

Tulsi Vs. Besar

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Court : Himachal Pradesh

Decided On : Oct-11-2001

Reported in : AIR2002HP12

Judge : Arun Kumar Goel, J.

Acts : [Specific Relief Act, 1963](#) - Section 38; ;Himachal Pradesh Land Revenue Act, 1954 - Section 38; ;[Evidence Act, 1872](#) - Section 81

Appeal No. : RSA No. 239 of 1994

Appellant : Tulsi

Respondent : Besar

Advocate for Def. : Shrawan Dogra, Adv.

Advocate for Pet/Arg. : K.D. Sood and; Anish Garg, Adv.

Disposition : Appeal dismissed

Judgement :

ORDER

Arun Kumar Goel, J.

1. This is defendant's second appeal against the judgment and decree dated 31-3-1994, passed by the then learned District Judge, Mandi, Kullu and Lahaul Spiti

Districts at Mandi in. Civil Appeal No. 123 of 1990. While dismissing the appeal of the defendant, the judgment and decree passed by Sub-Judge 1st Class, Sarkaghat in Civil Suit No. 110-1/88 dated 30-4-1990, has been upheld. By means of said decree, trial Court had decreed the suit of the plaintiff, permanently restraining the defendant from interfering in the possession of plaintiff on the suit land. While passing the decree, trial Court had further ordered that the possession of the plaintiff be deemed on behalf of other co-sharers as well as the decree shall enure for their benefit too.

2. Suit was filed by the plaintiff for permanent prohibitory injunction claiming that he jointly owns the land comprised in Khewat No. 53 min/115 min. Khasra No. 88, measuring 0-8-43 hectare, situate in Village Kalkhar, Illaqa Bara, Tehsil Sarkaghat, District Mandi along with other co-sharers. But he is in exclusive possession thereof, without having any right, title or interest, defendant has started interfering with his possession and destroying the crop as well threatening to remove the trees. Plaintiff further alleged that defendant is threatening to unsettle his settled possession, therefore, necessity of filing the suit.

3. This suit was contested and resisted by the defendant who inter alia pleaded that he has purchased the suit land for Rupees 500/- on 6-8-1968 from Dhanna co-sharer and since then he continues to be in its exclusive possession. Defendant also alleged that he has planted fruit bearing trees on the suit land, as such, there was no occasion for his interfering with the plaintiffs possession when he himself (defendant) is in actual possession of the same. Regarding revenue entries defendant alleged that he has approached the Assisant Collector, 2nd Grade, Baldwara for the correction thereof. And factum of his possession has been verified by the subordinate revenue staff on verification. Plaintiff has filed the suit only thereafter because taking undue advantage of such wrong revenue entries, he Intended to take benefit by throwing out the defendant. Plea of adverse possession was also set up as his title has matured into ownership for over a statutory period of 12 years. Suit being not maintainable; also being bad for non-joinder of necessary parties and plaintiff having no cause of action were the other pleas while repudiating the claim of the plaintiff as set up in the plaint, in replication pleas of the defendant which were contrary to the averments made in the plaint

were denied and facts urged in the plaint were reiterated.

4. On the aforesaid pleadings parties went to trial on the following issues :

1. Whether the plaintiff is owner in possession of the suit land, as alleged? OPP
2. Whether the defendant interferes in the possession of the plaintiff without any right, title or interest? OPD
3. Whether the suit land was purchased by the defendant and his brother from one Dhanna for consideration of Rs. 500/- as alleged? OPD
4. Whether the defendant has become owner of the suit land by way of adverse possession, as alleged? OPD
5. Whether the revenue entries showing ownership and possession of the plaintiff on the suit land are wrong, void and illegal, as alleged? OPD
6. Whether the suit is not maintainable in the present form, as alleged? OPD
7. Whether the plaintiff has no cause of action to file the present suit as alleged? OPD
8. Whether the suit is bad for non-joinder of necessary parties? OPD
9. Relief.

5. Under Issue No. 1 it was held that plaintiff is owner in possession, Issue No. 2 was decided in the affirmative. Issues Nos. 3 and 4 were decided in the negative. Though Issue No. 5 was decided in the negative, at the same time it was held that he is in possession as co-owner. Issues Nos. 6 to 8 were held in the negative and under Issue No. 9 suit of the plaintiff was decreed as per operative part of the judgment. Against this decree of the trial Court, defendant filed appeal before the learned appellate Court below, which has been dismissed. Hence the present appeal.

6. This appeal was admitted on 8-11-1995 on the following substantial questions of law :

1. Whether the findings of the Court below are vitiated and based on mis-construction of the basic document of title Exh. DW8/A which has not been set aside or modified that the property was sold by Dhanna to the defendant?

2. Whether the findings of the Court below, it was not established that the defendant was in possession of the property as owner by adverse possession and the suit for injunction was maintainable is established in law?

7. It has been urged on behalf of the defendant that both the Courts below have fallen into error by ignoring the mutation of sale entered in his favour, copy whereof has been placed on record as Ex. DW8/A. It was not disputed at the time of hearing on behalf of the parties that oral sale was permitted in the area where the land in dispute was situate and provisions of the Transfer of Property Act dealing with the sale came into operation with effect from 7-12-1970. While advancing argument on the basis of Exh. DW-8/A, it was also pointed out on behalf of the defendant that plaintiff was not in possession of the suit land, as such suit for injunction was not maintainable because defendant had proved by cogent, reliable and trustworthy evidence that he is in possession of the land from the date of sale till the filing of the suit. As such answer to both the aforesaid substantial question of law need to be recorded in favour of the plaintiff and consequently dismissing the suit. Evidence of DWs was also referred to in that behalf by the learned counsel.

8. All these please have been controverted by Mr. Sharwan Dogra, learned counsel appearing for the plaintiff. He submitted that there is no question of law much less substantial question of law involved in this appeal calling for adjudication under Section 100, CPC. Per him the findings regarding Ext. DW-8/A as well as on the factum of possession being pure findings of fact based on proper appreciation of evidence call for no interference in this second appeal.

9. Regarding plea of adverse possession it was urged on behalf of the plaintiff that this is a plea in the alternative. If this Court comes to the conclusion that the sale was void, since the defendant is in possession on the basis of such sale, therefore on this ground also the defendant must fail. This plea has also been contested on behalf of the plaintiff by Mr. Dogra, who pointed out that both the Courts have

concurrently held that defendant is not in possession over the suit land, so there is no question of his being in adverse possession at all. Without conceding the plea of alleged possession of the plaintiff he further submitted that the defendant when claimed adverse possession it had to be against another person and not against himself. Therefore, according to him when he claims to have allegedly purchased the suit land there was no question of his being in adverse possession against himself. On this ground also appeal must fail.

10. It has been urged on behalf of the defendant that Ex. DW8/A clearly establishes the sale in his favour by Dhanna of the suit land for Rs. 500/-. This position is belied from the document itself as produced by the defendant. A perusal of the mutation Ex. DW8/A shows that Mutation No. 1 of Mauja Kalkhar. Hadbast No. 417. Tehsil Sarkaghat, District Mandi was attested on 6-8-1968. When the order on the mutation is translated into English, it reads as under:

'Place Kalkhar. Dated 6-8-1968. Entry regarding oral sale about Khewat No. 28/93, Khasra No. 88, area measuring 00-8-43 hectare, on payment of Rs. 500/- being the sale consideration by Dhanna co-sharer seller in favour of Tulsi Ram, Dila Ram and Mohan Lal in equal share is attested as per entry.

Sd/-

A.C. 2nd Grade.'

It neither shows whether seller or purchaser was present at the time when it was attested. Who identified the seller and/or buyer there is nothing on record to suggest nor there is any evidence to that effect examined by the defendant.

11. Here reference to Chapter 8 of H.P. Land Records Manual Revised Edition 1992, needs to be made. In part A in Paragraph 4 thereof how the mutation is to be attested, is mentioned as under :

'(4) The Revenue Officer shall attest the mutation based on oral transaction in the presence of the parties in accordance with the provisions of Section 38 of the H.P. Land Revenue Act, 1954 in case acquisitions are otherwise legal.'

12. Purpose of this instruction seems to be that the parties i.e. seller and buyer were aware as to what is happening. There is nothing to suggest as to how the entry came into existence on basis whereof mutation was attested. This is being observed in the light of Ex. P3. This is the statement made by the defendant during the course of proceedings for correction of revenue entries which admittedly he had filed before the Assistant Collector Second Grade.

13. A reading of the said statement clearly suggests that defendant had claimed possession over the suit land in his capacity as tenant on payment of Rs. 5/- which he claimed to be earlier paid to Dhanna and thereafter to his son Dhameshwar DW-5. This statement has been taken note of by the learned District Judge and in my opinion rightly. In the face of this specific position there does not arise the question of his being in possession of the suit land as owner as claimed by him having purchased it for Rs. 500/-. What follows from this is that not only the statement of defendant as DW-1, but also of his witness DW-5 is also belied.

14. Another reason to discard this mutation is that its perusal suggests that Dhanna had only eight shares. In case if at all he could sell it was only his share and not beyond that. It is not the case of the defendant that Dhanna had the authority to have sold the entire suit land on behalf of the other co-sharers. The defendant admits in his cross-examination that the co-sharers are numbering 30/40 and the land is joint, Dhameshwar son of Dhanna stated that the land in suit was sold by his father to the defendant for Rs. 500/-. However, he admitted in his cross-examination that he stated before Tehsildar that Tulsi was giving him Rs. 5/- as gala batai i.e. rent. Then he volunteered to state that it was land revenue. His statement was recorded in Court on 18-9-1989. In case the property had been sold by his father as claimed by DW-5 in his examination-in-chief as also by the defendant while appearing as DW-1 and his other witnesses, there was hardly any occasion for him (defendant) having paid Rs. 5/- either as rent or land revenue to Dhameshwar.

15. Claim of the defendant regarding his being in possession is further belied by DW-6 who stated in his cross-examination that Girdwari was being conducted on the spot keeping in view the factum of possession. If that was so it is not

understood as to how Girdwari in favour of Defendant did not exist till he applied for correction of revenue entry. DW-7 Bikram Ram gives a totally different version. He states that the land which was purchased by Besar, is in Besar's possession. However, in the next breath he volunteered that it is not the land in dispute. He has further gone on record to state that Girdwari is recorded into keeping in view the possession. Whosoever cultivates the land Girdwari is recorded in his name. DW-8 is Hem Singh Patwari who has stated that he had recorded mutation true copy whereof is Ex. DW8/A under the orders of Tehsildar and it is in his hand. He however, in his cross-examination stated that he has not brought the order of Tehsildar with him and admitted that this mutation was subsequently rejected and another mutation was entered.

16. On the other hand plaintiffs evidence consists of his own statement where he has categorically pledged his oath and has also produced copy of Jamabandi for the year 1984-85 Exh. P-1. and Khasra Girdwari for Kharif, 1988 and Rabi, 1988. In both these documents possession of plaintiff is recorded as co-sharer. When his cross-examination is seen nothing has been extracted so as to dislodge him. On an overall examination of whole case. I am satisfied that Ex. DW8/A remained merely a paper entry and was never acted upon. This is in addition to the fact that there is no evidence of sale having been effected in favour of the defendant by Dhanna as alleged. Further the alleged sale was not in favour of defendant alone, but it is in favour of three persons as observed hereinabove. Defendant is silent in that behalf. He claims that the sale is in his favour. He has also not put up the case which will enure further benefit of other persons as entered in Mutation Ex. DW-8/A. He claims to be the sole beneficiary of the sale in question. This knocks the bottom of his defence set up in the written statement.

17. Another argument raised on behalf of the defendant was regarding additional evidence examined during the pendency of the appeal before the first appellate Court. Defendant examined AW-1 Mehar Singh, AW-2 Parkash Chand, AW-3 Tulsi Ram and AW-4 Dinesh Sharma. Exh. AW-1 /A is a certificate issued by Patwari Mehar Singh, Mohal Kalkhar, Exh. AW2/A is copy of the application. Ext. PW1/B is again a certificate issued by Mehar Singh on 31-3-1992 regarding mutation No1, type, oral sale, dated 8-6-1968 having been attested on that day

and Exh. AW4/A is a certificate issued by Dinesh Sharma. Patwari, Patwar Circle Patrighat. As already observed, mutation in question remained merely a paper entry and this aspect of the case has been discussed in detail hereinabove so these documents do not advance the case of the defendant in any manner.

18. In the face of the aforesaid discussion, I am further satisfied that presumption of correctness attached to the entry in Jamabandi Ex. P1 is not rebutted by the oral evidence examined on behalf of the defendant either by the DWs examined during the course of trial or by those produced by way of additional evidence, including the documents referred to hereinabove. That being so it is held that there is no misconstruction placed by the Courts below on Ex. DW8/A the so-called mutation of oral sale and thus first question is decided against the defendant.

19. On consideration of the evidence of the parties, both oral as well as documentary as discussed hereinabove. I am satisfied that the defendant has miserably failed to prove that he is in possession of the suit land as claimed by him either as owner on the basis of the title or by way of adverse possession as claimed. It may be observed regarding the plea of adverse possession as set up in the second question. When a reference is made to the statement of plaintiff, as well as of DWs 1 to 8 before the trial Court, and AWs 1 to 4 before the first appellate Court, there is nothing to suggest either directly or indirectly much less by necessary implication or remotely that the defendant ever demonstrated hostile animus to assert his possession to the knowledge of either the plaintiff or any other co-sharers over the suit land. This plea which has remained in air without any basis on record, as such it has been rightly rejected by both the Courts below.

20. In the face of this position, second question is also answered against the defendant.

21. I am further satisfied that both the Courts below have properly examined the evidence in accordance with law and have thus concurrently come to the conclusion that mutation entry Ex. DW8/A was merely a paper entry showing the possession of the defendant over the suit land, in addition to the fact that it was not in consonance with the requirement of law referred to hereinabove.

22. In this case on examination of evidence it cannot be said that any evidence which was either inadmissible or should not have been taken note of, has been relied upon by both the Courts below so as to arrive at concurrent findings of fact noted hereinabove. Similarly it also cannot be said that on evidence the findings recorded by both the Courts below were not possible. I will not hesitate to observe here that even in certain cases where there are either erroneous findings of fact or this Court would take a contrary view, will by itself not be a ground to interfere with such findings as noted hereinabove, in a second appeal of the present nature. In addition to this it also cannot be said to be a case of either no evidence or findings recorded by the Courts below to be perverse which has been held to be a good ground for interference.

23. See *Satya Gupta (Smt.) alias Madhu Gupta v. Brijesh Kumar*, (1998) 6 SCC 423, *Chandra Bhan v. Pamma Bai*, (2000) 4 JT (SC) 399 : (2001 AIR SCW 2295). *Mst. Kharbuja Kuer v. Jangbahadur Rai*, AIR 1963 SC 1203.

24. Findings recorded by the Courts below in this case do not fall within the exception as pointed out in *Hafazat Hussain s/o Mubarak Hussain v. Abdul Mazeed s/o Sri Wali Mohd alias Sheikh Ballan*, (2001) JT 6 (SC) 591 : (AIR 2001 SC 3201).

25. No other point is urged in support of the aforesaid two substantial questions of law on which the appeal was admitted.

26. In view of the aforesaid discussion, it is clear that there is no merit in this appeal, which is accordingly dismissed. Defendant will pay the costs to the plaintiff in all the three Courts. CMP No. 128 of 2001

27. No orders in view of the orders passed in the main appeal. It stands finally disposed of. And all interim orders, if any, passed in the main appeal shall stand vacated forthwith.