BISHWANATH PRASAD AND OTHERS

v.

DWARKA PRASAD (DEAD) AND OTHERS

October 30, 1973

[H. R. KHANNA, V. R. KRISHNA IYER AND R. S. SARKARIA, JJ.]

Indian Evidence Act (1 *of* 1872), *s.* 21—*Admission—Distinction between admissions of party and admissions of witness.*

In a suit for partition the first defendant (respondent in this Court) claimed that the disputed items of property exclusively belonged to him. The trial court as well as the High Court accepted his case on the basis of admissions made by the first plaintiff and the eighth defendant (father of the plaintiff) in depositions in an earlier suit as well as similar admissions made in the written statement filed in that suit by the eighth defendant together with the present plaintiffs, and held that the said property belonged to the first defendant.

It was contended in this Court that (1) the courts below relied on the admissions of the plaintiffs and the eighth defendant which were not even suggested in the written statement and as such a new case which was at total variance from the pleadings should not have been considered by the court; and (2) these admissions were not put to the first plaintiff, when he was in the witness box; nor was the eighth defendant summoned for examination by the first defendant to give him an opportunity to explain the admissions.

Dismissing the appeal,

HELD : There is no doubt that if the depositions of the first plaintiff, the deposition by the eighth defendant and the written statement filed by these parties in the title suit were reliable, the plaintiff's case was damaged by their own admissions. [126B]

(1) Although the first defendant's basic defence was a denial of joint family ownership even in the trial court the admissions had been considered and acted upon. Even in the High Court the appellants did not state that they had been prejudiced by the reliance on the admissions by the trial court nor did the appellants contend before the High Court of any prejudice by not being given an opportunity to explain the material against them. Neither in the memorandum of appeal appended to the application for a certificate nor in the statement of the case in this Court was a ground raised on this point. [126G-H]

(2) It cannot be contended that because the disputed setatements had not been put to the first plaintiff when he was in the witness box or to the eighth defendant they could not be used against him. [127A]

There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case an admission by a party is substantive evidence if it fulfils the requirements of s. 21 of the Evidence Act; in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore;* in the latter case the court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by s. 145 of the Evidence Act. [127B-C]

Bharat Singh & Anr. v. *Bhagirathi,* [1966] 1 S.C.R. 606, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1787 of 1967.

Appeal from the judgment and decree dated January 31, 1963 of the Patna High Court in Appeal from Original Decree No. 77 of 1958.

A *M. B. Lal*, for the appellants.

Sarjoo Prasad and *S. N. Prasad*, for respondents Nos. 2-7 & 14-18.

The Judgment of the Court was delivered by

KRISHNA IYER, J. The dispute is short, the points of law few, the evidence largely made up of admissions, and so the judgment B permits of brevity. A vignette of the facts is all that is therefore necessary.

This appeal arises out of a suit for partition where the narrow area of conflict in this Court is continued to two items claimed by the plaintiffs but disallowed by the High Court. The first two of the three points formulated for determination by the High Court reflect the controversy raised before us and may be expected :

C

> 1. Whether the said shop-room at the extreme north west corner of plot No. 1238 belongs exclusively to the defendants first party;
>
> 2. Whether the entire properties mentioned in Schedule C to the plaint are joint family properties liable to partition, and. . . .

D

Point No. 2 relates to three items in Schedule C to the plaint which were covered by four usufructuary mortgages, Ex.B-1 to B-4. The case of the first (contesting) defendant, who is the first respondent before us now, is that these items of property exclusively belonged to him. The Trial Court has accepted this case and the High Court has affirmed this finding. The foundation for these concurrent findings E is the admissions made by the first plaintiff and the eighth defendant, the father of the plaintiff, in depositions in an earlier suit, Title Suit No. 61 of 1945, as well as similar admissions made in the written statement filed in that suit by the present eighth defendant (who was first defendant there) together with the present plaintiffs, two of whom were majors at that time. The inference fluently drawn by the courts below from these admissions is that the said property F belongs to the first defendant.

Some challenge has been made in this Court about the propriety of relying on these admissions but we will deal with it a little later. Suffice it to say for the present that admissions are usually telling against the maker unless reasonably explained, and no acceptable ground to extricate the appellants from the effect of their own earlier statements has been made out. Be that as it may, concurrent con- G clusions from the two judicial tiers ordinarily find this Court's doors closed unless substantial reasons to the contrary exist. Having heard arguments at length we are disposed to agree with the High Court on the issue of the properties items 1 to 3 in Schedule C to the plaint.

The other short dispute relates to a shop-room at the north- H west corner of plot No. 1238. Here again the admissions of the eighth defendant and the plaintiffs, already referred to before, stand in the way of the plaintiffs' success. While the trial court partially upheld the possession of the first defendant of this shop-building it did not

go the whole hog in upholding his right. The learned Judges of the High Court held that the same admissions which had been relied upon by the trial court for holding in favour of the first defendant's title to the mortgaged lands covered by Exs. B-1 to B-4 operated against the plaintiffs regarding the shop-building also. There is no doubt that if the admissions—Ex. G (the deposition of the present first plaintiff in Title Suit No. 61 of 1945), Ex. G2 (the deposition in the same suit by the present eighth defendant, and Ex. H (the written statement filed by these parties in the earlier suit —are reliable, the plaintiffs' case is damaged by their own admissions. The High Court has taken this view and concluded :

> "On the strength of the written statement and the other statements aforesaid, there is no escape from the conclusion that this disputed shop-room was allotted to defendant No. 1 in the partition that took place in 1938."

Council for the appellants strenuously urged that the fatal admissions used against him have prejudiced him for many reasons. He contended that, for one thing, these statements were vague and therefore insufficient to justify a clear verdict against his client. For another, he argued, the case of the first respondent was that the suit for partition was not maintainable because the properties claimed belonged to him as heir of his father, Narain Sah, and the alternative case which has found favour with the courts below, based on the admissions of the plaintiffs and the eighth defendant, was not even suggested in the written statement, and as such a new case at total variance from the pleadings should not have been considered by the court. His further grievance is that these admissions were not put to his client, the first plaintiff, when he was in the witness box; nor was the eighth defendant summoned for examination by the first defendant to give him an opportunity to explain the admissions. Therefore, counsel contended that he was seriously harmed by the surprise reliance on statements atributed to his clients without extending a fair opportunity to them to offer their explanation and neutralise the effect of the admissions.

We are not satisfied that there is any substance in the grievances voiced by counsel. There was no *volte face* on the part of the first defendant. Although it is true that his basic defence was a denial of joint family ownership, it is seen that even in the trial court Exs. G, G2 and H had been considered and acted upon. In the appeal to the High Court the present appellants did not state that they had been hit below the belt by the reliance on the admissions by the trial court in holding against them. Indeed, there is no suggestion in the judgment of the High Court that the appellants had even contended about any prejudice to them or that they had been denied an opportunity to explain the material so used against them. What is more, it is found that at no stage subsequent to the High Court decision, either in the memorandum of appeal appended to the application for a certificate or in the statement of the case in this Court, has there been a pointed ground of complaint about the unfair reliance on the admissions aforesaid to the detriment of the appellants. Under these circumstances it is difficult to take the plea of prejudice seriously in the absence of earlier articulation thereof.

A There is no merit even in the contention that because these three statements—Exs. G, G2 and H—had not been put to the first plaintiff when he was in the witness box or to the eighth defendant although he had discreetly kept away from giving evidence, they cannot be used against him. Counsel drew our attention to s. 145 of the Indian Evidence Act. There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined B and is sought to be discredited by use of his prior statement. In the former case an admission by a party is substantive evidence if it fulfils the requirements of s. 21 of the Evidence Act; in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore*: in the C latter case the Court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by s. 145 of the Evidence Act. This distinction has been clearly brought out in the ruling in *Bharat Singh* v. *Bhagirathi*(1). This Court disposed of a similar argument with the following observations :

D "Admissions are substantive evidence by themselves, in view of ss. 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admis- E sions. The purpose of contradicting the witness under s. 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attach- F ed to an admission made by a party is a matter different from its use as admissible evidence."

We, therefore, reach the conclusion that the appellants' arrival in this Court has been an exercise in futility. The appeal must, therefore, fail and is hereby dismissed. There is some force in the submission that the first respondent had throughout in his pleadings set out a G case against the joint family character of the properties and it was only at the stage of the evidence that he fell back on the alternative case that has got him through. We, therefore, direct that the appellants shall be directed to pay only half the costs in this Court.

P.B.R. *Appeal dismissed.*

H

(1) [1966] 1 S.C.R. 606; 615-616.