

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA Nos. 365 and 366 of 2006

Reserved on: 10.3.2026

Date of Decision: 16.4.2026

RSA No. 365 of 2006

Avtar Chand (minor) through Piara Lal ...Appellant

Versus

Satwinder Singh (deceased) through LR's and ors.
...Respondents

RSA No. 366 of 2006

Desh Raj and another ...Appellant

Versus

Satwinder Singh (deceased) through LR's and ors.
...Respondents

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?¹ No.

For the Appellants : Mr. N.K. Thakur, Senior Advocate,
with Mr Divya Raj Singh,
Advocate for the appellants in
RSA No.365 of 2006 and for
appellant No.1 in RSA No.366 of
2006.

For Respondents No.1(a) to 1(c) and 2(a) to 2(e) in both the appeals : Mr Bhupender Gupta, Senior
Advocate, with Mr Janesh Gupta,
Advocate.

Respondent No.3 proceeded against ex-parte and the name of

¹ Whether reporters of Local Papers may be allowed to see the judgment? Yes.

respondent No.4 stands deleted in RSA No.365 of 2006.

Name of appellant No.2 stands deleted in RSA No. 366 of 2006

Rakesh Kainthla, Judge

The present appeal is directed against the judgment and decree dated 31.05.2006, passed by learned Additional District Judge, Una, HP (learned Appellate Court) vide which the judgment and decree dated 30.05.2003, passed by learned Sub Judge First Class, Court No.1, Una, H.P. (learned Trial Court) were partly upheld. (*Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience.*)

2. Briefly stated, the facts giving rise to the present appeal are that the plaintiffs filed a civil suit before the learned Trial Court for seeking possession of one room measuring 18' x 12', situated in Khasra No. 1515 (old) and 4208 and 4209 (new) as recorded in the copy of Jamabandi for the year 1996-1997, situated at Village Basdehra, Brahmna, Tehsil and District Una, H.P., (hereinafter referred to as suit land) and consequential relief of permanent prohibitory injunction for restraining the defendants from interfering with the suit land, changing its

nature by raising any further construction and in the alternative for vacant possession by demolishing the structure.

3. It was asserted that the plaintiffs are the owners in possession of the suit land. They constructed a pucca room on the suit land. The defendants, taking advantage of the plaintiffs' absence, occupied the room. The plaintiffs requested the defendants to deliver possession of the room to them, but they refused. They threatened to raise construction on the suit land. Hence, the suit was filed to seek the relief mentioned above.

4. The suit was opposed by filing a written statement taking preliminary objections regarding the suit being barred by *res judicata*, the plaintiffs being estopped to file the present suit by their act and conduct, lack of *locus standi*, and the suit being bad for non-joinder of necessary parties. The contents of the plaint were denied on the merits. It was asserted that the plaintiffs never remained in possession of the suit land. The revenue entries in their name are wrong, incorrect, illegal and against the facts. The defendants have been in possession of the suit land since the time of their ancestors. The room shown in orange in the site plan prepared by the Draughtsman marked

DEFGHIJC forming part of the suit land is occupied by defendants No.1 and 2 as owners. The room and courtyard shown green, marked with the letters PQRS and QUR, are in possession of defendant No.3 as owner. An abadi consisting of two kucha kotha of predecessor-in-interest of defendants No.1 and 2 existed on the suit land, which fell during the heavy rain in the year 1988. The defendants No.1 and 2 constructed the room in place of the kuchha kotha shown by green and letters PQRS in the site plan. A kuchha khadposh ancestral abadi also existed on the suit land, which fell in the year 1988, and defendant No.3 constructed a tin posh room. The defendants wanted to replace the tin with a slab, and the plaintiffs filed a false suit to harass them. Roda and Khema, the predecessor in interest of the plaintiffs, filed a Civil Suit No. 247 for possession of the suit land and abadis. The predecessor-in-interest of the defendants made a statement before Learned Sub Judge First Class, Una, District at Hoshiarpur, on 10.04.1911, and offered to pay ₹110/- to the predecessor-in-interest of the plaintiffs. This proposal was accepted by the predecessors-in-interest of the plaintiffs, and ₹110/- was paid to them on 11.04.1911. The suit was decided as withdrawn/dismissed. The old Khasra No. 1162 (min) was given

new Khasra Mo.1463 and 1464. The entries were changed in the year 1945-46 without the order of any Court or without any notice to the defendants. New Khsra No. 1515 was given to old Khasra No. 1463 and 1464 during the consolidation operation. Khasra No. 4188/1, 4208, 4209, 4210 and 4227 were given to old Khasra No.1515 during the recent settlement. The suit is barred by the principle of *res judicata*. The plaintiffs never constructed any room, and the defendants never occupied the room constructed by the plaintiffs. Hence, it was prayed that the suit be dismissed.

5. A replication denying the contents of the written statement and affirming those of the plaint was filed.

6. Learned Trial Court framed the following issues on 9.5.2001: -

1. Whether the plaintiffs are owners of the suit property? OPP.
2. If Issue No.1 is proved, whether the plaintiffs are entitled to recover possession of the suit property? OPP.
3. Whether the suit is barred by the principle of *res judicata*? OPD.
4. Whether the plaintiffs are estopped by their act and conduct to file the present suit? OPD.
5. Whether the plaintiffs have no locus standi and cause of action to file the present suit? OPD.

6. Whether the suit is bad for non-joinder of necessary parties? OPD.

7. Relief.

7. The parties were called upon to produce the evidence, and the plaintiff, Satwinder Singh, examined himself (PW1) and Bhagat Ram (PW2). The defendants examined Hari Dass (DW1), defendant No. 1 Des Raj (DW2), Malkiyat Singh (DW3), Pyare Lal (DW4), Baldev Chand (DW5) and Ram Pyara (DW6).

8. Learned Trial Court held that the revenue entries were in favour of the plaintiffs. The plea taken by the defendants that ₹110/- was paid by their predecessor to the predecessor of the plaintiffs was not helpful to the defendants because the land in that suit was not connected to the present suit. The defendants had failed to prove any title in themselves to retain the possession. The status of the defendants was merely that of a trespasser; hence, the learned Trial Court answered Issue No.1 in the affirmative, Issue No.2 partly in the affirmative, Issue No. 3 to 6 in the negative and partly decreed the suit.

9. Being aggrieved by the judgment and decree passed by the learned Trial Court, the defendant No.3, Pyare Lal and defendants No.1 and 2, Desh Raj and Lashkri Devi, and the plaintiff filed separate appeals which were decided by the

learned Additional District Judge, Una (learned Appellate Court). The learned Appellate Court concurred with the findings recorded by the learned Trial Court that the land in the earlier suit was not connected to the suit land. The entries in favour of the plaintiffs were not rebutted by the defendants. The defendants had no title to retain possession. The plaintiffs were entitled to get the possession of the room measuring 18 x 12 feet, shown with the letters PQRS in the site plan, by demolition of the superstructure. Hence, the appeal filed by the plaintiff was allowed, whereas the appeals filed by the defendants were dismissed.

10. Being aggrieved by the judgments and decrees passed by learned Courts below, three separate appeals have been filed before this Court. The appeal bearing RSA No.368 of 2006 preferred by the defendant Avtar Chand against the judgment and decree passed by learned Appellate Court allowing the plaintiffs appeal was dismissed by this Court for non-prosecution on 22.12.2008 and the appeals filed by defendants Des Raj and Lashkri Devi against the judgment and decree dismissing their appeal and allowing the appeal filed by Avtar Chand are pending before this Court.

11. Both of these appeals were admitted on the following substantial questions of law vide order dated 12.12.2007: -

1. Whether the impugned judgments are vitiated on account of misreading and misconstruing the documents, i.e. the revenue records, Ext. D1, D2, D4 and D12, wherein the predecessors-in-interest of the appellants have been recorded in possession over the suit land?
2. What is the effect of the decision of earlier suit No.247 of 1991 between the predecessors-in-interest of the parties wherein the predecessors-in-interest of the respondents had admitted and accepted the possession of predecessors-in-interest the appellants and relinquished their right on receiving a sum of Rs.110/- and both the learned Courts below have erred in misconstruing the judicial record of the earlier suit, which is on the file as Ext.D8, D9 and D10?
3. Whether, in view of the earlier decision dated 11.4.1911 in between the predecessors-in-interest of the parties, the present suit was barred under the principle of *res judicata*?

12. An additional substantial question of law was framed by the Court on 15.10.2024: -

Whether dismissal of RSA No.368 of 2006, for non-prosecution, amounts to *res-judicata* and the present appeals are liable to be dismissed, in view of the judgment rendered by a Division Bench of this Court in **Ramesh Chand Vs. Om Raj, 2022(2) Shim L.C. 1145?**

13. I have heard Mr. N.K Thakur, learned Senior Advocate, assisted by Mr. Divya Raj Singh, learned counsel for the appellant/defendant and Mr. Bhupender Gupta learned

Senior Advocate, assisted by Mr. Janesh Gupta, learned counsel for the respondents 1(a) to 1(c) and 2(a) to 2(e) in both the appeals.

14. Mr Bhupender Gupta, learned Senior Counsel for the respondents No.1(a) to 1(c) and 2(a) to 2(e), submitted that the present appeals are not maintainable because the judgment passed by the learned Appellate Court decreeing the suit has attained finality after the dismissal of the appeal (RSA No.368 of 2006), filed by Avtar Chand. Such a finding will constitute a *res judicata* in the present appeal. The principle of *res judicata* not only applies to the matters adjudicated on merits, but also to the matters dismissed for non-prosecution. Therefore, he prayed that the present appeal be dismissed and the substantial question of law framed on 15.10.2024 be answered in favour of the respondents. He relied upon the judgment of this Court in *Asha Devi versus Dau Dayal (deceased) through his LRs, 2019 (Suppl.) Him L.R. 2683* and *Prem Raj Sharma versus Baldev Verma, 2002(2) Shim. L.C. 74* in support of his submission.

15. Mr N.K. Thakur, learned Senior counsel for the appellants/ defendants, submitted that the dismissal of the

appeal filed by Avtar Chand would not affect the present appeal because Order 41 Rule 4 of the CPC permits one of the plaintiffs/defendants to obtain reversal of the whole decree where it proceeds on the ground common to all even though the other defendants have not filed the appeal. Hence, he prayed that the substantial question of law be answered against the defendants and that the earlier substantial questions of law be adjudicated on the merits.

16. I have given considerable thought to the submissions made at the bar and have gone through the records carefully.

Substantial Question of Law framed on 15.10.2024

17. Almost a similar situation arose in *Rameshwar Prasad and others. vs Shyam Beharilal Jagannath and Ors. AIR 1963 SC 1901*, wherein a decree was sought for the ejectment of the land. One of the plaintiffs died, and the appeal abated for failure to bring on record his legal representatives. It was submitted that Order 41 Rule 4 of the CPC would permit the other plaintiffs to continue with the appeal. The Hon'ble Supreme Court held that Order 41 Rule 4 of CPC does not apply when the decree proceeds

on a ground common to all and the appeal is dismissed qua some of the defendants. It was observed: –

“12. The second contention really is that the surviving appellants could have instituted the appeal against the entire decree in view of the provisions of O. XLI, R. 4 of the Code that they were therefore, competent to continue the appeal even after the death of Kedar Nath and the abatement of the appeal so far as he was concerned that the Court could have reversed or varied the whole decree in favour of all the original plaintiffs and could have granted relief with respect to the rights and interests of Kedar Nath as well. We do not agree with this contention. Rule 4 of O.XLI reads:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

These provisions enable one of the plaintiffs or one of the defendants to file an appeal against the entire decree. The second appeal filed in the High Court was not filed by anyone or by even some of the plaintiffs as an appeal against the whole decree, but was filed by all the plaintiffs jointly, and, therefore, was not an appeal to which the provisions of R. 4 of O. XLI could apply.

13. The appeal could not have been taken to be an appeal filed by some of the plaintiffs against the whole decree in pursuance of the provisions of R. 4 of O. XLI from the date when the appeal abated so far as Kedar Nath was concerned. If the appeal could be treated to have been so filed, then it would have been filed beyond the period prescribed for the appeal. At that time, the decree stood against the surviving plaintiffs and the legal

representatives of Kedar Nath. The legal representatives could not have taken advantage of R. 4 of O. XLI. It follows that R. 4 of O. XLI would not be available to the surviving plaintiffs at that time.

14. Further, the principle behind the provisions of R. 4 seems to be that anyone of the plaintiffs or defendants, in filing such an appeal, represents all the other non-appealing plaintiffs or defendants as he wants the reversal or modification of the decree in favour of them as well, in view of the fact that the original decree proceeded on a ground common to all of them. Kedar Nath was alive when the appeal was filed and was actually one of the appellants. The surviving appellants cannot be said to have filed the appeal as representing Kedar Nath.

15. Kedar Nath's appeal has abated, and the decree in favour of the respondents has become final against his legal representatives. His legal representatives cannot eject the defendants from the premises in suit. It will be against the scheme of the Code to hold that R. 4 of O. XLI empowered the Court to pass a decree in favour of the legal representatives of the deceased Kedar Nath on hearing an appeal by the surviving appellants, even though the decree against him has become final. This Court said in *State of Punjab v. Nath Ram*, AIR 1962 SC 89 at p. 91:

"The abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also, as a necessary corollary, that the appellate Court cannot, in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondent, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the right of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be

taken."

No question of the provisions of R. 4 of O.XLI overriding the provisions of R. 9 of O.XXII arises. The two deal with different stages of the appeal and provide for different contingencies. Rule 4 of O. XLI applies to the stage when an appeal is filed and empowers one of the plaintiffs or defendants to file an appeal against the entire decree in certain circumstances. He can take advantage of this provision, but he may not. Once an appeal has been filed by all the plaintiffs, the provisions of Order XLI, Rule 4 became unavailable. Order XXII operates during the pendency of an appeal and not at its institution. If some party dies during the pendency of the appeal, his legal representatives have to be brought on the record within the period of limitation. If that is not done, the appeal by the deceased appellant abates and does not proceed any further. There is thus no inconsistency between the provisions of R. 9 of O.XXII and those of R. 4 of O.XLI, C.P.C. They operate at different stages and provide for different contingencies. There is nothing common in their provisions which make the provisions of one interfere in any way with those of the other.

18. Therefore, the plea that the appeal can continue by taking recourse to Order 41 Rule 4 of the CPC cannot be accepted.

19. The effect of dismissal of the appeal filed by Avtar Chand questioning the decree of the suit is that the decree of vacant possession in favour of the plaintiffs has attained finality. In case the present appeals are adjudicated, and the suit is dismissed, it would lead to conflicting decrees — one dismissing the suit passed in the present appeals, namely, RSA Nos. 366 and 365 of 2006, and the other decreeing the suit passed in the

previous appeal filed by Avtar Chand, registered as RSA No. 368 of 2006. Therefore, it is impermissible to set aside a final decree and order the dismissal of the suit, the precise relief that has been claimed in the present appeal. Hence, the necessary consequence of the dismissal of the earlier appeal would be that the present appeals are to be dismissed as barred by the principle of *res judicata*. In **Prem Raj** (supra), the suit was dismissed under Order 17 Rule 3 of the CPC, and it was held by this Court that the judgment of dismissal amounts to *res judicata*. It was observed:

43. Examining the present appeal in the light of the facts as enumerated hereinabove as well as on the basis of the decisions of different courts including Supreme Court of India, I am of the considered view that the relief having been not expressly allowed in the earlier suit filed by the defendant shall be deemed to have been declined to him and thus mere non decision of all of those issues as was urged on his behalf of the defendant does not stop the operation of Section 11 Explanation (V) of the Code of Civil Procedure. Once the judgment was passed under Order 17 Rule 3 CPC particularly when identity of title to property in both the suits was/is the same, parties were/are the same and Court was competent to have adjudicated; then on the basis of the legal position explained above it can be safely said that the claim of the defendant stood negatived in the earlier suit. Therefore, questions No. 1 and 6 are decided against the defendant.

20. A similar view was taken in *Asha Devi* (supra), wherein it was observed:

32. It is, thus, clear from the aforesaid exposition of law that a decision rendered under the provisions of Order XVII Rule 3 CPC will operate as res judicata and bar a second suit for the same relief, i.e. mandatory injunction. Therefore, the suit in the present appeal is clearly not maintainable and barred by res judicata.

21. Therefore, the effect of the dismissal of the RSA No. 368 of 2006 would be that the present appeals also cannot proceed further. Hence, the substantial question of law is answered accordingly.

Substantial Question of Law No. 1 to 3:

22. These substantial questions of law have become redundant because the appeal is liable to be dismissed because of the dismissal of the earlier RSA No. 368 of 2006; hence, the substantial questions of law are held to be redundant.

Final Order:

23. In view of the above, the present appeals fail and are dismissed

24. Pending application(s), if any, also stand(s) disposed of.

25. Records of the learned Courts below be sent down forthwith.

(Rakesh Kainthla)
Judge

16th April, 2026
(Chander)