

**(2000) 01 SHI CK 0003**

**In the High Court Of Himachal Pradesh**

**Case No : Regular Second Appeal No. 304 of 1992**

State of H.P.

APPELLANT

Vs

Girja Kumar and Others

RESPONDENT

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**Date of Decision : 04-01-2000**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 80  
Himachal Pradesh Land Revenue (Amendment) Act, 1971 — Section 163, 163(1), 23, 23(1)  
Himachal Pradesh Land Revenue (Amendment) Act, 1989 — Section 163, 163(1), 163(2), 163(3), 163(4)  
Himachal Pradesh Land Revenue Act, 1954 — Section 163, 163, 163(1), 163(2), 163(3)  
Limitation Act, 1963 — Article 100, 112

**Citation : (2000) 2 ShimLC 253**

**Hon'ble Judges : R.L. Khurana, J**

**Bench : Single Bench**

**Advocate : Ashok Sharma, Assistant Advocate General, for the Appellant; K.D. Sood and B.K. Sood, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

R.L. Khurana, J.—This second appeal at the instance of the Defendants against the concurrent findings of the two Courts below has been admitted for hearing on the two following substantial questions of law:

1. Whether the suit was barred in view of the provisions of Section 163(3) of the H.P. Land Revenue Act, 1953?

2. Whether the suit of the Plaintiff, in the facts of the case that on 2nd April, 1970, an order of ejectment was passed ordering the ejectment of the Plaintiff u/s 163 of the H.P. Land Revenue Act, 1954, can be said to be within the period of limitation?

2. Briefly, the facts of the case leading to the present appeal may be thus stated.

Land measuring 2-4-10 bighas comprising of khata No. 72 min, khatuni No. 95 and Khasra No. 73 of village Bhiouli, Tehsil Sadar, District Mandi (hereinafter referred to as the land in dispute) is recorded in the revenue records under the ownership of the Defendants and under the illegal and unauthorised possession of the Plaintiffs. During the course of settlement, proceedings u/s 163, H.P. Land Revenue Act, 1953 for the ejectment of the Plaintiffs were initiated and consequently an order of ejectment of the Plaintiffs from the land in dispute came to be passed by the Settlement Officer exercising the powers of the Assistant Collector 1st Grade on 2.4.1970.

3. The Plaintiffs on 27.2.1989 filed a suit, being suit No. 41 of 1989 before the Senior Sub-Judge, Mandi, for declaration to the effect that they are coming in adverse possession of the land in dispute for the last more than 40 years and have acquired title thereto with the efflux of time and that the order dated 2.4.1970 passed by the Settlement Officer is wrong, null and void and without jurisdiction. A prayer for permanent injunction as a consequential relief was further made for restraining the Defendants from ejecting, or causing any interference with the possession of the Plaintiffs on the basis of the said wrong order dated 2.4.1970. It was averred that the Defendants through their agents and servants since 24.10.1988 have started interfering with their possession in order to forcibly evict them from the land in dispute.

4. The Defendants while resisting the suit pleaded that in the year 1970 on finding the encroachment over of the land in dispute by Bishamber Dass son of Kanhaiya Lal, the father of the Plaintiffs, proceedings u/s 163, H.P. Land Revenue Act, 1953, (hereinafter referred to as the Act) were initiated against him and an order for his ejectment was validly and legally passed on 2.4.1970. It was further pleaded that pursuant to the said order dated 2.4.1970 the Plaintiffs were ejected from the land in dispute on 12.7.1983. The Plaintiffs have again encroached upon the land in dispute sometime in the year 1989 and fresh proceedings u/s 163 of the Act have since been initiated against them. Legal objections as to maintainability of the suit, jurisdiction of the Court, valuation of the suit, absence of enforceable cause of action and suit being bad for absence of valid notice u/s 80, Code of Civil Procedure, were further raised.

5. On the pleadings of the parties, following issues were framed by the learned trial Court:

1. Whether Plaintiffs are in possession of the suit land for the last 40 years and have now become owners thereof by adverse possession as alleged? OPP.
2. Whether order dated 2.4.1970 by the Settlement Officer ordering ejectment of the Plaintiffs from the suit land and subsequent rapat No. 447/12.7.83 about ejectment of Bishamber Dutt are illegal, null and void as alleged? OPP.
3. Whether suit of the Plaintiffs is not maintainable? OPD.
4. Whether suit is bad for non-service of notice u/s 80 CPC? OPD.

5. Whether this Court has no jurisdiction to try the suit? OPD.
6. Whether suit is properly valued for the purposes of Court fees and jurisdiction? OPP.
7. Whether Plaintiffs have no enforceable cause of action as alleged? OPD.
8. Relief.

6. Issues No. 1,2 and 6 were decided by the learned trial Court in favour of the Plaintiffs while issues No. 3 to 5 and 7 were found against the Defendants. Consequently the suit of the Plaintiffs for declaration and injunction was decreed as prayed vide judgment and decree dated 14.6.1990. The appeal by defendant ts before the learned Additional District Judge, Mandi was dismissed on 28.2.1992. The learned Additional District Judge agreed with the findings of the learned trial Court on all the issues.

7. The present appeal was earlier allowed by a learned Single Judge (P.K. Palli, J.) of this Court on 3.7.1998. After setting aside the judgments and decrees of the two Courts below, the case was remanded to the learned trial Court for disposal afresh. It was observed in para-6 of the judgment by the learned Judge as follows:

After having gone through the impugned judgment and the record, I find that the case suffers from paucity of evidence. The Plaintiffs should have placed on record the order dated April 2, 1970, when a challenge has been made to it. The order would have further shown as to in what manner the possession of the Plaintiffs was treated as unauthorised and illegal. I am purposely avoiding to go through the evidence in detail since, in my view, the case needs to be re-examined by the trial Court in order to resolve the controversy in question. Both the judgments and decree are, thus, ordered to be set-aside and the case is remanded back to the trial Court for decision afresh in accordance with law. The parties shall not be denied an opportunity to lead further evidence as may be desired to be placed by them. However, it is made clear that not more than two opportunities be granted to either of the parties to conclude its additional evidence and in case evidence is not concluded on two opportunities, the evidence of that party shall be deemed to be closed by an order of the Court. The appeal is, consequently, allowed and the parties through their learned Counsel are directed to appear before the trial Court on July 31, 1998. Nothing said hereinabove, in this judgment, shall be taken to be an expression of opinion on the merits of the case. Records be sent back forthwith. Costs to follow the event.

8. The Plaintiffs feeling aggrieved with the judgment dated 3.7.1998 whereby the case was remanded, preferred an appeal being Civil Appeal No. 1348 of 1999 before the Supreme Court. Such appeal was allowed by the Supreme Court on 8.3.1999. The judgment dated 3.7.1998 of the learned Single Judge of this Court was set-aside and the appeal was remanded to this Court for disposal afresh. It

was observed as under:

We are of the opinion that the High Court was in error. Whoever has not led the appropriate evidence before the Trial Court must suffer for it. It is not for the High Court to send the matter back to cure any lacuna in the evidence. The order under challenge must, therefore, be set aside and the Second Appeal (Second Appeal No. 304/92) restored to the file of the High Court to be heard the disposed of afresh on the available evidence. Order on the appeal accordingly.

9. I have heard the learned Counsel for the parties and have also gone through the record of the case. My findings on the above two substantial questions of law is as under:

Question No. 2:

10. Admitteldy, an order of ejectment of the Plaintiffs from the land in dispute u/s 163, H.P. Land Revenue Act, 1953, was passed on 2.4.1970 by the Settlement Officer exercising the powers of the Assistant Collector 1st Grade.

11. Section 163, as it existed in the year 1970, was to the following effect:

163 (1) Where Government land or land which has been reserved for the common purposes of the co-sharers therein, has been encroached on by any person or any co-sharer, as the case may be, A Revenue Officer may, of its own motion or on the application of any other co-sharer eject the encroaching person from the land and, by order proclaimed in manner mentioned in Section 23, forbid repetition of the encroachment.

(2) The proceedings of the Revenue Officer under Sub-section (1) shall be subject to any decree or order which may be subsequently passed by any Court of competent jurisdiction.

12. The above section came to be amended in the year 1971 vide H.P. Land Revenue (Amendment) Act, No. 19 of 1971 (for short Amendment Act of 1971). The amended section reads:

(1) Where Government land or land which has been reserved for the site of a village or for the common purposes of the co-sharers therein has been encroached upon by any co-sharer or other person for any purpose including construction of a building or other structure thereon, then-

(a) The Revenue Officer may of his own motion or on the application of any other co-sharer eject the encroaching person (hereinafter in this section referred to as the encroacher) from such land and by order, proclaimed in the manner mentioned in Section 23, prohibit repetition of the encroachment therein:

Provided that no encroacher shall be ejected under this clause unless he has been given a reasonable opportunity of showing cause against the ejectment;

(b) the Revenue Officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of such

encroachment and may, by order, require the encroacher to pay the damages within such period and in such instalments as may be specified in the order;

(c) if the encroacher has erected any building or other structure or has grown crops or planted trees on the encroached land, it shall be competent for the Revenue Officer, while ordering his ejectment, to dismantle such building or other structure and confiscate any produce or other material on such land and put the same in public auction and deposit the sale proceeds thereof into the Government Treasury; and

(d) the Revenue Officer may impose upon the encroacher a fine up to five hundred rupees per Bigha or part thereof in the case of first encroachment and, where the encroachment is repeated, a fine upto one thousand rupee per Bigha or part thereof for each such subsequent encroachment.

(2) Any amount payable as damages under Clause (b) of Sub-section (1) or as fine under Clause (d) of that Sub-section may be recovered in the same manner as arrears of land-revenue.

(3) No suit or other legal proceeding shall lie against the Revenue Officer or any person acting under this Section in respect of anything in good faith done or purported to have been done under the provisions thereof or the rules made thereunder.

Explanation.-For the purposes of this section, any person who holds land under a lease granted by the Government for a fixed term and continues to be in possession of the land beyond the expiry of the period of lease shall be deemed to be an encroacher unless such person gets the lease-extended or renewed.

13. Section 163 of the Act came to be further amended by H.P. Land Revenue (Amendment) Act No. 15 of 1989, (for short: Amendment Act of 1989) with affect from 27.6.1989 as under:

163. Prevention of encroachment on lands.-(1) Where Government land or land which has been reserved for the site of a village or for the common purposes of the co-sharers therein has been encroached upon by any co-sharer or other person for any purpose including construction of a building or other structure thereon, then-

(a) the Revenue Officer may be his own motion or on the application of any other co-sharer eject the encroaching person (hereinafter in this section referred to as the encroacher) from such land and by order, proclaimed in the manner mentioned in Section 23, prohibit repetition of the encroachment therein:

Provided that no encroacher shall be ejected under this clause unless he has been given a reasonable opportunity of showing cause against the ejectment.

(b) the Revenue Officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of such encroachment and may, by order, require the encroacher to pay the damages

within such period and in such instalments as may be specified in the order;

(c) if the encroacher has erected any building or other structure or has grown crops or planted trees on the encroached land it shall be competent for the Revenue Officer, while ordering his ejectment, to dismantle such building or other structure and confiscate any produce or other material on such land and put the same in public auction and deposit the sale proceeds thereof into the Government Treasury; and

(d) the Revenue Officer may impose upon the encroacher a fine upto one thousand rupees per bigha or part thereof in the case of first encroachment and, where the encroachment is repeated, a fine upto two thousand rupees per bigha or part thereof for each such subsequent encroachment.

(2) Any amount payable as damages under Clause (b) of Sub-section (1) or as fine under Clause (d) of that Sub-section may be recovered in the same manner as arrears of land revenue.

(3) When there is a question as to title or to the adverse possession, wherein the possession is claimed by an encroacher for a period beyond thirty years in relation to the land from which ejectment is made or is to be made under this section, the Revenue Officer, not below the rank of an Assistant Collector of the First Grade, shall proceed to determine the question, as if he, were a civil Court and shall exercise all such powers as are exercisable by a civil Court.

(4) For the determination of the question under Sub-section (3), the Revenue Officer shall follow the same procedure as is applicable to the trial of an original suit by a civil Court, and he shall record a judgment and decree containing the particulars required by the Code of Civil Procedure, 1908 to be specified therein.

(5) An appeal from the decree of the Revenue Officer made under Sub-section (4) shall lie to the District Judge as if that decree were a decree of a Subordinate Judge in an original suit.

(6) A further appeal from the appellate decree of a District Judge upon an appeal under Sub-section (5), shall lie to the High Court only if the High Court is satisfied that a substantial question of law is involved, and

(7) No suit or other legal proceeding shall lie against the Revenue Officer or any person acting under this section in respect of anything good faith done or purported to have been done under the provisions thereof or the rules made thereunder.

Explanation.-For the purposes of this section, any person who holds land under a lease granted by the Government for a fixed term and continues to be in possession of the land beyond the expiry of the period of lease shall be deemed to be an encroacher unless such person gets the lease extended or renewed.

14. The learned Counsel for the Defendants has contended that since a challenge has been laid to the order dated 2.4.1970 of the Settlement Officer passed u/s

163 of the Act the suit should have been filed within one year from the date of the said order under Article 100 of the Limitation Act, 1963. The suit having been filed about 19 years after such order, on the face of it, is barred by time.

15. The learned Counsel for the Plaintiffs, on the other hand, has contended that as per the law prevalent in the year 1970, when the order was passed, an order passed u/s 163(1) of the Act was subject to any decree or order which might be subsequently passed by any Court of competent jurisdiction. Therefore, in view of the provisions contained in Sub-section (2) of Section 163, as in force in the year 1970, such order was not required to be assailed and a mere suit for declaration is maintainable. It was further contended that Article 100 of the Limitation Act, 1963 would have no application.

16. I do not find force in the contention of the learned Counsel for the Plaintiffs. The law as in force on the date of filing of the suit would govern and not the law as was in force at the time of cause of action. Though the Plaintiffs derived a cause of action to file a suit for declaration on 2.4.1970, the suit in fact came to be filed only on 27.2.1989.

17. In Hazari Tewari Vs. Mt. Maktula Chaubain and Another the Plaintiffs therein had filed a suit for possession of the land against his landlord on the allegations that although a lease was granted to him in 1923, he was never put in possession and has been deprived of the profits. It was alleged that that cause of action accrued on the date of execution of the lease and also at the end of each year on the dates of realisation of the lease money. Various defences were raised including a plea that the civil Court had no jurisdiction to entertain the suit. The trial Court dismissed the suit on the sole ground that it was not cognizable by the civil Court. Admittedly, in the said case a suit like the one filed by the Plaintiff therein was cognizable by a civil Court in the year 1923 under the Tenancy Act as was then in force. However, the jurisdiction of the civil Court was taken away on the coming into force of the new Tenancy Act which was applicable on the date of filing of the suit. A contention was raised by the Plaintiff therein before the High Court that the new Tenancy Act was not applicable since the cause of action in favour of the Plaintiff had arisen while the old Tenancy Act was still in force. Negating the plea of the Plaintiff, a Division Bench of the Allahabad High Court held:

It seems to us that a right of action is something different from the choice of the forum. There may be a vested right of action when the cause of action has accrued before the old Act has been altered; but there can be no vested right in the choice of a particular forum. If the legislature has thought fit to deprive the civil Court of its jurisdiction to entertain suits of a particular nature, a Plaintiff cannot compel the civil Court to hear his suit merely because his cause of action had accrued before the new Act depriving the civil Court of its jurisdiction was passed. The choice of forum is a matter of procedure and not a substantive right, and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned. The analogy of a new Act not affecting a pending

action does not apply.

18. The Supreme Court in *Anant Gopal Sheorey Vs. The State of Bombay*, has held that no person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode.

19. In *Public Prosecutor Vs. J.P. Sanghi and Another*, the offences were committed prior to 1.4.1951 when the provisions of Hyderabad Code of Criminal Procedure was applicable. The proceedings against the accused for their prosecution were initiated after 1.4.1951 when Code of Criminal Procedure, 1898, was applicable. A question arose whether the provisions of Hyderabad Code of Criminal Procedure or that of Code of Criminal Procedure, 1898, would be applicable. Following the ratio laid down by the Supreme Court in *Anant Gopal Sheorey v. State of Bombay* (supra), a Division Bench of the Andhra Pradesh High Court held that the repealed law cannot any longer be availed of in relation to proceedings which were instituted after 1.4.1951, and that the law as in force on the date of institution of proceedings would be applicable.

20. A Division Bench of the Madras High Court in *K. Nagarathnammal v. S. Ibrahim Saheb and Anr.* (AIR 1955 Mad 305), also has held:

The legal position appears to be plain. Where a statute takes over and occupies a field previously not regulated by legislation, the rights and powers conferred and the obligations imposed by the statute must be worked out within the statutory frame-work. If a statute confers a particular A right and prescribes a particular mode for its enforcement, the enforcement of the right must be sought in that mode....

21. In view of the above proposition of law, the present suit would be governed by the provisions of the Act as were in force on that date. As on the date of suit, an order passed u/s 163 of the Act was not subject to any decree or order which may be subsequently passed by any Court of competent jurisdiction. Therefore, such an order could be assailed only by a suit as provided for under Article 100 of the Limitation Act, 1963. The suit having been filed about 19 years of passing of the order, on the face of it, is barred by time.

22. For the sake of arguments even if it be assumed that the order dated 2.4.1970 of the Settlement Officer u/s 163 of the Act, as per the law in force at the time of filing of the suit was still subject to the decree or order that may be passed by a Court of competent jurisdiction, a suit should have been filed within a period of three years under Article 112 of the Limitation Act, 1963. The suit by the Plaintiff on this ground also was barred by time. The question is accordingly answered in the negative and against the Plaintiffs.

Question No. 1:

23. Section 163(3) of the Act as in force at present was introduced and incorporated in the Act by virtue of Amendment Act of 1989 on and with effect from 27.6.1989. The present suit was filed on 27.2.1989, that is, before the coming into force of the Amendment Act of 1989. Therefore, the bar u/s 163(3) read with clause (xxv) of Section 171(2) of the Act would not be attracted to the present case. The present suit as such would not be barred. The question is answered in the negative and in favour of the Plaintiffs.

Final order:

24. As a result of question No. 2 having been answered in the negative and against the Plaintiffs, the present appeal is allowed. The judgments and decrees of the two Courts below are set-aside and the suit of the Plaintiffs is dismissed as being time barred. Parties are left to bear their own costs.