

(2005) 11 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 288 of 2005

Ishwari Prashad

APPELLANT

Vs

Kuldeep Kumar and Others

RESPONDENT

Date of Decision : 10-11-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Evidence Act, 1872 — Section 17, 18, 19, 20, 21

Citation : (2006) 1 ShimLC 247

Hon'ble Judges : V.M. Jain, J

Bench : Single Bench

Advocate : Tarlok Chauhan, for the Appellant; Rakesh Jaswal and Abhilasha Kumari for Respondent Nos. 1 and 2, for the Respondent

Judgement

V.M. Jain, J.—This Regular Second Appeal has been filed by defendant-appellant Ishwari Parshad against the judgment and decree dated 10.3.2005 passed by the District Judge, whereby the judgment and decree passed by the trial Court were modified in terms of the alleged compromise.

2. The facts which are relevant for the decision of the present appeal are that Kuldeep Kumar etc. plaintiffs had filed suit for permanent prohibitory injunction and also for mandatory injunction against the defendants including defendant No. 1 Ishwari Parshad (father of the plaintiffs). In the written statement, the defendants contested the suit. It was denied that the plaintiffs were the son and daughter of defendant No. 1, alleging therein that the mother of the plaintiffs had left defendant No. 1 about 40 years back and was residing with her parents and the mother of the plaintiffs had given birth to the plaintiffs at her parents house, even though defendant No. 1 had not visited her nor she had joined him for the last 40 years. It was alleged that the plaintiffs being not son and daughter of defendant No. 1 were not entitled to claim any share in the suit property. It was also denied that the suit property was ancestral.

3. After hearing both sides and perusing the record, the learned trial Court

decreed the suit of the plaintiffs restraining the defendants from raising any construction or to dismantle the old house over the suit property till the plaintiffs were provided a share in the suit property. While decreeing the suit of the plaintiffs, it was held by the learned trial Court that the plaintiffs had taken birth during the subsistence of the marriage of their mother with defendant No. 1 and as such, they were proved to be the son and daughter of defendant No. 1 and since the suit property was proved to be ancestral property, they had a share in the suit property.

4. Aggrieved against the said judgment and decree of the trial Court, the defendants filed appeal before the District Judge. During the pendency of the appeal, the learned Counsel appearing for the appellants made a statement before the learned District Judge, Chamba on 25.10.2001 to the effect that the plaintiffs respondents were the son and daughter of appellant defendant No. 1 and that he shall not alienate the suit land in any manner i.e. by way of sale, mortgage, exchange, gift or Will etc. and that the appeal be decided accordingly. Thereupon, the learned Counsel appearing for the plaintiffs - respondents made a statement before the learned District Judge on 25.10.2004 that he had heard the statement of the Counsel for the appellants which he admitted to be correct and that the appeal be decided accordingly. No order was passed by the learned District Judge on 25.10.2004, after recording the aforesaid statement of the Counsel for the parties. On the other hand, part argument were heard and the case was adjourned for remaining arguments. Before the remaining arguments could be addressed, defendant - appellant No. 1 Ishwari Parshad filed an application u/s 151 C.P.C. before the learned District Judge for hearing and deciding the appeal on merits, alleging therein that he had come to know that H.N. Sharma, Advocate had made some statement which was prejudicial to him and contrary to his interest. It was alleged that infact applicant - appellant No. 1 had never instructed his Counsel Shri H.N. Sharma, Advocate, to make such statement before the Court and that Shri H.N. Sharma, Advocate had over stepped the brief entrusted to him and that he made the statement dated 25.10.2004 at his own at the back of applicant - appellant No. 1 without seeking instructions from him. It was accordingly prayed that the case of applicant - appellant No. 1 may be heard and decided on merits and not on the basis of the statement made by Shri H.N. Sharma, Advocate on 25.10.2004. The plaintiffs - respondents filed reply to this application to the effect that applicant appellant No. 1 had engaged Shri H.N. Sharma, Advocate, as his Counsel and he had filed a Power of Attorney in which it was clearly mentioned that the advocate was competent to make statement before the Court. It was alleged that in this manner Shri H.N. Sharma, Advocate, had the authority to make statement. It was further alleged that infact Shri H.N. Sharma, Advocate had made the above said statement after due consultation with the applicant - appellant No. 1 and as such, applicant - appellant No. 1 was bound by the said statement.

5. The learned District Judge after considering the said application vide order and decree dated 10.3.2005 modified the judgment and decree of the trial Court to

the effect that the plaintiffs - respondents were the son and daughter of defendant - appellant No. 1 and defendant - appellant No. 1 shall not alienate the suit property in any manner i.e. by way of sale, mortgage, exchange, gift, Will etc. and the statements recorded on 25.10.2004 shall form part of the decree. The appeal filed by the defendants - appellants stood disposed of accordingly. Aggrieved against the aforesaid order and decree dated 10.3.2005 passed by the learned District Judge, defendant No. 1, Ishwari Parshad filed the present appeal in this Court.

6. Notice was ordered to be issued to plaintiffs - respondents No. 1 and 2 and the records were also requisitioned.

7. I have heard the learned Counsel for the parties and have gone through the record carefully.

8. The learned Counsel appearing for the appellant submitted before me that the learned District Judge had erred in law in disposing of the appeal before him on the basis of the statement dated 25.10.2004, even when before the appeal could be decided by the learned District Judge, defendant appellant No. 1, namely Ishwari Parshad had already filed application before the learned District Judge to the effect that he had not authorized his Counsel to make the aforesaid statement dated 25.10.2004 and that the Counsel had made the said statement prejudicial and contrary to the interest of applicant - appellant No. 1 and that he had never instructed his Counsel Shri H.N. Sharma, Advocate, to make such statement and as such, the appeal may be decided on merits and not on the basis of the statement dated 25.10.2004 made by Shri H.N. Sharma, Advocate. It was further submitted that by moving the application, applicant-appellant No. 1 Ishwari Parshad had resiled from the admission allegedly made by his Counsel in his statement dated 25.10.2004 and that being so, the learned District Judge was required to decide the appeal on merits instead of disposing of the same on the basis of the statement dated 25.10.2004 made by Shri H.N. Sharma, Advocate.

9. After hearing the learned Counsel and perusing the record, in my opinion, the following substantial question of law arises for determination in this appeal:

Whether the learned District Judge could have decided the appeal on 10.3.2005 on the basis of the statement made by Shri H.N. Sharma, Advocate, on 25.10.2004 even when applicant-appellant No. 1 Ishwari Parshad had already moved an application before the learned District Judge for deciding the appeal on merits and not on the basis of the aforesaid statement dated 25.10.2004 on the ground that he had not authored his Counsel to make the said statement and that the said statement was without any authority from him? Also as to what would be the effect of applicant -appellant No. 1 resiling from the alleged admission made by Shri H.N. Sharma, Advocate, in his statement dated 25.10.2004.

10. After hearing the learned Counsel and perusing the record, in my opinion,

there is considerable force in the aforesaid submissions of the learned Counsel appearing for the defendant - appellant, I am further of the opinion that the aforesaid substantial question of law is to be decided in favour of the defendant - appellant. As referred to above, the statement made by Shri H.N. Sharma, Advocate, is dated 25.10.2005, whereas the appeal was disposed of by the learned District Judge only on 10.3.2005 placing reliance on the said statement of Shri H.N. Sharma, Advocate. It was during the intervening period that defendant - appellant No. 1 Ishwari Prashad had filed an application u/s 151 C.P.C. for hearing and deciding the appeal on merits. By moving the said application, defendant - appellant Ishwari Parshad had resiled from the admission made by Shri H.N. Sharma, Advocate, in the aforesaid statement dated 25.10.2004.

11. Once it is found that defendant - appellant Ishwari Prashad had resiled from the admission allegedly made by Shri H.N. Sharma, Advocate, in his statement dated 25.10.2004 and by the time, defendant - appellant had moved the said application, the learned District Judge had not decided the said appeal of the defendant - appellant, in my opinion, it was necessary for the learned District Judge to have held an enquiry with regard to the allegations made by defendant - appellant Ishwari Prashad in his application u/s 151 C.P.C. It is no doubt true that as per Vakalatnama Shri H.N. Sharma, Advocate, had the authority to compromise or withdraw the case on behalf of his client. However what comes up for consideration is as to whether Shri H.N. Sharma, Advocate had acted on the basis of the instructions received by him from the defendant- appellant and/or where he had made the aforesaid statement dated 25.10.2004 at his own, without seeking instructions from the defendants - appellants. All these questions were required to be gone into by the learned District Judge while deciding the appeal, especially when before the appeal could be decided by the teamed District Judge, defendant appellant No. 1 Ishwari Parshad had already brought it to the notice of the learned District Judge that the aforesaid statement dated 25.10.2004 was made by Shri H.N. Sharma, Advocate, without any authority and that he was not accepting the said statements made by Shri H.N. Sharma, Advocate and praying therein that the appeal may be decided on merits and not on the basis of the statement made by Shri H.N. Sharma, Advocate. Plaintiff - appellant No. 1 Ishwari Parshad having taken this plea before the learned District Judge by moving the aforesaid application, in my opinion, the learned District Judge was required to go into this question and the effect of the said application moved by defendant appellant No. 1 Ishwari Parshad before him, instead of disposing of the appeal on the basis of the aforesaid statement dated 25.10.2004 made by Shri H.N. Sharma, Advocate, by observing that Shri H.N. Sharma, Advocate, had the power to compromise or withdraw the case, as per the Vakalatnama in his favour and Shri H.N. Sharma, Advocate, having made the statement dated 25.10.2004, the same was binding upon defendant - appellant No. 1 and he could not be allowed to say that the said statement was made by his Counsel without seeking instructions from him. In my opinion, the view taken

by the learned District Judge is contrary to law and cannot be accepted.

12. In *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, , it was held by the Hon''ble Supreme Court that admission is not conclusive as to the truth of the matters stated therein and it is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it was made. It was further held that an admission can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel. Similarly in *Kishori Lal Vs. Mst. Chaltibai*, it was held by the Hon''ble Supreme Court that the admissions are not conclusive and unless they constitute estoppel, the maker is at liberty to prove that they were mistaken or untrue. It was further held that admissions are mere pieces of evidence.

13. In *S.R. Ejaz Vs. The Tamil Nadu Handloom Weavers Co-operative Society Ltd.*, , it was held by the Hon''ble Supreme Court that there can be no doubt that admission of a party is a relevant material, but could the statement made by the learned Counsel of a party across the Bar be treated as admission of the party? It was further held by the Hon''ble Supreme Court that having regard to the requirements of Section 18 of the Evidence Act, on the facts of the said case, the statement of the Counsel could not be accepted as an admission so as to bind the respondent. It was further found that excluding that statement from consideration there was no material before the Court to record his satisfaction. In the reported case as well, even though the respondent had denied that the appellant was an institution and required the premises bona fide, yet the learned Counsel for the respondent made a statement before the Rent Controller admitting the ground of admission and also the fact that the appellant was a public charitable institution and for that purpose it required the premises. On the basis of the said statement, the eviction petition filed by the appellant was allowed. It was thereafter that the respondent filed review application, which was dismissed and the appeal was also dismissed by the appellate authority. Subsequently, the order of eviction was challenged during the execution proceedings. The execution petition was dismissed and the order was upheld by the appellate authority. However, the appeal filed by the respondent before the High Court was allowed, against which order the appellant filed before the Hon''ble Supreme Court. The Hon''ble Supreme Court upheld the order of the High Court holding that the rent petition could not be disposed of on the aforesaid admission made by the Counsel for the respondent as the said admission would not bind the respondent. In my opinion, the law laid down by the Hon''ble Supreme Court in this authority would be applicable to the facts of the present case. Furthermore, the provisions contained in Sections 17 to 31 of the Indian Evidence Act, 1872, would also be relevant for considering the effect of the alleged admission made by Shri H.N. Sharma, Advocate, in his statement dated 25.10.2004.

14. In view of the detailed discussion above, in my opinion, order dated

10.3.2005 passed by the learned District Judge has to be set aside. I am further of the opinion that it is a fit case where the matter should be remanded to the learned District Judge for deciding the appeal afresh in accordance with law. It is made clear that it will be open to the learned District Judge to consider the effect of the statement dated 25.10.2004 made by Shri H.N. Sharma, Advocate and the effect of the stand taken by defendant - appellant No. 1 Ishwari Parshad by moving the application u/s 151 C.P.C. praying therein that the appeal be decided on merits and not on the basis of the aforesaid statement made by Shri H.N. Sharma, Advocate. Accordingly, the aforesaid question of law framed in this appeal is decided in favour of the defendant - appellant and against the plaintiffs - respondents.

15. In view of the above, the present appeal is allowed, the order and decree passed by the learned District Judge are set aside and the case is remanded to the learned District Judge for fresh decision in accordance with law, keeping in view the observations made by me above.

Parties through their Counsel are directed to appear before the learned District Judge on 20th December, 2005, for further proceedings in accordance with law.