



IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 26th DAY OF MAY, 2022

BEFORE

HON'BLE MS. JUSTICE JYOTSNA REWAL DUA

FIRST APPEAL FROM ORDER No.14 of 2021

Between:-

1. MULAKH RAJ, SON OF TIHRU
2. DEV RAJ,
S/O TIHRU (SINCE DECEASED)
THROUGH HIS LRs:
 - 2(a) SHEELA DEVI, WIFE
 - 2(b) BRIJ LAL, SON
 - 2(c) SHIV RAM, SON
 - 2(d) VINOD KUMAR, SON
 - 2(e) SANTOSH KUMARI, DAUGHTER
 - 2(f) VEENA DEVI, DAUGHTER
 - 2(g) RIMPLE DEVI, DAUGHTEROF LATE SHRI DEV RAJ S/O TIHRU,
ALL RESIDENTS OF VILLAGE SANGHNAI,
TEHSIL AMB, DISTT. UNA, H.P.

.....APPELLANTS/PLAINTIFFS

(BY SH. AJAY SHARMA, ADVOCATE WITH
SH. ATHARV SHARMA, ADVOCATE)

AND

1. RIKHI RAM ALIAS MILKHI RAM
SON OF TIRHU
2. SATYA DEVI, WIDOW
3. MADAN LAL, SON
4. GURMUKH, SON
OF MOHINDER SINGH
RESIDENTS OF VILLAGE SANGHNAI,
TEHSIL AMB, DISTT. UNA, H.P.

.....RESPONDENTS/DEFENDANTS NO.1 TO 4

**5. KAKA RAM ALIAS DURGA DASS
(SINCE DECEASED) THROUGH HIS LRs:**

5(a) SOM NATH,

5(b) HARBANS LAL,

5(c) SURINDER,

5(d) PREM

SONS OF LATE SH. KAKA RAM

ALIAS DURGA DASS SON OF TIRHU

**6. PAMMI ALIAS PARAM SINGH,
SON OF WATTANA,
ALL RESIDENTS OF VILLAGE SANGHNAI,
TEHSIL AMB, DISTT. UNA, H.P.**

.....PROFORMA RESPONDENTS

(SH. DHEERAJ K. VASHISHT, ADVOCATE, FOR R-1,

**SH. DIVYA RAJ SINGH AND SH. KARAN VEER
SINGH, ADVOCATES, FOR R-2 TO R-4,**

SH. AMIT JAMWAL, ADVOCATE, FOR R-6)

*This Appeal coming on for orders this day, the
Court delivered the following:*

J U D G M E N T

Appellants were the plaintiffs before the learned Trial Court. A suit was filed by them for declaration and permanent prohibitory injunction. Rikhi Ram alias Milkhi Ram, Satya Devi, Madan Lal and Gurmukh were the contesting defendants and Kaka Ram alias Durga Dass and Pammi alias Paramjit Singh were the proforma defendants in the civil suit. Kaka Ram and Pammi, i.e. proforma defendants No.5 and 6 were proceeded ex-parte before the learned Trial Court. The civil suit filed by the appellants was decreed by the learned Trial Court on 20.03.2018.

Plaintiffs alongwith defendants and proforma defendants were declared joint owners of the suit land. Proprietary rights sanctioned in favour of defendant No.1 and predecessor-in-interest of defendants No.2 to 4 in exclusive possession of the plaintiffs were held to be wrong and illegal. The defendants were restrained from interfering over the peaceful possession of plaintiffs over their share.

2. Defendant No.1-Rikhi Ram alias Milkhi Ram assailed the judgment passed by the learned Trial Court before the First Appellate Court. The appeal was instituted by him on 02.05.2018. In the said appeal, the plaintiffs (appellants herein) were impleaded as respondents No.1 and 2. Respondent No.3 therein was Kaka Ram alias Durga Dass [since deceased through his LRs 3(a), 3(b), 3(c) and 3(d)]. The remaining defendants figured at Sr. Nos.4 to 7.

The appeal was heard by the learned First Appellate Court. Alongwith the appeal, an application was also moved under Order 22 Rule 4 read with Section 151 of the Code of Civil Procedure (CPC) for bringing on record legal representatives of deceased respondent No.3(a)-Som Nath son of Kaka Ram alias Durga Dass. In this application, prayer was made for setting aside the

abatement under Order 22 Rule 9 CPC after condoning the delay under Section 5 of the limitation Act.

During hearing of the first appeal, it was pointed out that Kaka Ram alias Durga Dass had died on 11.06.2014, whereas the judgment and decree was passed by the learned Trial Court on 20.03.2018. Certificate of death of Kaka Ram was brought on record.

Learned First Appellate Court observed that Kaka Ram had died during pendency of the suit before the learned Trial Court. The issue of abatement of the lis on account of Kaka Ram's death was not noticed by the learned Trial Court. Once the issue of abatement of the lis on account of Kaka Ram's death had gone unnoticed before the learned Trial Court, then the issue of abatement or impleading the legal representatives of his legal representatives including that of Sh. Som Nath could not be gone into by the First Appellate Court. The judgment and decree dated 20.03.2018 passed by the learned Trial Court against the dead person (Kaka Ram) was a nullity. On this score, the learned First Appellate Court set aside the judgment and decree passed by the learned Trial Court and remanded the case to the learned Trial Court with a direction to decide the question of abatement, if any, or to

bring on record the legal heirs of defendant No.5-Kaka Ram alias Durga Dass son of Tihru, as per law and procedure. The application under Order 22 Rule 4 CPC moved for bringing on record the legal representatives of deceased respondent No.3(a)-Som Nath S/o Kaka Ram by setting aside the abatement under Order 22 Rule 9 CPC was also ordered to be sent to the learned Trial Court for decision. Aggrieved against the judgment dated 12.03.2020 passed by the learned First Appellate Court, the plaintiffs/appellants have preferred the instant appeal.

3. During hearing of the case, learned Senior Counsel for the plaintiffs/appellants submitted that the observations recorded by the learned First Appellate Court regarding death of Sh. Kaka Ram (defendant No.5) having gone unnoticed before the learned Trial Court were factually incorrect. Reference in this regard was made to order dated 09.02.2018 passed by the learned Trial Court. Being germane for deciding the present appeal, this order is extracted hereinafter:-

“No reply filed despite last opportunity. Time prayed. Request rejected as sufficient opportunities have been given to the defts to file reply to app. U/O 22 R4 CPC. Hence application U/O 22 R4 CPC is allowed. The LRs of performa deft. No.5 deceased Kaka Ram are not required to be brought on record as their predecessor-in-interest proforma deft. No.5 was already proceeded ex-parte. Hence the plaintiff is hereby

exempted from bringing on record LRs of deceased proforma deft. No.5 Sh. Kaka Ram @ Durga Dass.

Amended headnote be filed 20.02.2018. Also list the case for argument on above said date.”

A perusal of the above extracted order and the record makes it evident that an application under Order 22 Rule 4 read with Section 151 CPC was moved by the plaintiffs/appellants in the learned Trial Court for exempting them from bringing on record the legal representatives of deceased proforma defendant No.5-Kaka Ram alias Durga Dass. It was mentioned in the application that proforma defendant No.5 had died on 11.06.2014. That plaintiffs/appellants do not wish to bring on record his legal heirs as despite service, Kaka Ram had chosen not to appear before the Court. He had neither filed his written statement nor contested the suit. Learned Trial court vide order dated 09.02.2018, allowed the application observing that despite repeated opportunities, reply to the application was not filed by the non-applicants. In view of the fact that proforma defendant No.5-Kaka Ram had been proceeded ex-parte, the plaintiffs/appellants were exempted from bringing on record his legal heirs. This aspect of the matter has not been noticed by the learned First Appellate Court in its judgment dated 12.03.2020 (impugned herein). The exemption allowed to the plaintiffs/appellants from

bringing on record the legal representatives of the deceased Kaka Ram by the learned Trial Court on 09.02.2018 will have a bearing on the issue adjudicated upon by the learned First Appellate Court. It is also to be noticed here that Som Nath, one of the legal heirs of Kaka Ram, impleaded as respondent No.3(a) before the First Appellate Court, had died on 28.02.2019, i.e. after the institution of first appeal, whereas, the application to bring on record legal heirs of said Som Nath [respondent No.3(a)] has also been sent for adjudication to the learned Trial Court. This is not in conformity with the facts, law and procedure. Apparently, the memo of parties of first appeal has also not been correctly drawn and presented before the learned First Appellate Court.

Accordingly, for all the aforesaid reasons, I find grounds to interfere with the impugned judgment in this appeal. The judgment dated 12.03.2020 passed by the learned First Appellate Court in Case No.67 of 2018, is accordingly set aside. Learned First Appellate Court is directed to decide the first appeal afresh in accordance with law by taking into consideration the above observations and the record. Parties, through their learned counsel, are

directed to appear before the learned First Appellate Court on **06.07.2022**.

It is clarified that this Court has not expressed any opinion on merits of the matter and the observations made above are confined only to adjudication of the present appeal.

Registry is directed to return the records of the learned Courts below forthwith.

The appeal stands disposed of in the above terms, so also the pending miscellaneous application(s), if any.

May 26, 2022
Mukesh

Jyotsna Rewal Dua
Judge