

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.311 of 2003

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Abid Hussain, son of Dr. Kazim Hussain (deceased), resident of 97 Patliputra Colony, P.S.-Patliputra, Town and District-Patna.

.... (Plaintiffs)...Appellant/s

Versus

1. Asim Hussain, son of Late Dr. Kazim Hussain, resident of 97 Patliputra Colony, P.S.-Patliputra, Town and District-Patna. Presently residing at 36-Patliputra Colony, P.S.-Patliputra, Town and District-Patna.

.... (Defendant)....Respondents Ist Set

2. Sayem Hussain, son of Late Dr. Kazim Hussain.

3. Qayum Hussain, son of Late Dr. Kazim Hussain.

4. Zahid Hussain, son of Late Dr. Kazim Hussain.

5. Nazra Hussain, son of Late Dr. Kazim Hussain.

6. Tasneem Afshan, wife of Arif Zafar and daughter of Late Dr. Kazim Hussain. Respondent nos.2 to 6, all resident of 97 Patliputra Colony, P.S.-Patliputra, Town and District-Patna.

.... (Plaintiffs).....Performa Respondents 2nd Set.

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Appearance:

For the Appellant/s : Mr. Syed Firoz Raza, Adv.

For the Respondent No.1 : Mr. Mahendra Prasad Bhartee, Adv.

Mr. Shailendra Kumar Bhartee, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

C.A.V. JUDGMENT

Date: 20-02-2015

Appellant / Plaintiff No.1 had filed instant appeal against the judgment dated 19.07.2002 decree dated 02.08.2002 passed by Vinay Ranjan Govind, Sub-Judge-VII, Patna in Title (Partition) Suit No.83 of 1999 / 74 of 2001 decreeing the suit in terms of Order-XII Rule-6 of the CPC. During pendency of instant appeal, appellant died on 27.02.2013 and on account thereof, respondent no.4, who along with other members of respondents 2nd set arrayed as Performa respondents while plaintiff before lower court suit was transposed as appellant.

2. Appellant along with respondents 2nd set stood as a plaintiff (used as plaintiffs, henceforth) filed suit for partition



asking for relief (a) on the adjudication, a preliminary decree of partition and separate allotment of the suit premises according to the legal share of the parties be passed (b) a survey knowing pleader commissioner be appointed for allotment according to law for preparation of the final decree (c) a permanent injunction restraining the defendants from interfering with the peaceful possession of the plaintiff or alienating or transferring the suit property or any portion thereof, (d) a decree for cost of the suit, against respondent 1st set / sole defendant (used as defendant, henceforth) and for that, furnished a genealogical table under Schedule-II wherefrom it is evident that original tenant Dr. Kazim Hussain was married with Zakia Begum and sole defendant begotten from the aforesaid marriage. Unfortunately, Zakia Begum died while respondent 1st set / defendant was infant. Dr. Kazim Hussain then married with Sayama Khatoon and out of aforesaid marriage, they have blessed with five sons as well as a daughter namely Sayama Hussain, Quyam Hussain, Abid Hussain, Zahid Hussain, Nazara Hussain, Tansneem (all the plaintiffs). Dr. Kazim Hussain died leaving behind aforesaid legal heirs as well as the immovable property detailed under Schedule-I, of the plaint along with sketch map bearing Plot No.97 situated under Patliputra Colony, one of the quarters of Patna town under Patliputra Police Station having total area 14352 Sq. feet plus 2748 Sq. feet (Totaling 17,100 Sq. feet). During his lifetime, Dr. Kazim Hussain sold away 2748 Sq. feet on 04.08.1997, retaining the rest area 14352 Sq. feet of Plot No.97. After death of



Dr. Kazim Hussain, as per Hanafi school of Mohammedan Law under which the parties are governed, the wife entitled for 1/8th share and in likewise manner, the sons happens to be, while the daughter 1/16th share and in this way the plaintiffs have 14 anna share. In due course of time, the plaintiffs and the defendant entered into family arrangement whereunder they accede in terms of their entitlement as per sketch map however, the relevant documents could not be prepared as well as the respective parties have not endorsed the sketch map by having their respective signature over the same. Subsequently, the defendant go by from the aforesaid family arrangement as well as also engaged in grabbing upon the other portions exceeding his share and during course thereof, began to but hurdle as well as nuisance whenever, his illegal activities been resisted. On account thereof, it has become obligatory for the plaintiffs to file a partition suit for protecting their interest as well as proper demarcation of their share followed with possession over the suit property. It has also been averred that though the dower was not paid and it happens to be a charge over the property left by the deceased, however, for the present, same is not being raised. Accordingly, providing the other legal requirements such as cause of action as well as court fee, suit for partition has been filed.

3. Respondent 1st set / sole defendant (hereinafter defendant) appeared and had filed W.S. wherein the inter se relationship of the parties has been admitted. It has further been



pleaded that on 8th June, 1997 Dr. Kazim Hussain had gifted (Hibba) in his favour relating to 3 kattha of vacant land duly detailed under Schedule-'A' of the W.S. as well as had given possession thereof. By such action Dr. Kazim Hussain had divested himself of all kinds of right, title and interest with regard to Schedule-'A' of the W.S. Accordingly, Schedule-'A' of W.S. is coming under exclusive possession of the defendant without any hitch and hindrance. Consequent thereupon, defendant has become sole as well as absolute owner thereof. That being so, the plaintiffs have got no right title and interest with regard to the land detailed under Schedule-'A' of the W.S. It has also been averred that in the background of aforesaid event, plaintiffs have become very much annoyed and on account thereof, at so many occasions they attempted upon life of defendant. It has also been submitted that in April, 1998 the plaintiffs inducted one Hasan Waris as a tenant on a monthly rental of Rs.2000/- which, the plaintiffs are illegally enjoying, declining to give proper share to the defendant. It has further been submitted that Dr. Kazim Hussain died leaving behind the property detailed under Schedule-'C' of the plaint which only happens to be subject matter of partition. Then made averment with regard to entitlement of share of the respective parties. Then had also disclosed regarding non-payment of dower to his first wife also. Then had admitted that survey knowing pleader commissioner be appointed for ascertainment of share as well as partition of the movable as well as land, falling under Schedule-'B' and 'C'.

Schedule-‘B’ is the details of movable property while Schedule-‘C’ is the details of immovable property, the subject matter of suit.

4. On the basis of the pleadings of the respective parties, on 02-03-2000, issues were framed (however is not available on the record nor has been incorporated in the judgment) whereupon witnesses on behalf of respective parties were examined. While the matter was pending for argument, on 20-05-2002 petition under Order-XII Rule-6 of the CPC was filed on behalf of defendant whereupon objection was filed by the plaintiffs on 29-05-2002 and thereafter, hearing both the parties, the learned lower court had disposed of by the judgment and decreed impugned, subject mater of instant appeal.

5. It has been contended on behalf of appellant that the procedure adopted by the learned lower court in a way to disposing of the instant partition suit in terms of Order-XII Rule-6 of the CPC happens to be wrong, illegal as well as arbitrary. In order to support its plea, it has been submitted that the petition under reference filed on behalf defendant was not at all supported with an affidavit. Apart from this, it was filed at the fag end of trial while the suit was pending for argument. The purpose for introducing Order-XII is to avoid the cumbersome procedure enabling the court to decree the suit in terms of admission made by the defendant which is found divellicated as the matter was pending for argument on being examination of all the witnesses on behalf of respective parties. It has also been submitted that the admission should be unequivocal, complete as well as

without condition. Apart from the fact that, it happens to be a discretionary one which could be exercised in exceptional cases not as a matter of routine.

6. Further elaborating, it has been submitted that though Order-XII Rule-6 did not circumvent with the stage of the trial but in fairness, it should be at an earliest. When the suit was pending for final argument followed with judgment and on account thereof, the plaintiff had already faced the rigour of procedure, already placed their evidence to support their plea relating to their share as well as share of defendant, then in that event, there was no justification for the learned lower court to invoke the aforesaid jurisdiction.

7. It has further been submitted that family arrangement is otherwise than the legal entitlement. From the conduct of the appellant as well as respondent 2nd set, it is apparent that they have not concealed anything. During course of negotiation over amicable partition of the property, the plaintiff no.1, widow having her legal identify to the extent of 1/8th share had not claimed her share however, when a suit has been filed for the partition, then in that event, the legal share has to be carved out and that cannot be subject to erosion by any means what to talk about the sketch map, which on filing of partition suit lost its identity.

8. Furthermore, the petition dated 20-05-2002 neither contained signature of defendant nor found supported with an affidavit and in the aforesaid background, the learned lower court

should have considered that the aforesaid petition was not at all in terms of Order-XII Rule-6 of the CPC. Apart from the fact that order Order-XII Rule-6 of the CPC did not authorize the party to file a petition rather it happens to be a power vested in the court to perceive the event of admission. Hence, the procedure adopted by the learned lower court happens to be wrong.

9. It has also been submitted that after going through the contents of the petition more particularly para-8 as well as 9 thereof, it is evident that the conduct of the defendant was not under banner of admission rather happens to be circuitous as well as to defeat the ends of justice.

10. Per contra, it has been submitted on behalf of respondent Ist set/ defendant that the judgment and decree passed by the learned lower court is in tune of legal requirement envisaged under Order-XII Rule-6 of the CPC. It has further been submitted that application under Order-XII Rule-6 of the CPC is not at all influenced by the stage of the proceeding. Even before pronouncement of judgment, the defendant is at liberty to admit and in likewise manner, the court is competent enough to entertain such admission and pass judgment and decree in the background of aforesaid admission.

11. So far present proceeding is concerned, it is apparent that sketch map has been made part and parcel of the plaint and on account thereof, admission at the end of respondent Ist set/ defendant relating to sketch map as well as praying the court for decreeing the suit in terms thereof, was in accordance with law.

In likewise manner, appreciating the same as well as decreeing the suit by the learned lower court comply with the mandate of law and being so, does not attract interference. In support thereof, relied upon AIR 1926 Sindh 119, AIR 1974 MP 75.

12. After hearing rival parties as well as going through the respective pleading, only one point is found subject to adjudication, whether the judgment and decree impugned is legally sustainable?

13. In its objects and reasons set out while recommending for amendment of the said rule, law commission has stated that where a claim is admitted, the court has jurisdiction to enter judgment for the plaintiff and to pass a decree on admitted claim. Object of the rule is to enable the party to obtain a speedy judgment at least to the extent of the rule to which according to admission of the defendant, the plaintiff is entitled.

14. Before, coming to elaborate discussion over Order-XII of the CPC, the other relevant law on this score is to be seen. Admission is defined under para-17 of the Evidence Act which defines “an admission is a statement oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, which is made by any of the persons, and under the circumstances hereinafter mentioned”.

15. Section 58 of the Evidence Act prescribes as the facts admitted need not be proved. For better appreciation the same is quoted below:-

“No fact need to be proved in any proceeding which the parties thereof or their agents according to admit at the hearing, or which, before the hearing they agree to admit by any writing under their hands or which by any rule of pleading enforce at the time they are deemed to have admitted by their pleadings.

Provided that the court may in its discretion required the facts admitted to be proved otherwise than by such admission.

16. After conjoint reading of aforesaid two provisions of the evidence Act, it is evident that adversary has a liberty to admit the assertion in accordance with the procedure so, prescribed, and the aforesaid admission would be entertainable by a court of law. However, is found discretionary one as, the court, in spite of having such admission, may insist for getting the facts in issue proved otherwise by cogent as well as reliable evidence. Therefore, even having admission at the score of defendant, will not spare the plaintiff requiring to prove the facts in issue, in case, so directed by the court. Inasmuch as the court is also not found under obligation to accept the aforesaid admission for such purpose.

17. The aforesaid provisions have been perceived and that happens to be the germane of presence of Order-XII wherein admission has been properly, duly acknowledged however, with the same set of rigour which, the court can impose even having



presence of such admission. The presence of aforesaid provision has been engrafted apart from extinguishing the burden of the courts along with the fact that on such admission, if the court finds competent enough to decide the lis, will pass the judgment and decree in favour of plaintiff relinquishing him from the burden of continuance of suit as well as to give him speedy justice. That happens to be reason behind that in terms of Order-XII Rule-6 of the CPC, though discretionary power has been vested to the court, but without any limitation so far, stage of the suit is concerned. For better appreciation Order-XII Rule-6 of the CPC is incorporated below:-

[6. Judgment on admission.-(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.]

18. Order-XII contains so many rules commanding the procedure whereunder such activities is to be exercised. Under Rule-1, a party is required to give notice by his pleading or otherwise in writing with regard to his admission regarding assertion in whole or in part made on behalf of his adversary. Rule-2 and 2A details with the issue relating thereto as well as



time prescribed thereto while Rule-3 discloses the format prescribed therefor, 3A envisages power to the court in entertaining such admission. Rule-4 prescribes issuance of notice for admission of the facts while Rule-5 contains the format whereunder such exercise has to be done. Rule-6 contains the power of the court in passing judgment and decree on the basis of such admission. Rule-7 requires the admission to be supported with an affidavit. Rule-8 details with the provision asking for to produce the document while Rule-9 prescribes for imposing cost.

19. Though under Order-XII there happens to be lacking of the conditions which, the adversary is required to follow while tendering admission with regard to facts in issue but, by series of judicial pronouncement it has been held that aforesaid admission must be unequivocal, clear and positive. In likewise manner, the admission must be taken as a whole and it is not permissible to rely on a part of the admission ignoring the other part. On bare perusal of the relevant provisions it also explicit that exercise of Order-XII Rule-6 of the CPC would not be permissible where a case involves question which could be conveniently tried to motion under this rule.

20. In ***Balraj Taneja & Anr. vs. Sunil Madan & Anr.*** reported in **(1999) 8 SCC 396** it has been held:-

“23. Under this rule, the court can, at an interlocutory stage of the proceedings, pass a judgment on the basis of admissions made by the defendant. But before the court can act upon the admission, it has to be shown that

the admission is unequivocal, clear and positive. This rule empowers the court to pass judgment and decree in respect of admitted claims pending adjudication of the disputed claims in the suit”.

“24. In *Razia Begum v. Sahebzadi Anwar Begum* (AIR 1958 Sc 886) it was held that Order 12 Rule 6 has to be read along with the proviso to Rule 5 of Order 8, That is to say, notwithstanding the admission made by the defendant in his pleading, the court may still require the plaintiff to prove the facts pleaded by him in the plaint”.

21. In *M/s Jeevan Diesels & Electricals Ltd. v. M/s Jasbir Singh Chadha (HUF) & Anr.* reported in *AIR 2010 SC 1890* it has been held:-

“13. Whether or not there is clear, unambiguous admission by one party of the case of the other party is essential a question of fact and the decision of this question depends on the facts of the case. This question, namely, whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in *Karam Kapahi* (supra) may be unexceptionable they cannot be applied in the instant case in view of totally different fact situation.

14. In *Uttam Singh Duggal & Co. Ltd. v. United Bank of India and others* reported in (2000) 7 SCC 120 : (2010) AIR SCW 2924) the provision of Order 12 Rule 6 came up for consideration before this Court. This Court on a detailed



consideration of the provisions of Order 12 Rule 6 made it clear “whether there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed” the principle will apply. In the instant case it cannot be said that there is a clear admission of the case of the respondents-plaintiffs about termination of tenancy by the appellant in its written statement or in its reply to the petition of the respondents-plaintiffs under Order 12 Rule 6.”

22. In the background of above referred settled principle of law, now the facts of the case is to be looked into. After appearance of respondent Ist set/sole defendant, W.S. was filed wherein the share of the appellant-plaintiff has been admitted but not with regard to the area disclosed under plaint rather exclusion of three kattha as pleaded by him on the basis of gift made by his father Dr. Kazim Hussain during his lifetime as well as also denied the story of family arrangement which, according to plaint, was taken up however, did not act upon. Then thereafter issues were framed and both the parties had led their evidences. On 20.05.2002 petition purported to be under Order-XII Rule-6 of the CPC has been filed by the defendant whereupon objection has been raised however, considered by the learned lower court and formed basis of judgment.

23. First of all Order-XII Rule-6 of the CPC did not oblige either of the party to make an admission rather it happens to be a provision vesting the power to the court to pass judgment on the plea of admission. Therefore, the petition under reference

would not have under Order-XII Rule-6 of the CPC. Even considering that nomenclature of petition was not at all relevant, even then, it suffers from inherent defects. Neither petition bore signature of the defendant nor it is found supported with an affidavit in terms of Rule-7 of Order-XII of the CPC. Furthermore the relevant portion of the petition is incorporated below which would suggest the dexterousness of defendant:-

“9. That in order to avoid inconvenience, protracted litigation and loss of time, energy and money the petitioner is ready and willing that this suit be finally decreed in terms of sketch map which is schedule-I of the plaint.”

24. Now coming to the judgment impugned, it is found that the learned lower court had decreed suit with cost on admission of the defendant and as per legal share of the parties and the map attached with the plaint as Schedule-I is to form part of the decree as well as directing the parties to take their possession of the land as per sketch map contrary to it to obtain possession in accordance with law.

25. The learned lower court failed to consider that relevance of family arrangement was something different from the entitlement of a party in accordance with his respective share. From Schedule-I of the plaint, the sketch map it is evident that appellant / plaintiff no.1 (deceased) has got no presence and further, relief was not based on the basis of the aforesaid sketch map rather it was suit for, for determination of the share as well

as identification of respective share over the land. Therefore, once the party has filed suit for identifying his share and carving out patti in pursuance thereof, the propriety of the sketch map has gone. As such, admitting as well as asking for partition in terms of sketch map appears to be nothing but an eye wash. Further, having the sketch map to be part and partial of a decree, indirectly over shadowed the legal right entitlement of plaintiff more particularly to the extent of 1/8 which she was entitled for.

26. The citation referred by the learned counsel for the respondent reported in AIR 1926 Sindh 119, AIR 1974 MP 75 have not proved its relevance in favour of respondent 1st set.

27. Accordingly, the judgment and decree passed by the learned lower court is set aside. Appeal is allowed. The matter is remitted back to the learned lower court to proceed afresh from the stage of hearing of the suit as witnesses on behalf of respective parties have already been examined. However, in the facts and circumstances of the case, the parties will bear their own cost.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated, the 20th day of Feb., 2015
Prakash Narayan

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