

SUPREME COURT OF INDIA

Hem Singh (Dead) By Lrs.

Vs.

Gianoo

C.A.No.2699 of 2002

(Dalveer Bhandari and Deepak Verma JJ.)

29.07.2010

ORDER

1. We have heard the learned counsel for the parties.
2. This appeal is directed against the judgment and order dated 17.4.2000 passed by the High Court of Himachal Pradesh at Shimla in Regular Second Appeal No.229 of 1989, whereby the judgment and decree passed by the learned Additional District Judge, Mandi, was set aside and the appeal filed by the respondents was allowed.
3. This case has a checkered history.
4. The appellants herein were the plaintiffs in a suit, bearing No.123/136 of 1964/1965, filed with the prayer for a mandatory injunction in which the respondents herein were the defendants. The said suit was decreed in favour of the plaintiffs and the defendants were restrained from interfering, in any manner, in Khasra No.1665 measuring 5-0-9 Bighas, situated in Village Bakarta, Tehsil Sarkaghat.
5. The respondents, aggrieved by the order passed by the learned Senior Sub Judge, Mandi, filed an appeal before the District Judge, Mandi. During the pendency of the said appeal, the parties entered into a compromise/family arrangement on the basis of the statement of Nandlal (defendant No.31 in the suit) According to the compromise/family arrangement, Khasra No.611 came to the share of the appellants and Khasra No.1655 had gone to the share of Nandlal. The compromise entered into by Nandlal reads as under:

“State that we respondents are owners of Khasra No.611 measuring 4-12-15 bighas, on this disputed land possession recorded is also ours. Kind of land shown in Khadayan (grazing land). On this area the appellants who are potters by caste, have a right to take earth.

I have no objection to the same. The appellant can use this area for taking earth for pottery as they have been doing from before. I take responsibility for other shares.

Sd/- Nandl Lal”

6. It may be pertinent to mention that the appellants filed another suit bearing Civil Suit No.34/176/103/84 which was dismissed by the Sub Judge, First Class, Sarkaghat, Distt. Mandi, on 25.9.1985. The appellants, aggrieved by the order of the Trial Court dated 25.9.1985, preferred an appeal before the Additional District Judge, Mandi. The learned Additional District Judge, Mandi, passed a comprehensive judgment on 29.4.1989, in which he categorically dealt with the aspect of the customary rights of the respondents and came to a definite findings which reads as under:

“The defendants have therefore, failed to prove that they have any customary right for digging pits in the land for the purpose of taking soil for making earthen pottery etc.”

7. Aggrieved by the said judgment and order, the respondents herein preferred a second appeal under Section 100 of the Code of Civil Procedure before the High Court of Himachal Pradesh at Shimla. The High Court vide its judgment dated 17.4.2000, set aside the judgment and a decree passed by the learned Additional District Judge, Mandi and allowed the appeal.

8. The High Court has reproduced the issues which were framed by the Trial Court and the same are reproduced herein also:

“1. Whether the suit is barred by principle of res-judicata?

2. Whether there is no cause of action for the plaintiffs to file the present suit?

3. Whether the plaintiffs are estopped from filing the suit as alleged?

4. Whether the suit is barred by order 2, R.2 C.P.C. as alleged?

5. Whether the suit land is possessed by the plaintiffs to the exclusion of defendants as alleged? 5A. Whether there has been a private partition between the plaintiffs and proforma defendants as alleged?

6. Whether the defendants have acquired customary rights qua the suit land as alleged? 7. Relief.”

9. The High Court in the impugned judgment observed as under:

“...the learned trial court came to the conclusion that though the plaintiffs are the owners and in possession of the land in dispute, their ownership and possession was

subject to the customary rights of the defendants to take earth from the land in dispute.”

10. The aforesaid observations were erroneously recorded by the High Court. The High Court had further observed that "the parties arrived at a compromise before the District Judge, Mandi and consequently the compromise decree was passed on 18.3.1969. In such compromise the customary rights of the defendants to take earth from land comprising of Khasra No.611 was recognized and the plaintiffs agreed not to interfere with such rights of the defendants." This finding of the High Court is totally erroneous. In the compromise decree, as stated above, the customary rights of the defendants were not mentioned. Even Nandlal in his statement has not mentioned it, which is clear from the aforesaid compromise deed.

11. Therefore, in this case, it is clear that the customary rights of the respondents were not accepted by any Court. The finding of the High Court, is therefore, totally erroneous and contrary to the documents on record. The High Court also did not appreciate the fact that the compromise was not signed by the appellants and it was signed by Nandlal only. Nandlal could not have given any undertaking on behalf of the appellants for the land of which he was not the owner. The High Court came to the following conclusion:

“On the basis of the admission so made, the present defendants had not pressed their appeal before the learned District Judge and the decree Ex.D.2 came to be passed. Such admission of the customary rights of the defendants would estop the plaintiffs from denying the rights of the defendants in the land in dispute. Therefore, the suit out of which the present appeal has arisen would be barred by principle of estoppel.”

12. This finding of the High Court is totally erroneous and contrary to the documents on record. The High Court has decided the case on totally non-existent facts.

13. In this view of the matter, we are constrained to set aside the impugned judgment of the High Court.

14. Consequently, the judgment and order dated 29.4.1989 of the First Appellate Court i.e Court of Additional District Judge, Mandi, is restored and this appeal is accordingly allowed. In the facts and circumstances of this case, we direct the parties to bear their own costs.