

(2009) 02 SC CK 0054

In the Supreme Court Of India

Case No : Civil Appeal No. 1185 of 2009 (Arising out of SLP (C) No. 23262 of 2008)

Saroj Anand and Others

APPELLANT

Vs

Prahlad Rai Anand and Others

RESPONDENT

Date of Decision : 25-02-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 3, Order 22 Rule 6, 151

Citation : (2009) AWC 2346 Supp : (2009) 5 KCCR 3404 : (2009) 5 LW 18 : (2009) 8 MLJ 1410 : (2009) 3 PLJR 83 : (2009) 4 SCALE 474 : (2009) 15 SCC 505 : (2009) 3 SCR 428 : (2009) 3 UC 1981

Hon'ble Judges : V. S. Sirpurkar, J;S. B. Sinha, J

Bench : Division Bench

Advocate : R.C. Kaushik, for the Appellant; Sunil Gupta J.K. Sethi and Indra Sawhney, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—Leave granted.

2. Effect of a statement made by a counsel on the merit of a lis is in question in this appeal which arises out of a judgment and order dated 28.7.2008 passed by a Division Bench of the Delhi High Court dismissing an appeal from a judgment and order dated 20.7.2007 passed by learned Single Judge of the said Court.

3. Parties hereto were members of a joint family.

4. First respondent filed a suit for partition in respect of the properties fully described in Schedule appended to in the plaint. In the said suit, his brother, sisters and mother as well as children of the pre-deceased brother and Shri Amar Nath Anand, father of the appellants were impleaded as parties.

The matter came up before a learned Single Judge of the said Court on 14.10.1999. One Shri Y.K. Kapoor, learned advocate, appeared for all the defendants. He made a statement on their behalf that they were not disputing

the share of the appellant in all the properties in suit. On that premise, the question which arose for consideration of the Court was to explore the possibilities of partition by metes and bounds and/or sale of the joint properties. The counsel stated that the defendants were ready and willing to get the property sold and the plaintiff-first respondent may take his share therefrom.

Learned Single Judge recorded the order as under:

It is stated by the counsel for the defendants that the defendants do not dispute the share of the plaintiff in respect of all the properties. He further states that it is not possible to partition the property. The defendants are ready and willing to get it sold, allowing the plaintiff to take his own share. In case the properties are not partible, the parties may get a joint advertisement published in the news paper in the name of all the parties, giving their contact number after consulting each and within two weeks, so that the family property brings better price instead of making it a disputed property and selling it at a lower price. Interim order to continue till the next date subject to above modification.

5. Shri Ravi Gupta, advocate appearing on behalf of the plaintiff served a notice on Shri Y.K. Kapoor, advocate for the defendant, stating:

1. Reference is invited to your appearance and statement made on behalf of the defendants on 14.10.1999 before the Hon"ble the High Court of Delhi at New Delhi in Suit No. 844 of 1999 entitled Shri P.R. Anand v. Shri A.N. Anand and Ors. and the order passed by the Hon"ble Court pursuant thereto, please note that as per instructions from my client Shri Prahlad Rai Anand resident of 2/32, First Floor, Double Storey, Tilak Nagar, New Delhi - 110 018, the properties being subject matter of the said suit are capable of partition. As such no occasion arises for effecting sale of the immovable properties as suggested by you.

2. Take notice of the above position accordingly.

6. An interlocutory application was filed in the said suit. Notice was issued thereon. Contention of the plaintiff-first respondent therein was that he was not interested in the sale of the properties and prayed for partition thereof. The matter was taken up on 16.12.1999. The counsel appearing for the defendants, as also the plaintiffs, were asked to specify their respective stand in the matter.

The original first defendant Shri Amar Nath Anand expired on 7.5.2000.

Defendants thereafter changed their stand. An application was filed on behalf of the defendant No. 5 purported to be u/s 151 of the CPC in November 2002, alleging:

That at the time of hearing on 14.10.1999 the counsel for the defendants made the statement before the Hon"ble Court as under:

the defendants do not dispute the share of the plaintiff in respect of all the properties. He further states that it is not possible to partition the property. The defendants are ready and willing to get it sold, allowing the plaintiff to take his

own share.

That the above statement was given by the counsel of the defendants wrongly without verifying the facts of the case and without proper instructions from the defendants. In fact the said statement was to be made only in respect of the property bearing No. 1/13, Double Storey, Tilak Nagar, New Delhi which is an ancestral property. The said property is in the name of defendant No. 1, i.e., late Shri Amar Nath Anand.

XXX XXX XXX That earlier counsel engaged by the defendants had never gave the proper feed back of court proceedings as such the written statement could not be filed within the given period of four weeks from the last hearing i.e. 16.5.2000. That the mistake on the part of the counsel is neither intentional nor delebrate but due to misunderstanding of the instructions of the defendants for which the defendants apologize from the Hon''ble Court for the inconvenience cause to the Hon''ble Court. The defendants assure the Hon''ble Court that in future no such type of mistake will be repeated again.

7. On or about 12.5.2003, the plaintiff-first respondent filed a reply thereto, contending:

(b) After the death of the Defendant No. 1, who unfortunately expired on 7.5.2000, the remaining Defendants, under undue influence, motivatedly, tortured the Defendant No. 5 (Defendant No. 1's widow). The Defendant No. 1, who resides with the other defendants was not taken out of the house for weeks together and kept under lock and key by the remaining Defendants and even denied food and fought with daily, till she helplessly, was forced to sign certain blank papers, including a purported will prepared for her by the defendants and the present application which seeks to change her stand. The present application is 6 fraudulent as are the other documents, which the defendant No. 5 has been forced to sign.

(c) In the garb of seeking modification of the order dated 14.10.1999, by way of the present application, the Defendants have changed their earlier counsel and are now malafidely seeking to change the stand of the Defendant No. 1 recorded on 19.10.1999 which is nothing but seeking a review of the said order, after his death, which is not permissible in law.

(d) That the present application is made by the remaining defendants with the oblique and fraudulent motive to eschew the admissions made before this Hon''ble Court by the Defendant Nos. 1 and 5 is apparent as no such mention was made on 16.12.1999 and 21.1.2000 when this matter was heard by this Hon''ble Court and no such application was moved for more than eight months from 19.10.1999 during which period the Defendant No. 1 was alive. It is only after the death of the Defendant No. 1, who is no longer alive to reiterate his stand that the present application has been moved after coercing his hapless widow, after more than one year of passing of the said order.

8. A rejoinder thereto was filed by the defendant No. 5. The said application for modification was dismissed by a learned Single Judge of the said Court by an order dated 20.7.2007, stating:

Counsels act on instructions of their clients. Consequently, when Mr. Y.K. Kapoor, Advocate appeared and made a statement on 14.10.1999 before the court, conceding to the demand of the Plaintiff for partition "in respect of all the properties" (See order dated 14.10.1999) it is clear that this statement was made on instructions from the defendants and was within the knowledge of the Defendants including Defendant No. 5. This statement was maintained on 16th December 1999 and 21.1.2000, since it was not sought to be retracted, or challenged by the defendants. Even when the Plaintiff's Counsel issued a notice stating that the suit properties be partitioned by meets and bounds, there was no challenge to the same by contending that it was only the first property bearing No. 1/13, Double Storey, Tilak Nagar, New Delhi, which was subject to partition and not the others. The conduct of Defendants in not filing their written statement during the lifetime of the Defendant No. 1 is also indicative of the fact that the Defendants during the lifetime of the Defendant No. 1 did not dispute the claims of the Plaintiff as made in the suit.

9. The Court noticed that Shri Y.K. Kapoor had all along been representing all the defendants. It was furthermore noticed that defendants did not file their written statement during the life time of the original defendant No. 1. It was opined:

From the aforesaid, it is evident that Mr. Kapoor is also not in agreement with the stand taken by the Defendants that the statement made before court on 14.10.1999 was a result of any mistake or misunderstanding. Pertinently, no action has been initiated by the Defendants/applicants against their erstwhile Counsel. It appears that he has not even been put to notice of the alleged mis-statement or misunderstanding, and his response has not been elicited by the Defendants.

In regard to the contention that no vakalatnama was filed by Mr. Kapoor, the learned Judge held:

A perusal of paras 2 and 5 of the application, which is supported by an affidavit of Defendant No. 5 shows that Mr. Y.K. Kapoor was engaged as the Counsel for Defendants. Merely because there is no vakalatnama on record, that would not wash the fact of his appointment and authorization. Pertinently, the Defendants are not disowning the authority given to the Counsel to appear on their behalf and to make a statement in court. It is their case that there was a mistake in the statement made by him on account of a misunderstanding. Consequently, in my view it makes no difference whether or not the vakalatnama of Mr. Y.K. Kapoor is not on record.

10. An appeal was preferred thereagainst which by reason of the impugned judgment has been dismissed by a Division Bench of the said High Court, holding:

As it has been pointed out, when the statement was made on 14th October, 1999 on behalf of the defendants that they were disputing the share of the plaintiff in all the properties, the deceased defendant No. 1 as well as defendant No. 5, mother, were present in the Court. Since the statement was made by the counsel in the presence of both the parents, the contention that instructions were given to the counsel only in respect of one property does not inspire any confidence and cannot be believed. Not only this, the statement was reiterated again on 16th December, 1999 and further proceedings as to how the share of the plaintiff is to be given in these properties went on, on that basis.

It is clear from the above that the appellants have now turned turtle after the death of their father, which cannot be permitted. We may note that though there is hardly any satisfactory explanation given for delay in filing and refiling the appeal we, therefore, dismiss the appeal not only on the ground that it is time barred but on merits as well.

11. Mr. Munish Tyagi, learned Counsel appearing on behalf of the appellant, would contend that a counsel who had no specific instructions in the matter could not have made a concession on behalf of the parties. Drawing our attention to the fact that the property having been mutated in the name of Smt. Shanti Devi Anand, it was urged that no concession could have been made that the same was a joint family property or that the plaintiff had a share therein. In this connection, our attention has furthermore been drawn to a memorandum dated 1.3.1971 wherein it is stated that the property stood recorded in the records of the office of the Land and Development in the name of Shanti Devi. Learned Counsel would urge that the provisions of Order XII Rule 3 of the CPC having not been complied with, the provisions of Order XXII, Rule 6 will also not apply.

12. Mr. Sunil Gupta, learned senior counsel appearing on behalf of the respondent, on the other hand, argued that different stands have been taken by the appellants only after the death of Amar Nath Anand.

13. We have noticed hereinbefore the averments made by the petitioner in IA No. 1889 of 2002. We may also notice that in the rejoinder to the objection filed by the plaintiff-first respondent thereto, the appellant stated:

1(a) That the contents of sub para (a) are not denied to the extent that the Hon"ble Court passed the order in the presence of the defendants.... 3-5. It is respectfully submitted that the presence of the defendant Nos. 1 and 5 is not denied, but is also a hard fact...misunderstanding between the erstwhile counsel and the defendants which caused inconvenience to the Hon"ble Court....

Yet again, before the Division Bench in the Memorandum of Appeal filed in First Appeal No. 317 of 2008 which was filed on 4.12.2007, they averred as under:

(f) ...In the application u/s 151 of CPC the defendant No. 5 had honestly admitted the fact that Mr. Y.K. Kapoor was engaged as the counsel for defendants.... In fact the counsel Mr. Y.K. Kapoor misunderstood instructions of

the defendants and made the wrong statement in the court in respect of all the suit properties whereas in fact the said statement was to be made only in respect of property bearing No. 1/13....

(g) ...defendant No. 5 had honestly admitted the fact of engaging Mr. Y.K. Kapoor as their counsel....

(k) ...In the present case without filing the vakalatnama on record, the counsel Mr. Y.K. Kapoor made several appearances on behalf of the defendants unauthorisedly and the same was never noticed neither by the court master nor the concerned dealing section.

Yet again, in the rejoinder filed before this Court on 24.12.2008, it is stated:

3. ...It is further submitted that the entire fraud/cheating was made at the behest of son-in-law of the plaintiff (now respondent No. 1). It is submitted that son-in-law of respondent No. 1 is an advocate and practicing in the Hon'ble High Court of Delhi at New Delhi. He started his career by joining a law firm of Senior Advocate Shri Arun Jaitley. Shri Jitender Singh is the main culprit for the fraud which was committed by Shri Y.K. Kapoor..." ...In fact, son in law of the plaintiff namely Shri Jitender Sethi had been managing the aforesaid act of fraud which was made upon the petitioners 15. ...Order dated 16.12.1999 reflects that the petitioners/ defendants were not present....

14. Different stands taken by the appellant at different point of time is pointer to the conduct of the appellant. The records of the proceedings clearly show that the first Order dated 14.10.1999 was passed in presence of all the defendants.

Shri Kapoor represented all the defendants. If that be so, it was not unusual that in presence of their parents, all the children accepted that the plaintiff has also a share in all the properties in the suit. We may notice that Shanti Devi died in December 2003. Appellant in his application filed in November 2002 categorically admitted that Shri Kapoor was engaged as a counsel. If any misunderstanding occurred by and between him and the defendants as regards the instructions given to him, there was no reason as to why an application for rectification thereof could not be filed immediately thereafter. Instructions to that effect could have been given by Shri Amar Nath Anand and his wife also during their life time. It is difficult to accept that Shri Y.K. Kapoor would make appearance on behalf of the defendants without any authority. Again if that was so, the parties who had been appearing before the courts should not have allowed him to represent them. It is unfortunate that with a view to wriggle out of the admission, appellant has now gone to the extent of maligning a counsel who happens to be the son-in-law of the first respondent.

15. A decree can be passed on the basis of a concession of the parties. Such a concession can also be made through a counsel. The parties were present in court on 14.10.1999. They, thus, could instruct their counsel. As on the basis of the statements made by a counsel for all intent and purport, a preliminary

decree has been passed and the parties thereafter had been exploring the possibilities of partitioning the property by meets and bounds and/or taking recourse to sale thereof there cannot be any doubt whatsoever that they had knowledge of the said order dated 14.10.1999. The parties acted upon it. It is, therefore, in our opinion, too late in the day to allow the parties to take a stand contra. Having regard to the fact that they were present in court as also having full knowledge about the statement made by their counsel, it was for them to clearly spell out what could be the purported misunderstanding between them and the counsel.

In a suit for partition, the principal question which was required to be gone into was as to whether the properties were joint properties or self- acquired properties.

There were three items of the property in suit. To say now that the instruction was confined only to one of the properties, namely, 1/13, First Floor, Double Storey, Tilak Nagar, New Delhi cannot be accepted.

It is now a well settled principle of law that a counsel can make not only concession on a question of law but also on facts which would be binding on the parties. A decree can be passed on the basis of such concession in terms of Order XXII, Rule 6 of the Code of Civil Procedure. See *Jamilabai Abdul Kadar vs. Shankarlal Gulabchand and Ors.* AIR 1975 SC 2202 ; *Pushpa Devi Bhagat v. Rajinder Singh*, (2006) 5 SCC 566 and *BSNL and Others v. Subash Chandra Kanchan and Another* (2006) 8 SCC 279] .

16. For the reasons aforementioned, there is no merit in the appeal. It is dismissed accordingly with costs. Counsel's fee assessed at Rs. 25,000/- (Rupees twenty five thousands only).