



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 590 of 2008

Reserved on: 22.8.2026

Date of Decision: 01.9.2026

Tara Chand

...Appellant

Versus

Devinder (deceased) through LRs & ors.

...Respondents

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?¹ Yes.

For the Appellant : Mr Sumit Sharma, Advocate.

For Respondents No.1(a) to 1(f). : Mr. Sunil Moohan Goel, Senior Advocate, with Mr. Abhinav Mohan Goel, Advocate.

For Respondent No.2 : Nemo.

Rakesh Kainthla, Judge

The present appeal is directed against the judgment and decree dated 16.9.2008, passed by the learned Additional District Judge, Shimla, Camp at Rohru (learned First Appellate Court), vide which the judgment and decree dated 12.12.2005, passed by the learned Civil Judge (Junior Division), Court No. 1,

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

Rohru (learned Trial Court) were set aside. *(The 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 plaintiff filed a civil suit before the learned Trial Court seeking a declaration that he is entitled to use a path passing through the land mentioned in the head note and para-1 of the plaint, and that the defendants have no right to block the path. A consequential relief of permanent prohibitory injunction for restraining the defendants from blocking the path by raising construction was also sought. It was asserted that the plaintiff was using the path from the time of his ancestors without any interruption from any person, and he has acquired a right to use the path by way of prescription. Defendant No.2 started raising construction over the path and threatened to block it. The plaintiff requested the defendants not to do so, but in vain. Hence, the suit was filed for seeking the relief mentioned above.

3. The suit was opposed by defendant no. 1 by filing a written statement taking preliminary objections regarding lack of maintainability, and cause of action, and the suit being bad

for non-joinder of necessary parties. The contents of the plaint were denied on merits. It was asserted that defendant No.2 exchanged the land with defendant No.1 on 15.9.2004. Defendant No.1 raised a structure over the exchanged land. The plaintiff filed a false suit to compel defendant No.1 to provide a path through his land, whereas no such path exists on the suit land. A part of the suit land touches Devidhar-Badyara road. The plaintiff and other co-sharers want access to the road through the suit land. The suit was filed without any basis. Hence, it was prayed that the suit be dismissed.

4. A separate written statement was filed by defendant No.2 taking preliminary objections regarding lack of maintainability and *locus standi*. The contents of the plaint were denied on merits. It was asserted that a portion of the suit land was exchanged by defendant No.2 with defendant No.1. Defendant No. 1 is in possession of the exchanged land. The suit has been filed without any basis. Hence, it was prayed that the suit be dismissed.

5. Separate replications denying the contents of the written statements and affirming those of the plaintiff were filed by the plaintiff.

6. The learned Trial Court framed the following issues on 28.2.2005: -

- (i) Whether there exists an ancestral path upon the suit land, as shown in the tatima and is using the same for last more than 20 years, as alleged? OPD.
- (ii) Whether the defendants are blocking the path, as alleged? OPP.
- (iii) Whether the plaintiff is entitled for the relief of permanent prohibitory and mandatory injunction, as alleged? OPP.
- (iv) Whether the suit is not maintainable? OPD.
- (v) Whether the suit is bad for non-joinder of necessary party? OPD.
- (vi) Whether the plaintiff has no locus standi to file the suit? OPD.
- (vii) Relief.

7. The parties were called upon to produce the evidence.

The plaintiff examined himself (PW1), Kesar Singh (PW2), Pitamber Dass (PW3), and Hem Raj (PW4). Defendant No.1 examined himself (DW1), Lachhman Singh (DW2), Tara Chand (DW3) and Amar Chand (DW4).

8. The learned Trial Court held that the plaintiff had been using the path for the last 20–25 years. It was proved that

defendant No. 1 had constructed a two-storeyed building on the suit land. The copy of tatima (Ext.PW-4/A) showed the path. The defendants failed to prove that the plaintiff had any alternative path. Hence, the learned Trial Court answered Issues No. 1 to 3 in the affirmative, Issues No. 4 to 6 in the negative, and decreed the suit of the plaintiff.

9. Being aggrieved by the judgment and decree passed by the learned Trial Court, the defendant Devender Singh filed an appeal, which was decided by the learned Additional District Judge, Shimla, Camp at Rohru (learned Appellate Court). The learned Appellate Court held that the learned Trial Court had not properly appreciated the evidence on record. The path was not shown in the revenue record even though settlement had taken place recently in the area. The plaintiff had an alternative passage available to him. The learned Trial Court had also failed to specify the portion which was to be demolished. Therefore, the learned Appellate Court allowed the appeal and set aside the judgment and decree passed by the learned Trial Court.

10. Being aggrieved by the judgment and decree passed by the learned Appellate Court, the plaintiff filed the present

appeal, which was admitted on substantial questions of law on

7.11.2008: -

- (i) Whether appellant has pleaded and proved his claim and the suit was rightly decreed by the learned Trial Court, respondent No.2 having not filed any appeal; therefore, the decree as passed by the learned Trial Court could not be upset?
- (ii) Whether appellant has pleaded and proved on record his claim of right of use of path by prescription and therefore, the findings of the Trial Court are sustainable?

11. I have heard Mr Sumit Sharma, learned counsel for the appellant/plaintiff, and Mr Sunil Mohan Goel, learned Senior Advocate, assisted by Mr Abhinav Mohan Goel, learned counsel for the respondents/Legal Representatives No. 1(a) to 1(f).

12. Mr Sumit Sharma, learned counsel for the appellant/plaintiff, submitted that an application for additional evidence was filed before the learned Appellate Court, which was not decided. The learned Appellate Court erred in reversing the well-reasoned judgment passed by the learned Trial Court without assigning cogent reasons. Therefore, he prayed that the present appeal be allowed and the impugned judgment and decrees passed by the learned First Appellate Court be set aside.

He relied upon the following judgments in support of his submissions: -

- (i) *Murthy and others Vs. C. Saradambal and ors.* (2022) 3 SCC 209;
- (ii) *Somakka (deceased) through LRs Vs. K.P. Basavaraj (deceased) through LRS* (2022) 8 SCC 261;
- (iii) *V. Prabhakara Vs. Basavaraj K. (deceased) through LRs and anr.* (2022) 1 SCC 115;
- (iv) *Santosh Hazari Vs. Purshottam Tiwari (deceased) through LRs* (2001) 3 SCC 179; and
- (v) *Balbir Singh vs. Sanjeev Kumar*, RSA No. 405 of 2019, decided on 25.8.2023.

13. Mr Sunil Mohan Goel, learned Senior Advocate for the respondents, submitted that no substantial question of law has been framed regarding the non-disposal of the application for additional evidence. A regular second appeal can only be decided on the substantial questions of law framed by the High Court at the time of admission of the appeal. The application was filed by the respondents, and only they could have been prejudiced by its non-disposal. The appellant has no locus standi to question the non-disposal of the application. The learned Trial Court had failed to notice the essential ingredients of easement by way of prescription, and the learned Appellate Court had rightly set aside the decree passed by the learned Trial

Court. There is no substantial question of law in the present case. Hence, he prayed that the present appeal be dismissed.

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

Non-disposal of the application for additional evidence:

15. The record shows that the respondents had filed an application for additional evidence which was not disposed of. It was submitted that the judgment passed by the learned Appellate Court is bad because of the non-disposal of the application. This submission cannot be accepted. In CMP No.13476 of 2023 in RSA No. 114 of 2020, titled *Rajinder Kaur vs. Smt. Yashoda*, decided on 19.10.2023, the learned First Appellate Court had failed to decide the application for additional evidence. No ground was taken in the memorandum of appeal that the judgment was bad for non-deciding the application for additional evidence. An application was filed before the Court for framing an additional substantial question of law regarding the effect of non-disposal of the application. This Court held that when no ground was made out in the memorandum of appeal,

no substantial question of law could be framed regarding the effect of non-decision of the application for additional evidence.

16. In the present case also, the memorandum of appeal does not make any grievance about the non-disposal of the application for additional evidence. Therefore, in view of the binding precedent of this Court, it is impermissible to raise this question while arguing the regular second appeal.

17. Even otherwise, there is force in the submission of Mr Sunil Mohan Goel, learned Senior Advocate, that only the respondents could have been prejudiced by the non-disposal of the application filed by them. The appellant had not filed the application, and he cannot raise any grievance that the application was not decided by the learned First Appellate Court. Hence, the submission that the decision of the learned First Appellate Court is bad because the application under Order XLI Rule 27 of the Code of Civil Procedure (CPC) was not decided by the learned Appellate Court is not acceptable, and the judgment in *Balbir Singh* (supra) does not apply to the present case.

Substantial Questions of Law Nos.1 and 2:

18. The plaintiff asserted in para-2 of the plaint that the path started from the boundary of Khasra Nos. 441 and 445 and passes through Khasra No. 422, from where it turns near the boundary of Khasra Nos. 441, 445, 422, to 421 and so on. The plaintiff admitted in his cross-examination that Khasra No. 441 is owned by the defendants. The plaintiff has not specified the necessity to go to the defendants' land by using the path located on their land.

19. Kesar Singh (PW-2) admitted in his cross-examination that a PWD road is located near Khasra No. 441. Pitamber Dass (PW-3) also admitted that the Devidhar-Badyara motorable road is located adjacent to Khasra Nos. 441 and 445. Thus, it is apparent from the statements of these witnesses that the path starts from the motorable road and not from the edge of Khasra No. 441 as claimed in the plaint. It was laid down by this Court in *Savitri Devi vs. Gauri Dutt 2000(1) S.L.J.404* that where the path has not been properly described, a right of way cannot be claimed. It was observed:

“At the very outset, it may be stated that there are no specific pleadings with regard to the plaintiffs having

acquired the right of easement of passage by way of prescription. So much so that no point of ingress or egress of the alleged passage has been identified. Nor is there anything on the record to show as to what is the direction of the passage and as to what is the width of the passage, which is alleged to have been used by the plaintiffs since 1943. In the absence of requisite pleadings as to the acquisition of easementary right of passage by way of prescription and in the absence of specific identification of the passage, the learned First Appellate Court has rightly held that the plaintiffs have not acquired a right of easement of passage through the land in dispute.”

20. Therefore, the learned First Appellate Court was justified in holding that the plaintiff’s pleadings and evidence were not sufficient to establish the path.

21. Pitamber Dass (PW-3) admitted in his cross-examination that he is the owner of Khasra No. 423 located adjacent to Khasra No. 422. He admitted that a public path passes adjacent to his land, which is 3 meters to 6 meters wide. He admitted that people used this path earlier. He also admitted that everybody wants to connect to the motorable road after the construction of the road. Pitamber Dass was put forward as a witness of truth by the plaintiff, and his testimony is binding upon the plaintiff. His testimony clearly shows that a common path existed adjacent to his land, and the plea taken by the

plaintiff that the path existed through the defendants' land is not acceptable.

22. The plaintiff relied upon Tatima (Ext.PW-4/A). However, the person who had prepared the tatima did not appear before the Court because he had expired. The plaintiff examined Hem Raj (PW-4), who admitted in his cross-examination that he was not aware of the spot position. Therefore, the testimony of this witness does not prove the authenticity of the tatima, and no reliance can be placed upon Tatima (Ext. PW-4/A) filed by the plaintiff.

23. The plaintiff admitted in his cross-examination that a settlement had taken place in his area and all the passages etc. were depicted in the revenue record. The learned First Appellate Court had rightly held that the absence of the passage in the revenue record makes the plaintiff's version doubtful.

24. The learned Trial Court had failed to notice the absence of specific points of ingress and egress in the pleadings and also failed to notice the significance of the admission made by Pitamber Dass that the common passage touched his land. The learned First Appellate Court has rightly reversed the

judgment passed by the learned Trial Court in these circumstances.

25. It was submitted that respondent No. 2 had not filed any appeal and it was impermissible for the learned First Appellate Court to reverse the entire decree. This submission cannot be accepted. Order XLI Rule 4 of the CPC provides that where there are more plaintiffs or more defendants than one in a suit, and the decree proceeds from a ground common to all, any one of the plaintiffs or defendants may appeal from the whole of the decree, and the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants. It was laid down by the Hon'ble Supreme Court in *Ratan Lal Shah v. Lalmandas Chhadammalal*, (1969) 2 SCC 70: 1969 SCC OnLine SC 193 that the appellate Court can reverse a joint decree in an appeal filed by one of the parties. It was observed at page 72:

3.....Order 41 Rule 4 of the Code of Civil Procedure provides:

“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.”

The object of the rule is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. There was some conflict of judicial opinion in the High Courts on the question whether power under Order 41 Rule 4 of the Code of Civil Procedure may be exercised where all the parties against whom a decree is passed on a ground which is common to them are not impleaded in the appeal. The preponderance of authority in the High Courts was that even in the absence of a person against whom a decree has been passed on a ground common to the appellant, the appeal was maintainable, and appropriate relief may be granted. It is, however, unnecessary to examine those decisions, for, in our judgment, the question has been considered by this Court in *Karan Singh Sobti v. Pratap Chand* [1963 SCC OnLine SC 174 : (1964) 4 SCR 647]. In that case, a landlord of certain premises filed an action in ejectment against the tenant and the sub-tenant in respect of the premises on the ground that the tenant had sub-let the premises without the landlord's consent. The Trial Judge decreed the suit holding that the landlord had not acquiesced in the sub-letting. The sub-tenant alone appealed to the Additional Senior Subordinate Judge, who set aside the order of the trial court. It was urged before this Court that the appeal by the sub-tenant to the Subordinate Judge was incompetent, because the tenant against whom a decree in ejectment was passed had not appealed. On certain questions which are not material for the purpose of this judgment, there was difference of opinion between Sarkar, J., on the one hand, and S.K. Das, Acting C.J. and Hidayatullah, J., on the other, but the Court unanimously held in that case that the appeal was maintainable before the Subordinate Judge, even though the tenant had not

appealed against the order of the Court of First Instance. Sarkar, J., observed at p. 663:

“The suit had been filed both against the tenant and the sub-tenant, being respectively the Association and the appellant. One decree had been passed by the trial Judge against both. The appellant had his own right to appeal from that decree. That right could not be affected by the Association's decision not to file an appeal. There was one decree and, therefore, the appellant was entitled to have it set aside even though thereby the Association would also be freed from the decree. He could say that that decree was wrong and should be set aside as it was passed on the erroneous findings that the respondent had not acquiesced in the sub-letting by the association to him. He could challenge that decree on any ground available. The lower appellate court was, therefore, quite competent in the appeal by the appellant from the joint decree in ejectment against him and the Association, to give him whatever relief he was found entitled to, even though the Association had filed no appeal.”

With that view, S.K. Das, Acting C.J. and Hidayatullah, J., agreed; see p. 652. It is true that in that case the tenant was made a party to the appeal before the Subordinate Judge. But the judgment of the Court proceeded upon a larger ground that the sub-tenant had a right to appeal against the decree passed against him, and that right was not affected by the tenant's decision not to file an appeal.

26. This position was reiterated in *Chandramohan Ramchandra Patil v. Bapu Koyappa Patil*, (2003) 3 SCC 552: 2003 SCC OnLine SC 248 wherein it was observed at page 558:

“13. This argument has no merit. In a suit for partition, plaintiff and defendants are parties of equal status. If the right of partition has been recognised and upheld by the court, merely because only some of the plaintiffs had

appealed and not all, the court was not powerless. It could invoke provisions of Order 41 Rule 4 read with Order 41 Rule 33 of the Code of Civil Procedure. The object of Order 41 of Rule 4 is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. (See *Ratan Lal Shah v. Firm Lalmandas Chhadammalal* [(1969) 2 SCC 70: AIR 1970 SC 108] and *Mahabir Prasad v. Jage Ram* [(1971) 1 SCC 265: AIR 1971 SC 742])

14. Order 41 Rule 4 of the Code enables reversal of the decree by the court in appeal at the instance of one or some of the plaintiffs appealing, and it can do so in favour of even non-appealing plaintiffs. As a necessary consequence, such reversal of the decree can be against the interest of the defendants vis-à-vis non-appealing plaintiffs. Order 41 Rule 4 has to be read with Order 41 Rule 33. Order 41 Rule 33 empowers the appellate court to do complete justice between the parties by passing such order or decree which ought to have been passed or made although not all the parties affected by the decree had appealed.

27. Therefore, the learned First Appellate Court had the jurisdiction to reverse the decree even in an appeal preferred by one of the parties, and it was not necessary that all the parties should have joined in filing the appeal.

28. In *Murthy and others* (supra), *Somakka* (supra), *Santosh Hazari* (supra), and *V. Prabhakara* (supra), the duties of the First Appellate Court were highlighted. In the present case,

the learned First Appellate Court has demonstrated the flaws in the reasoning of the learned Trial Court before reversing the judgment and decree. Therefore, the principles laid down in the cited judgments do not advance the case of the appellant.

29. Consequently, the learned First Appellate Court had rightly reversed the judgment and decree passed by the learned Trial Court, and there is no infirmity or illegality in the impugned judgment and decree passed by the learned First Appellate Court. The substantial questions of law are answered accordingly.

Final order:

30. In view of the above, the present appeal fails, and it is dismissed.

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

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

(Rakesh Kainthla)
Judge

1st September, 2026
(Chander)