
(1960) 11 SHI CK 0001
In the High Court Of Himachal Pradesh
Case No : Second Appeal No. 14 of 1958

Sundar and Another

APPELLANT

Vs

Subedar Ram Dass and Another

RESPONDENT

Date of Decision : 24-11-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 36, 11
Limitation Act, 1908 — Article 142 , 144

Citation : AIR 1961 HP 18

Hon'ble Judges : C.B. Capoor, J.C.

Bench : Single Bench

Advocate : Indar Singh, for the Appellant; Hira Lal, for the Respondent

Final Decision : Dismissed

Judgement

C.B. Capoor, J.C.

1. This is a defendants' appeal and is directed against a judgment and decree of the learned District Judge, Mandi and Chamba districts, whereby an appeal against the dismissal of the suit filed by respondent No. 1 against the appellants and respondent No. 2 was accepted in part and a decree was passed for recovery of possession of the disputed land. The learned District Judge did not decree the claim for the past mesne profits and made the parties to bear their costs throughout and a cross-objection has been filed by respondent No. 1 against that part of the decree.

2. The suit filed by the plaintiff was based on the following allegations:- 10 biswas and 12 biswansis of land comprised in hasara No. 669 situate in village Datwad belonged to the Mandi Darbar and the defendants and some other persons were in occupation of the aforesaid land as tenants-at-will. The Mandi Darbar granted the aforesaid land to the plaintiff who instituted ejectment proceedings against the defendants in the revenue Court and in pursuance of an order of ejectment passed in those proceedings obtained possession over the

aforesaid land and some other land on 10-5-1949. After about a month the defendants dispossessed the plaintiff from the disputed land.

3. On the above allegations the plaintiff claimed recovery of possession of the disputed land and Rs. 150/- as past mesne profits.

4. Prior to the institution of the present suit, the plaintiff had filed a suit for recovery of possession of the disputed land. It was held in the case that the suit was cognizable by a revenue Court and the plaint was returned for presentation to the proper Court. The plaintiff, however, did not file the plaint in the revenue Court and instead he filed the present suit on slightly different allegations. The main difference between the two plaints was that while in the one filed earlier it was alleged that in spite of the passing of an order of ejectment the defendants did not give up possession over the disputed land, the case put forward in the present case, as has already been noticed, was that the defendants were ejected from the disputed land and had thereafter taken unlawful possession of the same.

5. The defence was that the plaintiff was not the owner of the disputed land, that the defendants had been in possession of the same for about 40 years and the suit was barred by the law of limitation. It was also pleaded that the suit was not entertainable by a civil Court and that the decision in the previous case that the suit was triable by a revenue Court operates as *res judicata*.

6. The findings recorded by the trial Court were that the plaintiff was the owner of the disputed land, that the suit was not barred by the principle of *res judicata* and that it was triable by a civil Court. It, however, held that the plaintiff had failed to establish his possession over the disputed land within 12 years next prior to the institution of the suit and on that finding dismissed the suit.

7. On appeal the learned District Judge upset the finding recorded by the trial Court on the question of limitation. He reached the conclusion that possession over the disputed land was delivered to the plaintiff on 10-5-1949 and that thereafter he was dispossessed from the same. Upholding the findings recorded by the trial Court on the other issues, he decreed the suit for recovery of possession. The evidence led on behalf of the plaintiff on the question of mesne profits did not appear to him to be satisfactory and he dismissed that part of the plaintiff's claim.

8. In view of the contentions raised by the appellant and respondent No. 1, the following points arise for decision:-

(1) Whether the suit was barred by the principle of *res judicata* and was not triable by a civil court.

(2) Whether the appellant was not ejected from the land in suit in pursuance of the order of ejectment and respondent No. 1 was not entitled to recover possession of the same.

(3) Whether respondent No. 1 was entitled to recover mesne profits? If so, to

what amount?

(4) Is the plaintiff-respondent entitled to get costs?

FINDINGS

9. Point No. (1): It will have been noticed that the allegations made in the former suit filed by plaintiff-respondent No. 1 were different from the allegations made in the present suit and as such a decision given in the former suit cannot operate as *res judicata*. On behalf of the appellants reliance was placed upon a ruling of the Punjab High Court, reported in *Murari Lal Vs. Madan Lal and Others*, but a perusal of that ruling indicates that if the allegations made in the subsequent suit are not identical with the allegations made in the earlier suit the principle of *res judicata* does not apply.

10. Thus the decision in the earlier suit filed, by the plaintiff that the suit was triable by a revenue Court cannot operate as *res judicata* in the: present case.

11. It is a well-established proposition of law that the jurisdiction of the Court is primarily to be determined by the allegations made in the plaint. In the instant case the defendants have been described to be trespassers and a suit for possession against the trespasser lies in the civil Court. The point is answered against the appellant.

12. Point No. (2) : Extract from Jamabandi for the year 1951-52 Ex. P. 9 bears out that the name of the plaintiff was entered *inter alia* against ploi No. 669. The extract from Jamabandi Ex. D2 bears out that Khasra No. 669 pertained to Khewat Khatauni No. 161/297. Respondent No. 1 had filed a notice for ejectment of the appellants and respondent No. 2 from 1 bigha 5 biswas and 6 biswansis of land of Khewat No. 161/297. An order of ejectment was passed in pursuance of that notice and on 10-5-1949 possession was delivered to respondent No. 1 in enforcement of the order of ejectment, vide Ex. P. 16, It has been contended on behalf of the appellants that the order for eject- merit did not relate to the disputed land. While it is true that Khasra No. 669 has not been mentioned in the order for ejectment or in the *Dakhnama* it has been abundantly proved that Khasra No. 669 pertained to Khewat Khatauni No. 161/297 and that the appellants and respondent No. 1 were ejected from 1 bigha 5 biswas and 6 biswansis of land situate in the aforesaid Khewat Khatauni.

13. The statements made by Banka Ram Girdawar (P. W. 5) and Nauta Ram Patwari Halqa indicate that actual possession was delivered to respondent No. 1 over the disputed land.

14. On behalf of the appellants my attention was invited to certain discrepancies which have crept in the statements made by the aforesaid witnesses and Tek Chand (P. W. 1) on the questions whether there was a beat of drum or not and whether the appellants were present at the time of delivery of possession and it was argued that in view of the aforesaid discrepancies actual possession should not be held to have been delivered to respondent No. 1. The aforesaid

discrepancies were of a minor nature and much weight could not be attached to them.

15. I am further of the opinion that even if it be held that actual possession was not delivered to plaintiff-respondent No. 1 there was no escape from the conclusion that symbolical possession was delivered to him. It has been held in *Ramanand Pathak and Others Vs. Bindhachal Tewari and Others*, that where in execution of a decree symbolical possession is delivered of immovable property to the person entitled to possession thereof, and such a person brings a suit for recovery of actual possession, the symbolical possession is to be deemed equivalent to actual possession as against the judgment-debtor or his representatives and the suit will be deemed to have been brought in time if it has been brought within twelve years from the date of the symbolical possession. The delivery of symbolical possession is the line of demarcation between possession precedent and possession subsequent. In a similar tune is the ruling reported in *Jawala Parshad v. Jiwan Ram*, AIR 1950 Pepsu 22.

16. In the extract of Jamabandi Ex. P. 5 for the period subsequent to the delivery of possession proceeding the appellants have been entered as Gharis Mauroosi tenants without payment of rent on account of dispute as to title and reliance on their behalf was placed upon, the aforesaid extract. It, however cannot avail them for it is the practice of the revenue authorities to record a person who is in possession without title in the column of cultivation describing him as a tenant-at-will and no presumption of tenancy arises in such cases : vide *Girdhari Ram v. Qasim*, AIR 1936 Lah 461.

17. Thus in any view of the case the possession of the appellants over the disputed land after 10-5-1949 could only have been in the capacity of trespassers and as the present suit was filed within 12 years from that date, the respondent No. 1 was entitled to recover possession of the disputed land and the suit could not be said to be statute barred.

18. Point No. (3) : Even the defendant Sundar stated that the yield per bigha Kham of the disputed land was 20 seers wheat and 30 seers paddy. He also stated that the selling rate of wheat and paddy respectively was Rs. 5/- and Rs. 5/- or Rs. 6/-per kuchcha maund and in the face of that statement the learned District Judge was not justified in throwing out the claim for mesne profit altogether. The evidence led on behalf of the respondent indicated that the land in suit yielded 6 kham maunds of paddy and 4 or 5. kham maunds of wheat and that the selling rate of paddy was Rs. 7/- or Rs. 8/-per kuchacha maund and that of wheat Rs. 8/- per kham maund. Both the per bigha yield and the per maund selling rate stated by Sundar defendant was an under-estimate and making some allowance for some exaggeration made by witnesses for respondent No. 1 the amount of past mesne profits may reasonably be determined at Rs. 100/-.

19. Point No. (4) : The normal rule is that costs should be awarded to a party according to success and I see no reason to depart from that rule in the instant

case. The parties should receive and pay costs in proportion to success and failure.

ORDER

20. The appeal fails and is hereby rejected. The cross-objection succeeds in part and in modification of the judgment and decree of the Court below the suit is also decreed for recovery of Rs. 100/- as past mesne profits and it is further ordered that costs in this Court and in the Courts below shall be receivable and payable by the contestants in proportion to success and failure.