



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

RSA No.287 of 2004

Reserved on 29.10.2014.

Decided on: 10.11.2014.

Ram Lok

.....Appellant.

Versus

Nand Ram & others

.....Respondents.

Coram

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?¹ Yes.

For the appellant:

Mr. Rajnish K. Lall, Advocate.

For the respondents:

Mr.N.K.Thakur, Sr. Advocate, with Mr. Rohit
Bharoll, Advocate, for respondents No. 1 to 3 & 6.

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Una, dated 5.5.2004 passed in Civil Appeal No. 68 of 2002.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs, for the convenience sake), filed a suit for declaration to the effect that the plaintiffs alongwith proforma defendants are owner-in-possession to the extent of 34749 shares and tenant in possession to the extent of 3395 shares under defendant No. 2 over the land measuring 0-80-15 hectares, comprised in Khewat No. 238, Khatauni No. 401, Khasra Nos. 644 and 645 as per *Misal Haquiat* Settlement for the year 1986-87 and the change of the revenue entries in the name of defendant No. 1 as non-occupancy tenant and subsequent order

¹ Whether reporters of the local papers may be allowed to see the judgment? Yes.

dated 10.6.1985 of Assistant Collector, IInd Grade, Amb sanctioning mutation No. 971 of proprietary rights in the name of defendant No. 1, were absolutely wrong, false, baseless, illegal and without jurisdiction and contrary to the provisions of H.P. Tenancy and Land Reforms Act and Rules with a consequential relief of permanent injunction restraining the defendant No. 1 from interfering in any manner or raising any sort of construction and cutting trees from the suit land.

3. The suit land was coming in possession of the plaintiff and proforma defendant Nos. 3 to 5 since the time of ancestors as non-occupancy tenants under Shri Bhagat Singh etc. owners on payment of rent and after coming into force of H.P. Tenancy and Land Reforms Act, the plaintiff had become owner to the extent of 34749 shares and tenant in respect of 3395 shares under the defendant No. 2 who is widow. Earlier the old Khasra No. of the suit land was 284 which was converted into new Khasra No. 293 during consolidation and thereafter the suit land was denoted by Khasra No. 644 and 645 during settlement operation. The defendant No. 1 with the connivance of the revenue staff got changed the entries of the suit land in his name as non-occupancy tenant and also got sanctioned mutation No. 971 of proprietary rights from Assistant Collector, IInd Grade, Amb. On 10.6.1985.

4. The suit was contested by defendant No. 1, namely Ram Lok. He filed the written statement. According to him, the suit land was coming in his possession as non-occupancy tenant on payment of rent to the owners since June, 1970 and now under

the provisions of H.P. Tenancy and Land Reforms Act, the defendant has become owner vide mutation No. 971 dated 10.6.1985. The defendant Nos. 2 to 5 despite service did not appear and they were proceeded ex-parte in the trial Court.

5. The plaintiffs filed replication to the written statement filed by the defendant. The issues were framed by the learned Sub Judge (Ist Class), Amb. The learned Sub Judge (Ist Class), Amb, decreed the suit on 27.6.2002. The defendant Ram Lok filed an appeal against the judgment and decree dated 27.6.2002 before the learned District Judge, Una. The learned District Judge, Una, dismissed the same on 5.5.2004. Hence, this regular second appeal.

6. The regular second appeal was admitted by this Court on 16.3.2005 on the following substantial questions of law:

“1. Whether the Civil Court had jurisdiction to try the suit as framed for correction of entries and setting aside the order confirming the ownership rights on the appellant under the provisions of H.P. Tenancy and Land Reforms Act?

2. Whether on a proper construction of H.P. Tenancy and Land Reforms Act, the onus to disprove the tenancy of the appellant which lay on the plaintiff was discharged and the court below mis-directed in directing the appellant to establish his tenancy?

3. Whether the judgment of the Court below is vitiated as the suit had abated because of the death of defendant No. 3 Prabhu and which question of abatement could only be decided by the trial Court where abatement had occurred?”

7. Mr. Rajnish K. Lall, Advocate, on the basis of substantial questions of law framed, has vehemently argued that the Civil Court had no jurisdiction to try the suit. He then contended that the plaintiffs have not become owners. The suit had abated because of the death of defendant No. 3 Sh. Prabhu and this question could only be tried by the trial Court where the abatement had occurred. On the other hand, Mr. Naresh Thakur, Sr. Advocate, has supported the judgments and decrees passed by both the Courts' below. In addition thereto, he has referred to the order passed by the learned District Judge on 13.6.2003 in CMA No. 52 of 2003.

8. I have heard the learned Advocates for the parties and gone through the records of the case carefully.

9. Since all the questions of law are inter-related, hence in order to avoid repetition of evidence, these were taken up together for discussion.

10. Now, as far as the question of abatement is concerned, defendant No. 3 Sh. Prabhu has died on 9.12.1999. At the time of death of Prabhu, the suit was pending before the trial Court. The application for bringing on record the legal representatives of Prabhu was filed under Order 22 Rule 4 CPC on 7.3.2003. The application was contested. Sh. Prabhu was admittedly arrayed as proforma defendant No. 3 by the plaintiffs in the suit. Defendant No. 3 refused to accept the summons. Defendants No. 3 to 5 were proceeded ex parte vide order dated 29.4.1993. No written

statement was filed by proforma defendants No. 3 to 5. According to the plaint, the plaintiffs have filed suit for declaration to the effect that the plaintiffs alongwith the proforma defendants No. 3 to 5 were owner-in-possession to the extent of 34749 shares in the suit land. The suit was filed for the benefit of proforma defendants No. 3 to 5. No relief was sought against the proforma defendant No. 3. Defendants No. 3 to 5 have not filed any written statement. In view of this, death of proforma defendant No. 3 would not result in abatement of the suit even if no application had been filed nor permission as required under Order 22 Rule 4 (4) CPC was obtained. Thus, the death of Prabhu i.e. proforma defendant No. 3 would not result in abatement of the suit or appeal, as argued by Mr. Rajnish K. Lall, Advocate.

11. In the case of **Sushil K. Chakravarty vrs. Tej Properties Private Ltd.**, reported in **(2013(9) SCC 642**, their lordships of the Hon'ble Supreme Court have held that when the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of 'S', it was done on the Court's satisfaction, that it was a fit case to exempt the plaintiff 'T' from the necessity of impleading the legal representatives of the sole defendant 'S'. Their lordships have held as under:

“31.3. A trial court can proceed with a suit under the aforementioned provision, without impleading the legal representatives of a defendant, who having filed a written statement has failed to appear and contest the suit, if the court considers it fit to do so. All the ingredients of Order XXII Rule 4(4) of the Code of Civil Procedure stood fully satisfied in the facts and circumstances of this case. In this behalf all that needs to be noticed is, that the defendant Sushil K.C. having entered appearance in

CS (OS) no. 2501 of 1997, had filed his written statement on 6.3.1998. Thereafter, the defendant Sushil K.C. stopped appearing in the said civil suit. Whereafter, he was not even represented through counsel. The order to proceed against Sushil K.C. ex- parte was passed on 1.8.2000. Even thereupon, no efforts were made by Sushil K.C. to participate in the proceedings of CS(OS) no.2501 of 1997, till his death on 3.6.2003.

31.4. It is apparent, that the trial court was mindful of the factual position noticed above, and consciously allowed the suit to proceed further. When the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of Sushil K.C. it was done on the court's satisfaction, that it was a fit case to exempt the plaintiff (Tej Properties) from the necessity of impleading the legal representatives of the sole defendant Sushil K.C. (the appellant herein). This could only have been done, on the satisfaction that the parameters postulated under Order XXII Rule 4(4) of the Code of Civil Procedure, stood complied. The fact that the aforesaid satisfaction was justified, has already been affirmatively concluded by us, hereinabove.

31.5. We are therefore of the considered view, that the learned Single Judge committed no error whatsoever in proceeding with the matter in CS (OS) no.2501 of 1997 ex-parte, as against the sole defendant Sushil K.C., without impleading his legal representatives in his place. We therefore, hereby, uphold the determination of the learned Single Judge, with reference to Order XXII Rule 4(4) of the Code of Civil Procedure.”

12. Similarly in the case of ***Mata Prasad Mathur versus Jwala Prasad Mathur and others***, reported in ***(2013) 14 SCC 722***, their lordships of the Hon’ble Supreme Court have held that in order to expedite process of law, courts may exempt plaintiff from substituting LRs of a defendant who failed to appear or contest the suit. Their lordships have held as under:

“3. Having heard learned counsel for the parties, we are inclined to agree with the order of the First Appellate Court that the suit had not abated no matter for a reason different from the one that prevailed with that Court. It is common ground that Virendra Kumar-defendant was proceeded ex parte as he had not appeared to contest the suit or file a written statement.

Substitution of the legal representatives of such a defendant could be legitimately dispensed with by the trial Court in view of the provisions of Order XXII Rule 4 Sub-Rule 4, which is as under:

“4. Procedure in case of death of one of several defendants or of sole defendant.-

- (1) xxxxx
- (2) xxxxx
- (3) xxxxx

(4). The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.”

4. The High Court has, in our view, rightly noticed this aspect in its order albeit the manner in which the High Court dealt with the same is not all that satisfactory. Be that as it may, so long as the power of exemption was available to the trial Court, the same could and ought to have been exercised by the First Appellate Court while hearing an appeal assailing the dismissal of the suit as abated.

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9. It would appear from the above that the Legislature incorporated the provision of Order XXII Rule 4(4) with a specific view to expedite the process of substitution of the LRs of non-contesting defendants. In the absence of any compelling reason to the contrary the Courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant-Virendra Kumar. We have no manner of doubt that the view taken by the First Appellate Court and the High Court that, failure to bring the legal representatives of deceased Virendra Kumar did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly available to the Courts below under Order XXII Rule 4 (4) of the CPC.”

13. The learned Single Judge in the case of **Bhagirath Mal vrs. Bhagwan Dutt**, reported in **AIR 1996 Rajasthan 27**, held that the decree against a dead person is not nullity when deceased-defendant had not filed written statement and had not made legal appearance during pendency of trial and in fact the trial has proceeded against him ex parte. It has been held as follows:

“3. I have heard the learned counsel for the parties. During the course of arguments it has not been disputed by the learned counsel for the non-applicant that no legal appearance had been made by the deceased during the pendency of the trial and that the learned counsel for the applicant-defendant had put in appearance on behalf of the deceased also without filing any Vakalatnama and that during the pendency of the suit statement was made by the learned counsel representing the applicant in the learned trial Court that the written statement filed by the applicant-defendant should be treated as the written statement of the deceased-defendant as well, but the learned trial Court had refused to treat the same as the written statement of the deceased-defendant. The suit in question had been filed by the non-applicant for specific performance of the agreement to sell said to have been executed by the deceased in his favour in respect of the property in dispute which is said to have been sold by the deceased to the applicant in violation of the terms of the agreement and the defendant-applicant had been put in possession of the property. It is also the common case of the parties that the property in dispute is situated in District Jhunjhunu within the State of Rajasthan and the deceased was

resident of the State of Bihar and that the sale deed in favour of the applicant had been executed by a person who had been given a Power of Attorney by the deceased. The deceased-defendant not having made appearance and the appearance having been made on his behalf without any authority from him on the basis of a memorandum of appearance and the counsel on the basis of the said memorandum having not been accepted as a duly appointed Advocate and because of that fact the written statement filed by the applicant was not taken as the written statement of the deceased shows that, although, no specific order in this regard was passed, proceedings against him were ex parte, and in these circumstances, it cannot be said that it was within the knowledge of either the plaintiff non-applicant or the defendant-applicant that deceased had died during the pendency of the suit and in these circumstances this fact was not brought to the notice of the learned trial Court who passed the impugned decree. Even otherwise, in view of sub-rule (4) of Rule 4 of Order 22 of the Code of Civil Procedure it was not obligatory, in the circumstances, for the plaintiff to have brought on record the legal representatives of the deceased during the pendency of the suit and as such the appeal having been filed by the applicant impleading the deceased as respondent No. 1 and the report having been received that he had died, there was no question of impleading his LRs as he had died before the suit was decided and not during the pendency of the appeal. In view of these facts, I am of the view that it cannot be said that the appeal can be said to have abated or that the decree passed by the learned trial Court was nullity as no legal representative had been brought on record.

Consequently, I am of the view that the order dated 5-11-1993 dismissing the appeal as having abated should be recalled and appeal should be heard on merits.

4. Consequently, while holding that neither the appeal had abated nor the decree was nullity, the application dated 25-4-1994 filed for recalling the order is allowed. The order dated 5-11-1993 passed by me is recalled and the appeal is restored with a direction that it should be registered at its original number and be placed before the regular Bench hearing first appeals.”

14. In ***Ram Sarup vs. Chandra Bhan and ors.*** reported in **1992 PLJ 179**, the learned Single Judge has held that when no relief was sought against the defendant who died, suit would not abate and it is not necessary that all those who succeed to estate must be made a party. It has been held as under:

“3. Mr. Sharma, learned counsel for the appellant forcefully contended that the learned Courts below have not at all applied their mind to the facts of the case and inasmuch as Chandni was not a necessary party to the litigation nor any relief was claimed against her, her death could not entail dismissal of the suit as having abated.

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5. After hearing the learned counsel for the parties, I find sufficient force in the contention of Mr. Sharma, learned counsel for the appellant. Plaintiff had challenged the Will said to have been executed by Nand Lal in favour of respondents No. 1 to 6. If the suit was to be decreed, the benefit of the said judgment would have been available to all those who are entitled to succeed in the estate of Nand Lal. Even

one of the successors without impleading others could successfully maintain the suit. Although, it is true that on declaration that the Will was a forged document or that Nand Lal had not executed the Will, the plaintiff alone would not succeed to the entire estate but it cannot, as a necessary corollary, be held that all those, who were to succeed to the estate must have been made a party. As has been mentioned above, no relief was claimed against Smt. Chandni and for that reason as well, her death could not result into abatement of the suit."

15. Now, the Court would advert to the substantial question of law whether the plaintiffs and proforma defendants No. 3 to 5 have become owners to the extent of 34749 shares and tenant in possession to the extent of 3395 shares under defendant No. 2 and also whether the change of revenue entry in favour of defendant No. 2 was wrong including the order passed by the A.C. IInd Grade, Amb, dated 10.6.1985 sanctioning mutation No. 971 of proprietary rights in favour of defendant No. 1. It is admitted fact that Bhagat Singh was the owner of the suit land and initially Santu son of Mangu alongwith Sikh son of Bardu i.e. plaintiff was recorded as a tenant over old Khasra No. 284 measuring 20 kanals 18 marlas on payment of rent as per *jamabandi* for the year 1945-46, Ext. P11. These revenue entries were also repeated in the subsequent *jamabandis* 1954-55, Ext. P-12, 1963-64 Ext. P-13 and 1968-69 Ext. P-14. The change in entry had taken place for the first time in the *jamabandi* for the year 1973-74, Ext. P-1. Ram Lok was recorded as tenant in respect of 10 kanals 9 marlas

over Kh. No. 284 min. Initially, as per the remarks column of *jamabandi* Ext. P-1, mutation regarding conferment of the proprietary rights was ordered to be sanctioned in view of notification in favour of the plaintiff and proforma defendants on 21.5.1976. The proprietary rights were to be given to the plaintiffs only in respect of 17 kanals out of the land and share of widow co-owner was to remain intact during her life time. In *jamabandi* for the year 1984-85 Ext. P-2, Ram Lok during the course of consolidation was shown to be tenant over old khasra No. 284, new khasra No. 293 measuring 20 Kanals 18 marlas under the ownership of Bhagat Singh. The name of the plaintiff was deleted as tenant in *jamabandi* Ext. P-2 for the year 1984-85. The *jamabandi* for the year 1986-87 Ext. P-3 prepared during the course of settlement, suit land comprised in old Kh. No. 293 min was denoted by new khasra Nos. 644 and 645 kita 2 measuring 0-80-15 wherein defendant No. 1 Ram Lok was shown to be '*gair marusi tenant*' except the share of Sita Devi widow.

16. PW-1 Ajit Kumar Patwari, has testified that the suit land falls in his Patwar Circle. He has brought the record pertaining to '*khasra girdawari*' of the suit land from the year 1972 to 1979. According to him, the change of entry was reflected in favour of defendant No. 1 firstly in *rabi* 1976, but there was no order of any revenue officer regarding the change of entry nor there was any mutation or *rapat* to this effect in the revenue record.

17. PW-2 Kewal Krishan, Patwari has produced '*register karvai*' pertaining to the suit land alongwith '*rapat roznamachas*'.

PW-3 Naresh Kumar, Patwari has deposed that there was no order of any revenue officer regarding the change of entry as tenant in favour of defendant No. 1. Sh. Nandu Ram has examined himself as PW-4. He has supported the averments made in the plaint. According to him also, no order was passed by the competent authority for effecting change of entry in the suit land in the presence of the recorded tenants i.e. plaintiffs. PW-5 Prem Chand has supported the version of the plaintiffs.

18. According to DW-1 Ram Lok, Bhagat Singh was the owner of the suit land. The suit land was given by the owners in the year 1970 to him for the purpose of cultivation as tenant. He was regularly paying rent to the owners since 1970. The plaintiff Nandu was present on the spot when proprietary rights were conferred upon him but no-objection was raised by him. He admitted categorically that the suit land was partitioned and after consolidation only khasra number of the suit land changed. He has not filed any application regarding the correction of the entries. The defendant has also examined Bhagat Singh co-owner of the suit land. According to him, the defendant No. 1 was cultivating the suit land as tenant since 1970.

19. There is no order of the Revenue Officer how the change was effected showing defendant No. 1 Ram Lok as tenant in the *jamabandi* for the year 1973-74 and also in *jamabandi* for the year 1984-85, Ext. P-1 and P-2, respectively. The revenue entries before 1973-74 were in favour of the plaintiffs. According to the instructions issued by the Financial Commissioner, it is the duty

of the Patwari before making any change in the existing entry at the time of harvest inspection, to notify in writing to the person or persons likely to be adversely affected by such a change of the entries and retain on record proof of the notifications. The entries are required to be attested by the 'Lumberdar' or 'Panch' of the village concerned. The entries made in violations of these instructions are null and void. The first entry was made in favour of the plaintiffs and proforma defendants in *jamabandi* for the year 1945-46, Ext. P-11. The defendant has failed to prove how the entries were changed in his favour without any order from the competent authority. The plaintiff alongwith the proforma defendants were recorded as tenants since 1945-46. These entries, as noticed above, were changed abruptly in the *jamabandi* for the year 1973-74. The plaintiffs have conclusive proof that they are owners in possession of the suit property and the entries made in favour of the defendant were wrong.

20. The dispute primarily is between the previously recorded tenants i.e. plaintiff and proforma defendants on the one hand and defendant No. 1 on the other, who was abruptly recorded as tenant for the first time in the *jamabandi* for the year 1973-74. The entries have been changed without hearing the plaintiffs. The mutation was attested in their absence. The revenue authorities have not followed the prescribed procedure for making changes in the revenue entries. Thus, the civil Court has the jurisdiction to adjudicate the matter regarding validity of the tenancy. The Assistant Collector, IInd Grade, Amb was not competent to make

correction of tenancy entry or conferring proprietary rights in favour of defendant no. 1. The final order dated 10.6.1985 has been passed by the Assistant Collector, IInd Grade, Amb, behind the back of the plaintiff- Sikh Ram. It was in violation of the principles of natural justice. In these circumstances, the conferment of proprietary rights in favour of defendant No. 1 was null and void. The plaintiffs were recorded as tenant on payment of rent. The defendant No. 1 has failed to prove how the entries were changed abruptly in his favour. The substantial questions of law are answered accordingly.

21. Consequently, the appeal is dismissed.

November 10, 2014,

(karan)

(Rajiv Sharma),
Judge.