

**IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA**

FAO No. 505 of 2005

Judgment reserved on 19.4.2006.

Date of Decision: May 25, 2006

Raghunath Singh

...Appellant.

Versus.

Kartar Singh

.. Respondent.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for Reporting?

For the Appellant(s): Mr. Anup Rattan, Advocate.

For the Respondent(s): Mr. Ajay Sharma, Advocate.

Deepak Gupta, J.

This appeal under Order 43 rule 1(u) CPC is directed against the judgment of the District Judge, Una in Civil Appeal No. 52/2002 decided on 3.11.2005 whereby he has set aside the judgment of the Sub Judge Ist Class (2) Amb, District Una in case No.34/96 decided on 21.3.2002.

The brief facts of the case are that the appellant (hereinafter referred to as the plaintiff) had filed a suit praying for a decree of declaration to the effect that he is joint owner of the suit land along

with respondent (hereinafter referred to as the defendant) and the land is in his exclusive possession and that the entries in the revenue record showing the suit land to be mortgaged with the defendant are wrong, illegal and null and void. Consequential relief for permanent injunction restraining the defendant from interfering in the exclusive possession of the plaintiff till partition was also prayed for. The defendant contested the suit and took various objections. In the written statement a specific plea was taken that prior to consolidation proceedings, the father of the plaintiff was in need of money and had mortgaged his share in the suit land for Rs.50/-. This mortgage was an oral mortgage and was reflected in the revenue record.

The case was tried by the learned Sub Judge Ist Class (II), Amb. The plaintiff led evidence. The defendant Kartar Singh appeared in the witness box as DW1. In his statement as DW1 recorded on 7.3.2002, the defendant clearly stated that he had only half share in khasra No.2127 and he should get his half share. He stated that he had no objection in case the suit is decreed with regard to the remaining suit land. It was on the basis of this admission that the suit of the plaintiff was decreed to the effect that the suit land is jointly owned by the plaintiff and defendant. It was further held that the same is in exclusive possession of the plaintiff. Thereafter the defendant filed an appeal before the learned lower appellate court. In this appeal, the defendant took various pleas. During the course of the

appeal, an application under Order 41 rule 27 CPC was filed which application was allowed by the lower appellate Court on 4.10.2004. Thereafter the defendant filed an application under Order 6 rule 7 CPC. This application was dismissed by the lower appellate court vide its order dated 18.10.2005 and one of the main grounds taken for dismissing the same was that no sense could be made out of the application. Thereafter the matter was heard and the appeal was allowed. The learned lower appellate court framed three new issues on the basis of the pleadings and set aside the judgment and decree and remanded the case back to the learned trial Court.

The learned lower appellate court has not at all properly appreciated the fact that the trial court had decreed the suit basically on the admission of the defendant. It is true that the defendant had taken a number of pleas in his written statement. However, while appearing in the witness box, the said defendant had clearly admitted that the plaintiff had half share in the land and he had no objection if the suit is decreed qua this half share. He only claimed to be the owner of half share. This aspect of the matter has not at all considered by the lower appellate court.

Mr. Ajay Sharma learned counsel appearing on behalf of the defendant contends that the admission was made by the defendant under some apprehension and, therefore, an application under Order 6 rule 17 PC had been filed. By filing an application under Order 6 rule

17 CPC, the defendant could not have withdrawn the admission made by him on oath before the trial Court merely by amending the grounds of appeal. The application for amending the appeal has been rejected by the learned lower appellate Court. The learned lower appellate Court has rejected the application on the ground that no application under Order 6 rule 17 CPC could have been allowed after the trial has commenced. In fact the application as filed was not an application under Order 6 rule 17 CPC. No doubt it is true that the application was termed as an application under Order 6 rule 17 CPC. However, what was sought to be amended was the grounds of appeal and not the pleadings before the trial Court. Such an application should have been filed by invoking the provisions of order 41 rule 2 CPC. However, I do not want to say anything further in the matter in view of the position I am taking that the judgment of the learned lower appellate court is illegal and the matter has to be referred back to it.

As observed above, the learned trial Court had decreed the suit basically on the admission of the defendant which fact has not at all been noted by the lower appellate court. Whether this admission could have been withdrawn or could have been permitted to be withdrawn is a matter which the lower appellate court should decide. However, till the admission stands, the judgment of the learned trial Court cannot be said to be incorrect. The learned trial Court has, therefore, gravely erred in casting fresh issues and remanding the case

when there was no occasion for the same in view of the admission of the defendant. Therefore, the judgment of the learned lower appellate court is set aside and the matter is remanded to it for deciding the same in accordance with law. The defendant shall be at liberty to argue that the admission was wrongly made by him but it is for the learned lower appellate Court to decide whether the defendant can be permitted to get out of his admission or to withdraw the same.

Parties through their learned counsel are directed to appear before the learned lower appellate Court on 26th June, 2006. The Registry is directed to send back the records of the case so as to reach the lower appellate court before the date fixed.

The appeal is disposed of in the aforesaid terms. No costs.

May 25, 2006.

(Deepak Gupta),
Judge.

s.