

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.144 of 2012

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Sri Satyendra Tiwary & Ors.

.... Interveners Defendants-Appellants
Versus

Sri Sarveshwar Tiwary & Ors.

.... Plaintiffs-Respondents

with

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First Appeal No. 174 of 2012

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M/S Navyug Homes Pvt. Limited

.... Defendant-Appellant

Versus

Sri Sarveshwar Tiwary & Ors.

.... Plaintiffs-Respondents

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(Both the appeals against the common judgment and decree dated 30.06.2012 passed by Subordinate Judge-III, Patna in Title Suit No.234 of 2010).

For the Appellants in F.A. No.144 of 2012 : Mr. Sukumar Sinha, Sr. Advocate
Mr. J.S. Arora, Advocate
Mr. Avinash Kumar, Advocate
Mr. Pankaj Maijorwar, Advocate.

For the Appellants in F.A. No.174 of 2012 : Mr. J.S. Arora, Advocate
Mr. Manoj Kumar, Advocate.

For the Respondents in both the appeals : Mr. Jitendra Kishore Verma, Advocate
Mr. Anjani Kumar, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 07-01-2015

Both the first appeals arise out of the common judgment and decree dated 30.06.2012 passed by the learned Subordinate Judge-III, Patna in Title Suit No.234 of 2010. First Appeal No.144 of 2012 has been filed by the intervener defendants whereas First

Appeal No.174 of 2012 has been filed by the original defendant M/s Navyug Homes Private Limited.

2. The plaintiffs-respondents have filed the aforesaid Title Suit No.234 of 2010 praying for enforcement of the development agreement dated 29.03.2005 against the appellant of First Appeal No.174 of 2012. It may be mentioned here that the developer defendant, who is appellant in the First Appeal No.174 of 2012 was the sole defendant. The plaintiffs claimed the relief that the developer is liable to deliver possession as per the development agreement, 25% of Schedule II and III properties to the plaintiffs as agreed. It further appears that after institution of the suit the interveners filed application for being added as party defendants whose application was allowed and they were added as party defendants, who are appellants in First Appeal No.144 of 2012.

3. The plaintiffs-respondents alleged that out of 100% of the built up portion, 50% share is of the builder developer whereas 50% belongs to the land owners. The suit property with construction was allotted to the plaintiffs along with the heirs of Jaduvansh Tiwari, Hargovind Tiwari and Abhilakh Tiwari having 20% share each out of 100%. Subsequently there was exchange of shares between the plaintiffs, the heirs of Jaduvansh Tiwari, Hargovind Tiwari and Abhilakh Tiwari with the shares allotted in Kolkata property. The



heirs of Jaduvansh gave 10% of their share in exchange to the heirs of Abhilakh and likewise the heirs of Jaduvansh Tiwari gave 10 % share to the heirs of Jagdish Tiwari, i.e. the plaintiff. 20% share of Hargovind Tiwari was also given by him to the heirs of Abhilakh Tiwari in exchange. Thereafter the defendant developer-appellant of First Appeal No.174 of 2012 entered into development agreement with owners of the suit property. After exchange the plaintiffs together have got 25% share out of 50% and the remaining 25% belong to the heirs of Abhilakh Tiwari. The heirs of Hargovind Tiwari and Jaduvansh Tiwari became the confirming party in the development agreement dated 29.03.2005 wherein the plaintiffs with the heirs of Abhilakh Tiwari were the party shown as owners of the property. Thereafter the defendant-builder developer completed the construction pursuant to the said agreement in the name of 'Sidhi Vinayak Plaza' within the period prescribed in the agreement but because of price rise the possession of the flats was not given by the developer either to the plaintiffs or to the heirs of Abhilakh Tiwari. Therefore, the plaintiffs filed the suit for enforcement of the said development agreement.

4. The defendant developer filed written statement. The interveners, who were added as party, subsequently also filed written statement. Thereafter an application was filed by the plaintiffs on



14.09.2010 under Order 12 Rule 6 of the Code of Civil Procedure for passing a judgment and decree on admission against defendant developer in favour of the plaintiffs. By the impugned judgment and decree the court below passed the judgment in terms of Order 12 Rule 6 of the Code of Civil Procedure decreeing the plaintiffs-respondents' suit. Against this judgment and decree passed on admission, both the appeals have been filed.

5. The learned senior counsel Mr. Sukumar Sinha appearing in the First Appeal No.144 of 2012 submitted that the learned court below without applying his judicial mind has decreed plaintiffs' suit on admission by committing error of record. The interveners-appellants had filed written statement denying the case of the plaintiffs and claiming their share to the extent of 20% and also bringing the fact to the notice of the Court that another title suit filed by them is pending but the court below while passing the impugned judgment and decree held that defendant no.2 appeared but not filed written statement. According to the learned counsel, after judgment is written and typed this statement has been written by the Presiding Officer by his pen. In fact the written statement was filed by all the appellants. Therefore, the court below without considering the defence of the interveners-appellants has decreed the plaintiffs' suit against the developer on admission. This error committed by the court

below is sufficient enough to set aside the judgment and decree impugned.

6. The learned counsel further submitted that admittedly there were five brothers, therefore, the interveners, who are representing the branch of one brother, have got 20% share in the property and according to the plaintiff there was exchange between the parties but no document is there showing exchange and in fact there was no exchange and exchange could not have been made without the registered document. The plaintiffs filed the aforesaid suit in the garb of enforcement of development agreement, which is in fact for declaration of title and the appellants have filed Title Suit No.110 of 2010 for enforcement of their agreement. According to the appellants the developer entered into agreement with the interveners and constructed the flats. The court below without considering this aspect wrongly recorded that no written statement has been filed and decreed the plaintiffs-respondents' suit, therefore, the impugned judgment and decree is liable to be set aside and the matter be remanded to the court below for a fresh decision after framing issues.

7. The learned counsel Mr. J.S. Arora appearing for the appellants in First Appeal No.174 of 2012 submitted that the learned court below has misdirected itself in assuming admission without considering the legal position that the principles of non-traverse in the



written statement as provided under Order 8 Rule 3 to 5 of the Code of Civil Procedure cannot be held to be admission within the meaning of the term used in Order 12 Rule 6 of the Code of Civil Procedure. According to the learned counsel, there must be clear and unambiguous admission admitting the case of the plaintiffs in the pleading, i.e. written statement of the defendant then only the judgment cannot be passed under Order 12 Rule 6 of the Code of Civil Procedure. In the present case the court below in the judgment held that the defendant developer has not denied the case pleaded by the plaintiffs, therefore, it will amount to admission and then passed the impugned judgment and decree. The learned counsel submitted that non-traverse will never be the admission and on the basis of the said principle no judgment can be passed under Order 12 Rule 6 of the Code of Civil Procedure. The learned counsel giving the instances to the effect that if no written statement is filed then also the court is required to pass the judgment and decree after satisfying the fact that whether the plaintiff is entitled for the relief or not but no direct judgment can be passed under Order 12 Rule 6 of the Code of Civil Procedure. In support of the case the learned counsel relied upon the decision of the Hon'ble Supreme Court in the case of **Himani Alloys Limited Vs. Tata Steel Limited, reported in (2011) 15 Supreme Court Cases 273.**

8. The learned counsel further submitted that the fact pleaded by the plaintiffs in paragraph 2 and 3 of the plaint are with respect to exchange of property among the successors of the five brothers and partition among the persons, who had entered into development agreement. Therefore, these facts were not known to the appellants, as such, in the written statement at paragraph 16 to 18 replied the same. The court below wrongly assumed that since the plaintiffs' case is not denied it will amount to admission and passed the judgment under Order 12 Rule 6 of the Code of Civil Procedure. In view of the aforesaid pleading in the plaint the fact alleged by the plaintiffs was required to be decided finally in the suit and in the agreement there is no such statement made. In such circumstances the defendants clearly pleaded that the suit is not maintainable and the relief claimed by the plaintiffs cannot be granted. The learned counsel further submitted that failure to prove the defence does not amount to an admission and likewise non-denial or non-response to a plea if not supported by evidence cannot be deemed to be admitted by applying doctrine of non-traverse because the pleadings are not the substitute of evidence. The learned counsel relying on the decision of the Supreme Court in the case of **V.M. Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao and another, reported in (2005) 4 Supreme Court Cases 613** submitted that even if an admission

leading to an order under Order 12 Rule 6 will not lead to waiver of the objection as to maintainability of the suit and that has to be tried.

9. On the other hand, the learned counsel Mr. Jitendra Kishore Verma appearing for plaintiffs-respondents in both the appeals submitted that the learned trial court has rightly passed the impugned judgment and decree considering the fact that the developer has admitted the case of the plaintiffs. According to the learned counsel the developer in paragraph 8 to 10 of this written statement clearly admitted all the case of the plaintiffs. He admitted the plaintiffs who are heirs of Jagdish and Bhagirathi and the heirs of Abhilakh as owners with whom he entered into agreement dated 29.03.2005. In the agreement he admitted the plaintiffs and heirs of Abhilakh as absolute owner. The agreement is not challenged by the developer. He admitted to have come in possession of the land and construction of multistoried building according to the development agreement. He also admitted his liability to hand over possession of 50% shares of land owners and expressed his willingness in the W.S. to give possession. Therefore, there is no dispute between the plaintiffs and developer according to the pleadings but the developer with ulterior motive is lingering the litigation at the instance of others who have filed Title Suit No.110 of 2010. However, prayer for stay made by the developer was rejected by this court which was



confirmed by the Supreme Court also and the plaintiffs have got their 25% share and the owners of remaining 25% share have been added as co-plaintiffs in the court below and the amendment application filed by the co-plaintiffs is pending. The defendant developer after taking advantage under the agreement is now disputing the title of the plaintiffs which speak a volume against the intention of the developer. He cannot be allowed to blow hot and cold at a time.

10. The learned counsel further submitted that the case of the interveners that they have got 20% share is concerned that cannot be decided in the present suit. They have not filed any counter claim. Moreover for getting possession they have already filed Title Suit No.110 of 2010. If that suit will be decided in their favour they will get possession. However, it is immaterial for them as to whether they will get possession from builder or from plaintiffs but for the reason that Title Suit No.110 of 2010 is pending the possession should not be allowed to remain with developer particularly when the developer is admitting the ownership of plaintiffs and heirs of Abhilakh. The learned counsel further submitted that in view of these facts the W.S. of the intervener is not required to be considered. Therefore, on the ground of wrong statement in judgment the matter cannot be remanded because the disputes raised by the interveners in their W.S. are outside the purview of decision in a suit for specific performance

of contract. According to the learned counsel they are not necessary party and they have wrongly been added as party in the suit. On these grounds the learned counsel submitted that both the appeals be dismissed.

11. Both the learned counsels appearing on behalf of the appellants as well as on behalf of the respondents have filed their respective written arguments elaborating their submissions.

12. In view of the above contentions of the parties the following points arise for consideration in both these first appeals:-

- (A) Whether the original defendant-appellant of First Appeal No.174 of 2012 has admitted the case of the plaintiffs in the written statement and on the basis of the said admission whether the court below could have passed the judgment and decree under Order 12 Rule 6 C.P.C.?
- (B) Whether because of error of record committed by the trial court in the impugned judgment, the whole judgment and decree is vitiated and is liable to be set aside or not?

So far point no.(A) is concerned, it relates to First Appeal No.174 of 2012 whereas point no.(B) relates to First Appeal No.144 of 2012.

Point No.(A)

13. The plaintiffs-respondents originally filed Title Suit No.234 of 2010 against the sole defendant M/s Navyug Homes Private Limited praying for a decree that the plaintiffs are entitled to



enforce the development agreement dated 29.03.2005 as it is, against the defendant developer. The plaintiffs-appellants prayed for declaration that the defendant developer is liable to deliver possession as per the development agreement, 25 % Schedule II and III properties as agreed and shown as per Annexure-2 and 3 series, i.e. 25% share to the plaintiffs and further prayed for mandatory injunction mandating to deliver possession of the Schedule II and III properties shown in Annexure-2 and 3 and further the defendant developer be restrained from disturbing the status quo, i.e. vacant possession of Schedule II and III shown in Annexure 2 and 3A.

14. The plaintiffs (heirs of Jagdish Tiwari and Bhagirathi Tiwari) claimed the aforesaid relief mainly alleging that the heirs of two brothers namely Jaduvansh Tiwari and Hargovind Tiwari exchanged their sharers with the heirs of three brothers namely Abhilakh Tiwari, Jagdish Tiwari and Bhagirathi Tiwari, who became the owners of 100% of land of plot no.797 measuring 2.71 katha. These owners entered into agreement with developer on 29.03.2005. In the said agreement the heirs of Hargovind Tiwari and heirs of Jaduvansh Tiwari became confirming party to the said development agreement in view of the exchange of shares. According to the said agreement, the share of the plaintiffs was 50% out of 50% and the remaining 50% was of the developer. The defendant was to complete

the construction within two years. It was also agreed that the developer will first hand over the owner's share before taking over the developer's share. There is no dispute between the plaintiffs and the heirs of Abhilakh Tiwari with respect to their allotment in the built up area.

15. The further case is that the defendant developer completed the construction in the name of 'Sidhi Vinayak Plaza' within stipulated period and after completion the defendant-developer started playing fraud and fraudulently possession of the share of the plaintiffs and Abhilakh Tiwari, i.e. 50% was not delivered either in the flats or shops or parking area. The developer without delivering possession to the owners, sold out to different customers his share. The plaintiffs demanded delivery of possession of their 25% share but the developer issued notice to all other persons, i.e. to conforming party also and entangled parties in dispute.

16. The defendant developer filed written statement clearly taking a stand that he is ready to hand over possession of 50% share of the owners. The defendant also took various ornamental pleas such as the suit is not maintainable, barred by law of limitation etc.

17. In view of the above facts the controversy between the plaintiffs and the defendant is with respect to 25% share of

constructed portion of the plaintiffs.

18. From perusal of the plaint filed by the plaintiffs the clear case is that the plaintiffs and heirs of Abhilakh Tiwari entered into development agreement with the defendant developer. The possession of the land was given by these owners, i.e. plaintiffs and heirs of Abhilakh Tiwari to the developer. Agreement was that owners will get 50% of the constructed portion and 50% will go to the developer. The developer completed the construction but is not giving possession to the plaintiffs and heirs of Abhilakh Tiwari. In the written statement the defendant developer at paragraph 8 admitted the execution of the agreement dated 29.03.2005 between the parties. In the said paragraph the developer also admitted 50% share of the plaintiffs and heirs of Abhilakh Tiwari. At paragraph 9 the developer also admitted that he constructed multistoried building in terms of the agreement dated 29.03.2005 after taking possession of the land from the owners, i.e. the plaintiffs and heirs of Abhilakh Tiwari. In paragraph 9 the developer also admitted that construction has already been completed. In both these paragraphs he also admitted that there is no dispute regarding identity of 50% share of owners and 50% share of developer. The developer also acknowledged his liability to hand over possession of 50% share to the land owners and the statements in paragraph 9 and 10 of the written statement clearly

show that he expressed his willingness to hand over possession of 50% share to the land owners jointly. In view of these above pleading now each and every case pleaded by the plaintiffs entitling them to get possession is admitted by the defendant. There is nothing remained to be decided in the present case because the plaintiffs had sought for enforcement of the agreement, i.e. for directing the developer to hand over possession to the plaintiffs, who are entitled for 25 % out of 50%.

19. Order 12 Rule 6 of the Code of Civil Procedure reads as follows:-

- (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.
- (2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.

20. In view of the aforesaid provision the Court has the jurisdiction to pronounce the judgment on admission at any stage where admission of facts have been made either in the pleading or otherwise. In the present case as discussed above, I find that in the above paragraphs of the written statement the developer admitted



each and every fact pleaded by the plaintiffs on the basis of which the plaintiffs sought for relief. The developer is not challenging the genuineness or otherwise of the agreement dated 29.03.2005, therefore, it stands admitted. Obtaining of possession of land from the plaintiffs and heirs of Abhilakh Tiwari is also admitted and likewise construction and share of the plaintiffs is admitted and also admitted that he is ready to hand over possession. The only objection raised by the developer is all the land owners should come jointly together.

21. The Hon'ble Supreme Court in the case of **Himani Alloys Limited Vs. Tata Steel Limited, reported in (2011) 15 Supreme Court Cases 273** has held that the Court on examination of the facts and circumstances has to exercise its judicial discretion keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore, unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short, the discretion should be used only when there is a clear admission which can be acted upon.

22. So far the submission of learned counsel Mr. J.S. Arora that the plaintiffs in the plaint pleaded that there was exchange of shares between the land owners and that there had been partition



between the five brothers are concerned, those are the facts which is to be proved by the plaintiffs and the same can be proved only by leading evidence as the defendant developer has got no knowledge about the said fact. In such circumstances, it cannot be said to be a clear admission is concerned, it may be mentioned here that the defendant developer is not disputing that he came in possession of the property pursuant to the agreement entered into between the plaintiffs and heirs of Abhilakh Tiwari on one side and the developer on the other side on 29.03.2005. He is also not disputing that pursuant to the said agreement he completed the construction. Now, therefore, he is admitting the plaintiffs as land owners as they have been described in the agreement. Now, therefore, when he came in possession pursuant to the agreement and constructed the multistoried building pursuant to the agreement, he cannot turn round and say that unless the plaintiffs will prove partition and exchange, the agreement cannot be enforced. However, it will not be out of place to mention here that the plaintiffs have filed this suit for enforcement of their right following from the agreement. The suit is not a regular title suit or that a partition suit. The court will not decide in the suit filed by the plaintiffs as to whether the plaintiffs have a right, title vis a vis developer because admittedly the developer is not claiming title, he admitted the case of the plaintiffs. Therefore, the enforcement of agreement is not



dependent on the proving of title of the plaintiffs particularly when in the agreement, which is not challenged by the developer, he clearly stated that on enquiry he found the plaintiffs and heirs of Abhilakh Tiwari are the owners of the land, therefore, he entered into the agreement. In such circumstances, in the agreement he admitted the ownership of the plaintiffs and the heirs of Abhilakh Tiwari but before this court the argument is advanced contrary to the admission made in the agreement. In my opinion, therefore, the defendant developer, who is appellant is in First Appeal No.174 of 2012, is approbating and reprobating. In this matter the reference may be made to the decisions of the Hon'ble Supreme Court in the case of **R. N. Gosain Vs. Yashpal Dhir, reported in A.I.R. 1993 SC 352** and in the case of **Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (International) Company Limited, reported in (2011) 10 SCC 420**. Therefore, the defendant developer cannot be allowed to blow hot and cold at a time.

23. It is settled principles of law that the plaintiffs may plead many things in the plaint but he is required to prove those facts which entitles him to get the relief and if he will not be able to prove those facts his case will be dismissed. In the present case, for the relief claimed the plaintiffs are required to prove the fact that the defendant developer entered into agreement and obtained possession



of the suit land and constructed multistoried building pursuant to the agreement and that 50% share is of the builder and that builder is liable to deliver possession of 50% share to the land owners but he is refusing to do so. If they prove these facts by adducing evidence, the relief will be granted to the plaintiffs. If all these facts have not been disputed rather admitted by the defendant in the written statement then there is no dispute regarding these issues between the plaintiffs and the defendant developer then what remains to be proved by adducing evidence by the plaintiffs. In my opinion, therefore, since all the facts entitling the plaintiffs to get the relief have been admitted by the defendant in the written statement, there is no controversy between the parties. According to Order 14 Rule 1 C.P.C. issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. The material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Here, as discussed above, there is no denial at all by the defendant. Therefore, there is no issue between the parties as such no evidence is necessary at all to prove any issue between the parties.

24. In view of my above discussions I find that there is a

clear and unambiguous admission made by the defendant in the written statement about the material proposition of facts pleaded by the plaintiffs in the plaint and, therefore, this is a fit case where the Court should exercise jurisdiction under Order 12 Rule 6 of the Code of Civil Procedure.

25. So far the submission of the learned counsel for the appellants that the court below has decreed the suit on the principles of non-traverse is concerned, it may be mentioned here that the court below has also taken into account the admission made by the defendant in the written statement. However, this Court is exercising first appellate jurisdiction under Section 96 of the Code of Civil Procedure. Therefore, this Court has the same jurisdiction as that of the trial court and on the reason that the trial court judgment is wrong on some facts or on some account cannot be the ground for remanding the matter. In this matter reference may be made to the decision of the Hon'ble Supreme Court in the case of **Ashwinkumar K. Patel Vs. Upendra J. Patel and others, reported in A.I.R. 1999 Supreme Court 1125**. Here, I have myself examined the admission made by the defendant in the written statement.

26. The defendant developer appellant in First Appeal No.174 of 2012 is fighting the case only with a view to fight the case. In other words, it can very well be said that this is nothing but a

luxurious litigation initiated by the defendant developer.

27. In view of my above finding the point no.(A) is answered against the appellants. The learned court below has rightly, therefore, find that the defendant has admitted the case of the plaintiffs. Thus the finding of the court below is confirmed.

Point No.(B)

28. So far First Appeal No.144 of 2012 is concerned, the learned senior counsel Mr. Sinha submitted that the appellants have filed written statement but the court below has not at all considered the written statement and wrongly held that no written statement has been filed. Therefore, it is apparent error on the face of the record as such the judgment be set aside and the matter be remanded to the court below. We have seen above the case of the plaintiffs and the original defendant. During the pendency of the suit these appellants of First Appeal No.144 of 2012 filed application for being added as party on the ground that they have also got 20% share in the suit property. In the written statement also this is their case. As a subsequent development agreement was entered into between these appellants with the defendant-developer, therefore, they have filed another suit being Title Suit No.110 of 2010. It is admitted fact that in that suit the defendant developer appeared and filed written statement admitting the case of the present plaintiffs, i.e. admitting



the fact that he came in possession of the land pursuant to the agreement dated 29.03.2005 and he has constructed the multistoried building. That case is still pending. So far this case is concerned these appellants are also not disputing the genuineness or otherwise of the agreement dated 29.03.2005. They are also not disputing that the possession was delivered by the plaintiffs and the heirs of Abhilakh Tiwari to the developer. They never filed counter claim in the case for declaration of their 20% share or partition of their share in the present case. They are pursuing the matter in the suit. Now, therefore, it becomes admitted fact that even if the plaintiffs' suit is dismissed then also they will not get possession of the property and likewise if the plaintiffs' suit is decreed then also they will not get possession of the property. They will get possession of the property if their suit is decreed and possession is directed to be given to the plaintiffs. Therefore, they will get possession ultimately if their suit will be decreed finally either from the builder or from present plaintiffs but for deciding the controversy between the present plaintiffs and the builder, they have got no role to play. They may remain as proper party in the suit. They have filed the written statement as defence in the case but certainly as stated above on the basis of the written statement they will not get possession of the property nor the plaintiffs' suit will be dismissed.



29. The Hon'ble Supreme Court in the case of **Kasturi Vs. Iyyamperumal and others, reported in (2005) 6 Supreme Court Cases 733** has held that from a plain reading of expression 'all the questions involved in the suit' used under Order I Rule 10(2) of the Code of Civil Procedure it is abundantly clear that the legislature clearly meant that only the controversies raised as between the parties to the litigation must be gone into, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiffs or the defendants inter se or questions between the parties to the suit and a third party. In the present case, the dispute raised by these appellants cannot be gone into because this is a simple suit for enforcement of the agreement dated 29.03.2005. The appellants of First Appeal No.144 of 2012, who have been added subsequently, are claiming title over the suit property. They will get the same only in a properly constituted suit.

30. So far the submission of the learned counsel that the appellants could not get the opportunity to file the counter claim is concerned, it may be mentioned here that the suit is still pending wherein the heirs of Abhilakh Tiwari had been allowed to be impleaded as co-plaintiffs, who have also been described as owners in



agreement dated 29.03.2005. There is no dispute between the heirs of Abhilakh Tiwari and the present plaintiffs. In my opinion, therefore, on anticipation that the defendant may file counter claim the court will never wait for passing the judgment under Order 12 Rule 6 of the Code of Civil Procedure. Therefore, so far written statement of the present appellants is neither here nor there in the present case and the basis of non-consideration of their written statement or making an error on record or misstatement in the judgment will never vitiate the judgment impugned, particularly when there is no controversy between the plaintiffs and the defendant developer.

31. It is settled principles of law that the court can take into consideration the subsequent development in the case. As stated above admittedly now all the land owners are already in the suit. The heirs of Abhilakh Tiwari are co-plaintiffs after having added as co-plaintiff in the suit. The appellants of this first appeal are only claiming that they have got 20% share and this dispute raised by them is entirely a foreign dispute to the suit for specific performance of agreement. Therefore, their written statement denying the claim of the plaintiffs regarding partition or exchange will not be an impediment in the way of passing the judgment on admission under Order 12 Rule 6 of the Code of Civil Procedure.

32. In view of my above discussions, the point no.(B) is

decided against the appellants and in favour of the plaintiffs-respondents.

33. In the result, First Appeal No.174 of 2012 is dismissed with cost of Rs.10,000/- to be paid by the defendant-developer to the plaintiffs-respondents within two months, failing which the plaintiffs-respondents shall be at liberty to realise the same through the process of Court. First Appeal No.144 of 2012 is also dismissed but in the facts and circumstances no order as to cost.

(Mungeshwar Sahoo, J)

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