civil suit hence by the learned Senior Sub- Judge, Lahaul and Spiti, (d) besides, and with the afore verdict, becoming affirmed, upto the Hon'ble Apex Court, thereupon she espouses, qua there being a complete lack, of, entitlement, in, the plaintiff/respondent, to, obtain the espoused concurrent verdicts, and, decrees, and, thereupon she contends, that, the instant appeal enjoins, it, being allowed.

8. However, for the reasons, to be assigned hereinafter, the afore made submission, is, unamenable for acceptance, by this Court, (a) as, during the pendency, of, the instant Regular Second Appeal, before this Court, an

application, bearing CMP No. 8319 of 2018, and, cast under the provisions of Order 41 Rule 27 CPC, stood instituted, hence herebefore, by the respondent/plaintiff, wherethrough, the counsel concerned, strived to obtain, the, leave of this Court, (b) to place on record, the verdict pronounced, on 18.10.1985, upon, civil suit No. 31 of 1981, by the learned Single Judge, of, this Court, and, wherein, the apt findings, as, occur in paragraph-13, of, the verdict (supra), are extracted hereinafter:

"13. Gehru, plaintiff, died during the pendency of this suit. Kimtu is admittedly his daughter and stands impleaded as one of his legal representatives. It has been urged by Mr. Indar Singh, learned counsel for defendant 1-A to 1-F (successors-in-interest of Charan Dass Dogra), that Kimtu is bound by sale made by her on June 6, 1975 under the provisions of Section 43 of the Transfer of Property Act."

(i) and wherein also a discussion exists, vis-à-vis, the respondent/plaintiff, standing, on demise, of, her purported predecessor-in-interest, one Gehru, hence ordered to be impleaded, as one, of, the afore(s) legal representative, (ii) and with evidently, the afore order of impleadment, of, plaintiff/respondent, in place of one Gehru, also visibly remaining, un-demonstrated, to be challenged or suffering, from, any infirmity, and, when the verdict(s), pronounced by this Court, upon, civil suit No. 31 of 1981, rather stood affirmed, upto, the Hon'ble Apex Court, (iii) thereupon hence concomitantly, with the, afore order of impleadment, of, the plaintiff respondent, one Kimtu, in substitution of Gehru, dehors, the factum, vis-à-vis, hers being not fathered, by Gehru, does acquire conclusive, and, binding effects, rather for all requisite purposes, inclusive of hers being entitled, to, make transaction(s), vis-à-vis, the suit property unless more empowered, and, capacitated, persons to hence stake claim(s) thereon(s).

9. Necessarily, hence when the afore strived, to be introduced, as, a piece, of, additional evidence, is both just and essential, for un-settling the vigor, of the espousal, addressed before this Court, by the learned counsel for the aggrieved defendant, (a) and, also for enabling this Court, to, determine qua the afore verdict, holding preponderance, vis-à-vis, the verdict(s), as relied, upon, by the learned counsel appearing, for, the aggrieved defendant, (b) and, wherethrough(s), claims adversarial vis-à-vis, the concurrent verdict(s), pronounced, against it, by both the learned Courts below, are visibly rested (a) thereupon the espoused leave is granted, and, the afore verdicts, are, permitted to be taken on record, (c) moreso, when judicial notice can be taken thereof and, also when the requisite underlining, embodied therein, does prevail upon the verdicts relied by the learned counsel, for, the aggrieved defendant.

10. Be that as it may, the afore conclusion made by this Court, upon, an appraisal, of, the afore verdicts, does, reiteratedly to a large extent, undermine, the findings, recorded initially, by, the learned Civil Judge concerned, qua Kimtu, being not fathered by Gehru and, findings whereof, hence, attained approbation, upto, the Hon'ble Apex Court, (a) emphatically dehors, the fact, qua the afore

factum rather coming to be approbated, upto, the Hon'ble Apex Court, (b) nonetheless, the conclusive order, of, substitution, of, Kimtu, in place of Gairu, as made in Civil Suit No. 31 of 1981, survives vis-à-vis, her, and, alongwith other consequential legal effects, (b) conspicuously with one Pritam Chand, and, one Kali Dass, both remaining un-impealed, in the instant suit, and, who may be the apt befitting person(s), to, challenge the espousal, made in the instant suit, by Kimtu, and, also when the afore(s), through, an apposite motion, being cast, by the defendant, before the learned Courts below, could be strived, to be impealed, in the instant suit, (c) yet with the apposite afore endeavours rather remaining un-recoursed, thereupon the aggrieved defendant, cannot make, any capitalization, upon, the afore conclusive, and, binding finding, recorded, upon, civil suit No. 35, of, 1987, (d) given the judicially declared legal representative, of, deceased Gehru, inasmuch as one Kimtu, hence through conclusive and binding verdict(s) hence recorded by this Court, upon Civil suit No. 31 of 1981, rather therethrough(s) naturally acquiring all empowerments, to hence continue (e) for all the requisite purposes, and hence, validly represent his estate, inclusive, of, hers' making transaction(s), qua therewith, (f) unless persons holding a valid better title, other than her, making the apt projections, before the Court concerned, and, when may be, the, afore Pritam Chand, and, Kali Dass, were, holding the requisite adversarial capacity, vis-à-vis, one Kimtu, whereas theirs' rather remaining un-impealed, in, the instant suit, (g) thereupon the legal capacity, bestowed upon Kimtu, to represent the estate of deceased Gehru, cannot be legally interfered, with, even vis-à-vis, transactions, as, made by her, vis-à-vis, the suit property, (h) thereupon the espousal made by the learned counsel, for, the aggrieved defendant, and, rested upon, the afore verdict, is, discountenanced.

11. Lastly, the learned counsel, appearing for the aggrieved defendant, has contended, with much vigor, before this Court, that, though the endeavour, of, the latter, to, through OMP No. 212 of 2010, instituted, in, Civil Suit No. 43 of 2009, (a) in suit whereof the defendant is arrayed as plaintiff, and, the defendants therein, are other than, the, afore Pritam Chand, and, Kali Dass, rather seek permission to cast, an, interpleader suit against the afore defendant, hence stood declined, by the learned Single Judge of this Court, (b) yet when appeal bearing No. OSA No. 8 of 2010, has been instituted, thereagainst before the Division Bench, of, this Court, and, with the latter, on 23.12.2010, directing the parties, to maintain status quo, with, respect to the suit property, (c) thereupon both the learned Courts below, were, enjoined to stay, the, proceedings, upon, Civil suit No. 35 of 1987, (d) given the analogous therewith controversy, being subjudice, before this Court. However, the afore submission, is, un-hinged, by the factum, qua the proceedings, drawn in the instant civil suit, commencing earlier in time vis-à-vis, the commencement, of, proceedings, in civil suit No. 212 of 2010. inasmuch, as the proceedings, in the instant suit, commencing, upon presentation, of, the plaint, vis-à-vis, civil suit No. 35 of 1987, whereas, the presentation, of, the plaint, in, civil suit bearing No. 212 of

2010, occurring subsequently, on, 28.9.2010, b) and when pre-eminently, and, most emphatically, within the civil suit No. 35 of 1987, the defendants, therein being, one Pritam Chand, and one Kali Dass, and, when vis-a-vis whom hence conclusive findings, were, recorded therein qua, Kimtu being not, the daughter of deceased Gehru, (c) and with all effects thereof standing considered supra by this Court, and, would also rather required to be impleaded in civil suit No. 212 of 2010, (d) given theirs may be holding the apposite locus, and, capacity to challenge the capacity, of, plaintiff/respondent, though conclusively recorded, as the legal representatives, of, deceased Gehru, to, rather make any transaction(s), with the suit property, given theirs being holding a better, and, superior title, vis-à-vis, her. Apparently, with theirs remaining unimpleaded in, the afore civil suit, thereupon the order made in OSA No. 8 of 2010, hence, directing the parties, to, maintain status quo, does not, hold any effect, of, diluting, the vigor, of, the verdicts, made, upon, civil suit No. 31 of 1981.

12. Moreover, during the pendency of the instant appeal, before this Court, Mr. Sanjeev Kuthiala, the learned Senior counsel, has instituted, an application, bearing CMP No. 10630 of 2018, cast under the provisions, of Order 1 Rule 10 CPC, (a) wherethrough he seeks leave of the Court, to add, in the array, of, the apt parties, in the apposite litigation, hence the persons named therein, (b) given theirs' being impleaded, being just, and, appropriate, to, completely rest the extant lis, and, the afore striving, is grooved, in, the casting of a challenge, through, institution, of, a civil suit titled as, "Dev Raj and others versus Kimtu Devi, before the learned Civil Judge concerned, wherethrough, they strive, to, beget reversal, of, findings, pronounced, upon, civil suit No. 31 of 1981, (c) on anvil of it, being obtained by fraud, or misrepresentation. Since, the afore civil suit, is, instituted, subsequent, to the institution of the extant suit, whereon, hence the concurrent verdicts, stands pronounced, rather against the aggrieved defendant, and, also when the afore concurrently pronounced verdicts are affirmed, by this Court, (d) thereupon the fate of the afore subsequently, instituted suit also cannot determine, the fate of the instant suit, nor obviously merely upon institution, of, the afore subsequent suit, can hence beget hereat, the, attraction, of, the principle, of, resjudicata, and, also concomitantly, when the lis in the afore suit, is yet, to, be clinched by the learned civil judge concerned, (e) thereupon, their striving to seek their impleadment, in the array of litigants, in the instant suit, is, declined, conspicuously when hence they untenably strive, to, ensure, the, fate, of, the afore suit, being also determined hereat, and, also through their afore mis-endeavour, they untenably strive, to, usurp, the, jurisdiction of the learned Civil Judge concerned. The Substantial questions of law are answered accordingly.

13. There is no merit in the instant appeal and the same is dismissed. The impugned judgments and decrees, are hence, affirmed and maintained. All, the pending application(s), if any, are also disposed of.