

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA RSA No.709 of 2008. Judgment reserved on: 13.11.2019. Date of decision: 18 th November, 2019.

Satish KumarAppellant. Versus Mahant RamRespondent. Coram The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge. Whether approved for reporting?1. No For the Appellant : Mr. Romesh Verma, Advocate. For the Respondent : Mr. Nitin Thakur, Advocate.

Tarlok Singh Chauhan, Judge Defendant is the appellant, who aggrieved by the judgment and decree passed by the learned first appellate Court on 01.10.2008, whereby it decreed the suit filed by the plaintiff and set aside the judgment and decree passed by the learned trial Court, has filed the instant Regular Second Appeal. 2. The parties hereinafter shall be referred to as the "plaintiff" and the "defendant". 3. The plaintiff filed a suit for recovery of Rs.1,63,520/- from the defendant being the price of fuel wood with interest at the rate of 12% per annum. It was averred that the plaintiff was dealing in the

1Whether the reporters of the local papers may be allowed to see the Judgment?Yes business of supplying of fire wood to the brick kilns and others. On 28.12.1992, an agreement in writing was entered into between the plaintiff and the defendant, whereby the plaintiff agreed to supply to the defendant 3000 quintals of fuel wood at the rate of Rs.69/- per quintal and in case the plaintiff would not supply the wood, the defendant would calculate the amount of the supplied wood at the rate of Rs.19/- per quintal. It was further averred that half of the price of the wood would be paid by the defendant to the plaintiff up to 31.03.1993 and the remaining by 30.08.1993 and in case the defendant fails to make the entire payment on the above date, he would pay the amount of fuel wood at the rate of Rs.80/- per quintal. It was also averred that loading/unloading and freight charges would be paid by the defendant on each trip. The plaintiff supplied 3032 quintals fuel wood and the defendant paid Rs. 1,03,326/- and after deducting Rs.36,384/- being loading/unloading and freight at the rate of Rs.12/- per quintal, only Rs.66,942/- were received by the plaintiff from the defendant as the price of only 988 quintals wood and as such out of 3032-988, now 2044 quintals is to be charged at the rate of Rs.80/- per quintals, which comes to Rs.1,63,520/- and even the defendant failed to pay the price of wood by the due date and, therefore, liable to pay the aforesaid amount, hence, the suit. 4. The defendant contested the suit by filing written statement wherein he took preliminary objections qua cause of

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action, maintainability and estoppel. On merits, it was averred that the plaintiff did not approach the Court with clean hands. The plaintiff and defendant had entered into an agreement dated 28.12.1992 to supply the fuel wood, however, the said agreement was not acted upon by the plaintiff and failed to perform his part of the contract for the reasons best known to him. It was denied that the plaintiff supplied 3032 quintals of fuel wood, therefore, the question of any payment does not arise. It was averred that the plaintiff vide writing dated 08.11.1993 had admitted that nothing remains to be paid by the defendant up till 08.11.1993, after he received Rs.14,451/- and prayed for dismissal of the suit. 5. On the pleadings of the parties, the learned trial Court on 05.04.1995 framed the following issues:"1. Whether the plaintiff is entitled for recovery of Rs.1,63,520/- as alleged? OPP. 2. Whether the suit is not

maintainable and plaintiff has no cause of action? OPD. 3. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD. 4. Relief.”

6. After recording evidence and evaluating the same, the learned trial Court dismissed the suit constraining the plaintiff to file an appeal before the learned first appellate Court which, as observed above, came to be allowed vide judgment and decree dated 01.10.2008, leading to filing of the present appeal at the instance of

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the defendant, which was admitted on 31.12.2008 on the following substantial questions of law: “1. Whether the material admissions on the part of the respondent especially in respect of document, Ex.A-1 and Ex. R-1 have wrongly been ignored by the learned District Judge and thus the findings are vitiated? 2. Whether the impugned judgment and decree are beyond the scope of pleadings of the respondent and learned lower appellate Court has developed entirely a new case which as neither pleaded, nor proved on record and thus the appellant has been taken with surprise?”

Substantial Questions of Law No.1 and 2.

7. Since both these questions are intrinsically interconnected and interlinked, therefore, they are taken up together for consideration and are being disposed of by common reasoning. 8. The plaintiff in order to prove his case has led his evidence by way of affidavit wherein he reiterated the contents of the plaint and claimed to have supplied 3032 quintals of wood, but the defendant paid only Rs.1,03,326/- out of which Rs.36,384/- were loading and unloading charges and in addition thereto Rs.12/- per quintal were liable to be deducted towards freight charges and as such only Rs.66,942/- were paid which was the price of 988 quintal of wood. As such, the defendant was liable to pay for the balance of 2044 quintal at the rate of Rs.80/- per quintal, which comes to Rs.1,63,520/-. He proved on record the legal notice and also the

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procured permits from the Forest Department which are Ex.P-1 and Ex. P-2. 9. PW-1 Som Nath, an official from the office of the D.F.O., Una proved on record both these permits and in cross examination, he admitted that for issuance of these permits, no application was received by their office. 10. PW-2 Harish Kumar placed on record an agreement Ex. A-1. PW-4 Joginder Pal placed on record receipts Ex. PW4/A to Ex. PW4/P. PW-5 Shri R.D. Sharma, Advocate, proved on record the legal notice Ex. PW5/A that was issued by him on behalf of the plaintiff to the defendant along with postal receipt Ex. PW5/B. He stated that registered letter was received back undelivered with acknowledgement Ex.PW5/C. 11. To rebut the evidence of the plaintiff, the defendant led his evidence by way of an affidavit wherein he reiterated the averments as contained in the written statement and stated that even though an agreement was entered into between the parties, but the same was not acted upon. He claimed that

no fuel wood had in fact been supplied in terms and conditions of the agreement. He further stated that on 08.11.1993, the plaintiff issued a receipt wherein he admitted that he had already received the payment and had further received a sum of Rs.14,451/- for supply in the next year and there was nothing due from the defendant.

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12. At this stage, it needs to be noticed that earlier to the evidence led by the parties on the main issues, the plaintiff had filed an application under Section 65 of the Indian Evidence Act for permission to lead secondary evidence of the agreement Ex. A-1. The same was duly allowed and thereafter the plaintiff led secondary evidence. 13. While, appearing as AW-1, the plaintiff got recorded his statement on oath on 07.05.2003 and in his cross examination he not only admitted that the receipt Ex.R-1 was duly signed by him, but, he further stated that the same was correct. Even, while appearing as PW-3, he admitted that his statement had earlier been recorded by the Court on 07.05.2003 and further admitted the correctness of Ex. R-1 and being duly signed by him and further stated that both the statements are correct. But, thereafter he tried to wriggle out of the receipt and this fact was duly noted by the learned trial Court, as is evident from paras 11 and 12 of the judgment which reads as under: "11. From the statement of the plaintiff discussed above, it becomes quite clear that plaintiff issued receipt Ex.R-1 which is duly signed by him and plaintiff admitted this receipt to be correct. The receipt Ex. R-1 was issued on 8.11.1993 in which, it is specifically mentioned that he has not to receive any amount from M/s Satish Kumar for the previous year. It is admitted by plaintiff in this receipt that for the new year, he is taking advance of Rs.14,451/- from the defendant.

12. The plaintiff has also placed reliance on the receipts Ex. PW4/A to Ex. PW4/P. Perusal of this receipt Ex. PW4/P reveals

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that it bears date as 15.2.1993 and Sr. No. 300 whereas receipt Ex. PW4/A bears date 17.2.93 but serial No. 299 which fact falsifies genuineness of these receipts. The plaintiff cannot derive any benefit from these receipts as name of the defendant is not mentioned on these documents and as per statement of Som Nath, an official of the forest department, no application was received by their office for issuance of permits Ex.P1 and Ex.P2 on record. Thus, the plaintiff infact, has failed to prove on record that he is entitled to recover the suit amount from the defendant. Accordingly, issue No.1 is decided against the plaintiff and issue No.2 in favour of the defendant."

14. This led to dismissal of the suit of the plaintiff. However, when the matter was carried in appeal by the plaintiff, the learned first appellate Court reversed the findings of the learned trial Court that too on surmises and conjectures. The learned first appellate Court proceeded to question the execution of the subsequent receipt Ex. R-1 itself. As regards, the execution of this receipt, the defendant had made a

specific reference to the agreement in para-7 of the written statement and the relevant portion thereof reads as under: "7.....The plaintiff vide his writing dated 8.11.1993 admitted therein that nothing remains to be paid by the defendant for the past i.e. upto 8.11.1993 and further received Rs. 14,451/- for supplying the fuel wood for the ensuing year which agreement has also never been acted upon at the hands of the plaintiff and when the defendant demanded the amount duly paid to the plaintiff along with interest at the market rate the plaintiff made out a false, frivolous and baseless suit for recovery against the defendant as a counter blast to the said agreement dated 8.11.1993. The defendant reserves his right

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to file a suit for recovery in terms of the agreement dated 8.11.1993 duly signed and admitted by the plaintiff in the appropriate court of law." 15. The plaintiff while filing replication did not deny the execution of the receipt Ex. R-1 and the only defence put up by him was that he had not received Rs.14,451/- subsequent to the agreement. This would be clearly evident from para-7 of the replication which is reproduced hereinbelow in its entirety and reads thus: "7. That para No. 7 of the written statement is totally wrong hence denied. It is wrong that the plaintiff received Rs.14,451/- subsequent to the agreement. It is also wrong that the present suit is counter blast."

16. Therefore, once the execution of the receipt Ex. R-1 is not denied, then obviously, consequences that flow out of it cannot be avoided by the plaintiff. 17. Adverting to the receipt Ex. R-1, the same reads as under:

"jln

eSa Jh egUr jke S/o Jh ujk;k flgWa xkWao cwBku rfg cMlj ftyk gehjiqj Is ydM+h dk tks eSusa M/s Sh. Satish Kumar Is fiNys lky Agreement Courts ¼/klrhZ½ fd;k Fkka eSa fQj nqkckjk mlh Agreement ds vuqlkj M/s Sh. Satish Kumar B.K.D. Behdala Distt. Una Is eSa vkus u;s o'kZ 14451@& Advance ys jgk gwW vxj eSus ftruh jde Advance yh gS ml dh fdlh izdkj ydM+h nsus Is bUdkj dj nwWa rks eSa nqxuh jde nsus dks rS;kj gWawA ckdh vxj esjh ct; Is HkBs dk ydM+h u nsus ij dksbZ uqdlku gks rks eSa ftesokj gWawA

ckdh ejsk bu Is fiNys lky dk ysu nsu ckdh dksbZ ughaA

14451 : olwy ik,A gLrk 8@11@93 Mahant Singh s/o Narain Singh Vill. Bathan PO Lohara, Teh. Barsar Distt. Hamirpur (HP)"

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18. It would be evident from a perusal of the receipt that it has been specifically stated therein that the plaintiff has nothing to recover from the defendant of the previous year. 19. On the basis of the aforesaid discussion, it can conveniently be held that the learned first appellate Court has failed to

appreciate documents Ex.A-1 and Ex. R-1 in their right perspective, more particularly, the material admissions made in receipt Ex. R-1 and has further travelled beyond the pleadings of the case by raising a question mark regarding execution of receipt Ex. R-1, the execution whereof was not even denied by the plaintiff. Both the substantial questions of law, referred to above, are answered accordingly. 20. In view of the aforesaid discussion, I find merit in this appeal and the same is accordingly allowed. The judgment and decree passed by the learned first appellate Court on 01.10.2008 are ordered to be set aside and that of the learned trial Court are restored. Parties are left to bear their own costs.

18th November, 2019. (Tarlok Singh Chauhan) (krt)