

Sarla Devi Vs. Leela Devi

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Court : Himachal Pradesh

Decided On : Aug-27-2009

Reported in : 2009(2)ShimLC404

Judge : Kuldip Singh, J.

Appellant : Sarla Devi

Respondent : Leela Devi

Advocate for Pet/Ap. : Mr. K.D. Sood

Disposition : Appeal allowed

Judgement :

Kuldip Singh, J.

1. This appeal has been directed against the judgment, decree dated 3.12.1999 passed by learned Additional District Judge (I), Kangra at Dharamshala in Civil Appeal No. 37-D/97 affirming the judgment, decree dated 20.5.1997 passed by learned Sub-Judge 1st Class Dharamshala in Civil Suit No. 198 of 1990.

2. The facts in brief are that respondent had filed a suit for possession of land comprised in khasra No. 88/2/2/1/1, measuring 0-00-15 hectares, situated in Mohal Mant Khas, Tehsil Dharamshala, claiming herself to be the owner and alleging that appellant had occupied the suit land to the extent of 15 square meters

according to the report of Kanungo dated 18.7.1990, which was confirmed on 26.7.1990 by Naib Tehsildar (Settlement), Dharamshala.

3. The suit was contested by the appellant by taking preliminary objections of locus-standi, maintainability, cause of action and valuation. On merits, the case of the respondent was denied. The suit land was not properly demarcated and the report of the Kanungo is not binding on the appellant. The respondent filed replication. The suit was decreed by the learned Sub-Judge on 20.5.1997, which was assailed in appeal by the appellant and learned Additional District Judge dismissed the appeal on 3.12.1999, hence defendant has come in second appeal, which has been admitted on the following substantial questions of law:

1. Whether the judgment of the District Judge disposing of the appeal and thereafter the application for amendment without considering that the same was necessary for determining the controversy between parties is sustainable?

2. Whether the disposal of the application, additional evidence without considering the principles for amendment of pleadings is sustainable?

3. Whether the report of the Local Commissioner PW-3/A could be relied upon when the same had been made in the absence of the appellant and without notice to him and whether he was not a party and more so when the procedure for demarcation has not been followed?

4. Heard and perused the record. Mr. K.D. Sood, learned Counsel for the appellant has submitted that the appellant had filed an application on 21.9.1998 for amendment of the written statement in the lower appellate Court. The learned Additional District Judge dismissed the appeal vide impugned judgment and thereafter decided the application under Order 6 Rule 17 CPC of the appellant and dismissed the same primarily on the ground that since the main appeal has been dismissed, therefore, the application for amendment of the written statement has become infructuous. The other reasons given for dismissal of the application are also not correct. It has been submitted that the learned Additional District Judge should have decided the application for amendment of the written statement earlier to the decision of the appeal or atleast with the main appeal. The Additional

District Judge had left no jurisdiction to decide the amendment application once he decided the main appeal. The learned Counsel for the respondent has supported the impugned judgment and order dated 3.12.1999 of learned Additional District Judge dismissing the amendment application.

5. The substantial questions of law No. 1 and 2 are taken up together as they are interconnected.

6. The learned Additional District Judge has decided the appeal on 3.12.1999 and dismissed the same. Thereafter, the learned Additional District Judge vide order dated 3.12.1999 has also dismissed the amendment application of the appellant, which was filed on 21.9.1998, by observing that in view of disposal of the main appeal, the application under Order 6 Rule 17 CPC has become infructuous. It has also been observed that proposed amendment relates to evidence and to fill up the lacuna and gaps. The amendment is not necessary for determining the real controversy between the parties. There is no denial of the fact that the main appeal was dismissed by the learned Additional District Judge on 3.12.1999 before deciding amendment application. On the dismissal of the main appeal, no jurisdiction was left with the learned Additional District Judge to decide the amendment application separately. The amendment application should have been decided either prior to the appeal or atleast at the time of decision of the appeal.

7. In Harbans Lal and Anr. v. Kundan, Latest HLJ 2008 (HP) 1362 an application for additional evidence was filed on 3.1.2008 but was dismissed on 7.1.2008 on the ground that since the main appeal stood disposed of on 7.1.2008, therefore, no order was required to be passed on the same and the application was not maintainable. On those facts, it has been held that Court has committed serious error by passing erroneous order and therefore, the judgment, decree dated 7.1.2008 were set-aside and the case was remanded to lower appellate Court. In the present case also, the main appeal was dismissed and thereafter the amendment application was decided after the decision of the main appeal even though the amendment application was filed much earlier on 21.9.1998 when the appeal was pending before the lower appellate Court. On this ground alone, the impugned judgment and decree are not sustainable. The substantial questions of

law Nos. 1 and 2 are decided in favour of the appellant.

8. The appeal has been decided on the basis of substantial questions of law Nos. 1 and 2, therefore, it is not necessary for this Court to decide substantial question of law No. 3, which is left open.

9. As a result of above discussion, the appeal is allowed. The judgment and decree dated 3.12.1999 passed by the Additional District Judge (I), Kangra at Dharamshala are set-aside and the case is remanded back to learned Additional District Judge (I), Kangra at Dharamshala with a direction to decide the amendment application and appeal of the appellant-defendant in accordance with law preferably in six months from the date of first appearance of the parties in lower appellate Court after remand. The parties through their Counsel are directed to appear before learned Additional District Judge (I), Kangra at Dharamshala on 18.9.2009. The record of the Courts below be sent back so as to reach well before the date fixed. No costs.

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