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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

***NOTICE OF MOTION NO.955 OF 2018
IN
SUIT NO.493 OF 2018***

Mrs.Daulatbanoo Sadrudin Nanavati)
an Indian Inhabitant residing at 7th floor,)
Noor-e-Rehmat, 59, Byramjee)
Jeejeebhoy Road, Bandra (West),)
Mumbai – 400 050.) ...Applicant

IN THE MATTER BETWEEN :

Mrs.Daulatbanoo Sadrudin Nanavati)
an Indian Inhabitant residing at 7th floor,)
Noor-e-Rehmat, 59, Byramjee)
Jeejeebhoy Road, Bandra (West),)
Mumbai – 400 050.) ...Plaintiff

....Versus....

- 1). Tazaldin Sadrudin Nanavati)
an Indian Inhabitant residing at)
7th floor, Noor-e-Rehmat, 59,)
Byramjee Jeejeebhoy Road,)
Bandra (West) Mumbai – 400 050.)
)
2). Shahid Sadrudin Nanavati)
an Indian Inhabitant but resident)
of Canada having his address in)
India at 7th floor, Noor-e-Rehmat, 59,))

- Byramjee Jeejeebhoy Road,)
Bandra (West), Mumbai – 400 050.)
)
- 3). Shams Fayaz Surani nee)
Shams Nanavati, an Indian Inhabitant)
but resident of Canada having her)
address in India at 7th floor,)
Noor-e-Rehmat, 59,)
Byramjee Jeejeebhoy Road,)
Bandra (West), Mumbai – 400 050.)
)
- 4). Farida Mehboob Lalani)
nee Farida Nanavati, an Indian)
Inhabitant but resident of United)
States of America having her address)
in India at 4th Floor, Meena Mahal,)
Manuel Gonsalves Road,)
Bandra (West), Mumbai – 400 050.)
)
- 5). Amin Abdul Aziz Rajwani)
an Indian Inhabitant residing at)
2nd Floor, Mon Repos Apartments,)
Next to Mannat, Byramjee)
Jeejeebhoy Road, Bandstand,)
Bandra (West), Mumbai – 400 050.)
)
- 6-a). Nadiya Karim Rajwani)
)
- 6-b). Rahim Karim Rajwani)
)
- 6-c). Zahra Karim Rajwani)
)
being heirs of late Karim Abdul)

- Aziz Rajwani, being Indian)
Inhabitants residing at 4th Floor,)
Panju Mahal Apartments, Next to)
Prathnalaya, Byramjee Jeejeebhoy)
Road, Bandstand,Bandra (West),)
Mumbai – 400 050.)
)
7). Yasmin Shashi Valiyani)
nee Yasmin Rajwani, an Indian)
Inhabitant residing at 285, Loretta)
Ave S.Ottawa, ON, K1S, 5A5,)
Canada and having local address)
at 6th Floor, Noor-e-Rehmat, 59,)
Byramjee Jeejeebhoy Road,)
Bandra (West), Mumbai – 400 050.)
)
8). Munira Munir Merchant)
nee Munira Rajwani, an Indian)
Inhabitant having her address at)
C/o Dr.Munir Merchant, 1500 South)
Main Street, Fort Worth Houston,)
Texas, TX 76104, United States of)
America & having local address)
at 6th Floor, Noor-e-Rehmat, 59,)
Byramjee Jeejeebhoy Road,)
Bandra (West), Mumbai – 400 050.) ...Defendants

Mr.Aspi Chinoy, Senior Counsel with Mr.D.D. Madon, Senior Counsel, Mr.Sharan Jagtiani, Ms.Ankita Singhania and Mr.Mutahhar Khan i/b Shane Clifford Cardoz for the Applicant / Plaintiff.

Mr.Zal Andhyarujina with Mr.Kunal Dwarkadas i/b Mr.Vrushal Gupta for the Defendant Nos.1 to 4.

Mr.Pradeep Sancheti, Senior Counsel with Ms.Deepthi Panda and Mr.M.R. Pardiwala I/b Pardiwala & Co. for the Defendant Nos.5 to 8.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 21st January, 2019
PRONOUNCED ON : 2nd May, 2019

JUDGMENT :-

1. By this notice of motion, the applicant (original plaintiff) seeks a judgment on admission under Order XII Rule 6 of the Code of Civil Procedure, 1908 in terms of prayer clause (a) of the plaint, by way of a preliminary decree on admission in terms of Order XX Rule 18(2) of the Code of Civil Procedure, 1908 and seeks further declaration that the plaintiff along with defendant nos.1 to 4 on one hand and the defendant nos.5 to 8 on the other hand have undivided $\frac{1}{2}$ share in each of the properties described firstly to sixthly in the schedule, Exhibit "A" to the plaint and seeks further reliefs for partition of those properties by appointing a commission under Order XXVI Rule 13 of the Code of Civil Procedure, 1908. Some of the relevant facts for the purpose of deciding this notice of motion are as under :

2. The plaintiff is a widow of late Sadruddin Mohamed Nanavati (for short “late S.M. Nanavati”). The defendant nos.1 to 4 are the sons and daughters of the plaintiff and late Sadruddin M. Nanavati. The defendant nos.5 to 8 are the sons and daughters or lineal descendants of late Abdul Aziz Fazalbhaj Rajwani (for short “late A.F. Rajwani”).

3. It is the case of the plaintiff that S.M. Nanavati with A.F. Rajwani were jointly associated in real estate business from early 1060 till 1990 and had acquired various properties jointly. Both of them had also constituted a partnership firm vide a Deed of Partnership dated 10th November, 1969 in the name of Nanavati Construction Company, which was duly registered. S.N. Nanavati died on 9th February, 1999. A.F. Rajwani died on 10th July, 2015. The plaintiff and defendant nos.1 to 4 are the legal heirs and representatives of late S.N. Nanavati. The defendant nos.5 to 8 are the legal heirs and representatives of late A.F. Rajwani. In view of the death of S.N. Nanavati on 9th February, 1999, the partnership firm i.e. Nanavati Constitution Company stood dissolved. It is the case of the plaintiff that the assets which the erstwhile partners of Nanavati Constitution Company held insofar as Baitul Karim property and residuary rights in J.D. Alves's property were held by the plaintiff

and the defendant nos.1 to 4 as the co-owners with late A.F. Rajwani during his life time. On the death of A.F. Rajwani on 10th July, 2015, the said assets i.e. Baitul Karim property and residuary rights in J.D. Alves's property of the Nanavati Constitution Company are jointly held by the plaintiff and the defendant nos.1 to 4 on the one hand and the defendant nos.5 to 8 on the other hand as co-owners.

4. It is the case of the plaintiff that Nanavati Group and Rajwani Group had joint interest in several parcel of land, the plaintiff has filed this suit which are presently capable of partitioned. According to the plaintiff, the parcels of land with which late S.N. Nanavati and late A.F. Rajwani were concerned during their life time can broadly be classified as “Non-Versova properties”. It is the case of the plaintiff that the parcels of land which are presently capable of partitioned fall in the category of “Non-Versova property” and the same comprise of lands and buildings described firstly to sixthly in the schedule annexed to the plaint at Exhibit “A” (hereinafter the property referred to as the “suit property”).

5. It is the case of the plaintiff that in addition to excluding Versova property for the reasons set out in the plaint, the plaintiff

has also excluded from the scope of this suit, parcels of land which is jointly held by Nanavati Group and Rajwani Group being the lands at Byramjee Jeejeebhoy Road, Bandra and buildings thereon for the reasons set out in the plaint. There are certain minor assets or rights which are jointly held by Nanavati Group and Rajwani Group, which are also excluded from the suit. The plaintiff has reserved her right to seek relief at an appropriate time in respect of Versova property, lands and the buildings in Byramjee Jeejeebhoy and other minor assets which are jointly held by Nanavati Group and Rajwani Group.

6. Insofar as the property described firstly and fifthly in the schedule, Exhibit "A" are concerned, since the defendant nos. 5 to 8 have raised certain issues in respect of these properties and these properties being the properties of the partnership firm, the plaintiff has prayed for appropriate reliefs in the notice of motion only in respect of other four properties forming part of schedule, Exhibit "A" to the plaint.

7. It is the case of the plaintiff that some time in the year 2005, the plaintiff made known her views to the said late A.F. Rajwani and his son Amin (defendant no.5) in respect of Baitul Karim property that she wanted the said properties and assets jointly

held with late A.F. Rajwani to be separated and that she should be given her share therein. Some time in the year 2005, the plaintiff along with her children i.e. defendant nos.1 to 4 filed a suit bearing Suit No.4008 of 2005 before the Bombay City Civil Court against late A.F. Rajwani and his son Amin (defendant no.5) in respect of Baitul Karim property for the relief of injunction restraining the said late A.F. Rajwani and his son from unilaterally taking over possession of the ground floor portion of the said Baitul Kasim property which was given on tenancy to a school run by the Mumbai Municipal Corporation. The parties thereafter initiated mediation to compromise the dispute between the two groups.

8. It is the case of the plaintiff that even during the said mediation, the plaintiff had expressed her views that she wanted a separation of joint assets held by Nanavati Group and Rajwani Group. However, late A.F. Rajwani and the defendant no.5 indicated that the suit properties and other assets were continued to remain in possession jointly of the two groups, but an arrangement had made whereby the responsibilities to develop some of the properties had given to designated persons of Rajwani Group and to give responsibility of development of the remaining property to the designated persons of Nanavati Group. It is the case of the plaintiff that though the proposed amendment was not entirely to the

satisfaction of the plaintiff, children of the plaintiff counselled the plaintiff not to confront A.F. Rajwani and his son Amin and late Karim Rajwani on the ground that it would involve a long and costly litigation.

9. It is the case of the plaintiff that late A.F. Rajwani having experience of 40 years in real estate business, persuaded and assured the plaintiff that he would oversee implementation of the scheme whereby the undeveloped assets (suit property) would be converted into assets, being constructed flats, which would readily yield for the plaintiff the monetary value of her share. It is also the case of the plaintiff that late A.F. Rajwani represented to the plaintiff that the arrangement would be made whereby either the defendant no.1 and defendant no.2 or the defendant no.5 and late Karim Rajwani would be appointed as the persons in charge in respect of jointly held properties which includes the suit property in such person in charge would be taking over onerous responsibility for vacating tenants / occupants from the jointly held properties, to have names of the plaintiff and other co-owners inserted in the Property Register Cart, getting from the co-owners approval of plans for construction of building on the suit property, obtaining statutory approvals for construction of buildings and undertaking the construction of buildings on the jointly held properties which includes the suit

property.

10. On 12th December, 2008, the plaintiff, defendant nos. to 4, as also the wife of the defendant as part of Nanavati Group on one hand and late A.F. Rajwani, late Rahmatbanoo Rajwani, along with defendant no.5 and late Karim Rajwani as Rajwani Group on the other hand signed a writing, styled as the consent terms in the said Suit No.4008 of 2005 before the Bombay City Civil Court. The Bombay City Civil Court passed an order in the suit as well as the notice of motion and disposed of the same as the matter was settled out of Court. The Bombay City Civil Court took the said consent terms on record and marked Exhibit – 3.

11. It is the case of the plaintiff that the Bombay City Civil Court did not pass a decree in the said suit whether in terms of the writing dated 12th December, 2008 styled as the consent terms or otherwise. It is the case of the plaintiff that by the said writing dated 12th December, 2008, two groups had agreed to distribute the development rights by entering into a Joint Venture Agreement in respect of Baitul Karim property, St. Martin's Road Property, Jal Moos Properties, J.D. Alves's Property and Symons' Property. It is the case of the plaintiff that there has been no development in respect of any of the aforesaid five properties since December, 2008

till date.

12. By a letter dated 20th April, 2017, addressed by the plaintiff to late Rahamatbanoo Rajwani and their children, the defendant no.5, late Karim Rajwani and the defendant nos.7 and 8, the plaintiff alleged that there had been no progress in the construction and development of the joint several assets of the two groups. The plaintiff accordingly expressed her views that the joint holding assets including the suit property be separated. On 29th May, 2017, the plaintiff issued a notice through her advocate to the aforesaid parties and reiterated that the plaintiff intended to have the suit property partitioned either by meets and bounds or in the just and equitable manner or by sale thereof.

13. By a letter dated 12th June, 2017, the defendant no.5 through his earlier advocate denied the allegations made by the plaintiff in the letter dated 20th April, 2017. By a letter dated 12th June, 2017, the plaintiff through her advocate forwarded an English translation of a letter dated 20th April, 2017 to the defendant no.5. On 1st October, 2017, Rehmatbanoo Abdul Aziz Rajwani died intestate leaving behind the defendant no.5, late Karim Rajwani, defendant nos.7 and 8 as her only heirs and legal representatives. Karim Rajwani died on 31st January, 2018 leaving behind his

mother, late Rehmatbanoo Abdul Aziz Rajwani and upon demise of the said Rehmatbanoo Abdul Aziz Rajwani, the properties held by her has been inherited by the defendant nos.6-A, 6-B and 6-C.

14. By a letter dated 26th February, 2018, the defendant nos.5, 7 and 8 through their advocate's letter to the plaintiff's advocate acknowledged the receipt of various letters. It is the case of the plaintiff that by the said letter the defendant nos.5, 7 and 8 admitted that the plaintiff and the defendant nos.1 to 4 had undivided $\frac{1}{2}$ share in the suit properties under the consent terms signed by the parties on 12th December, 2008. It was contended by the defendant nos.5, 7 and 8 that the consent terms dated 12th December, 2008 had been acted upon, were valid, subsisting and binding upon the parties and that the defendant nos.5, 7 and 8 were ready and willing to continue to perform their obligations under the said consent terms. It was also contended that those defendants had incurred huge costs, whereas Nanavati Group had failed and neglected to do the acts required by law under the said consent terms. It was contended that the so called consent terms were binding upon the parties and thus there was no question of the parties separating or dividing the suit properties.

15. The plaintiff by her advocate's letter dated 15th February,

2018 to the defendant nos.6-A, 6-B and 6-C which letter was dispatched on 6th March, 2018, contended that it was an understanding of the plaintiff that the right, title and interest of late Karim Rajwani in the suit properties had devolved on the defendant nos.6-A, 6-B and 6-C, being his wife, son and daughter. The plaintiff reiterated her demand that the suit properties which were jointly held by the plaintiff and the defendant nos.1 to 4, and the defendant nos.5 to 8 be partitioned.

16. The defendant nos.5, 7 and 8 by their advocate's letter dated 26th February, 2018 refuted the allegations made by the plaintiff. The plaintiff by her advocate's letters dated 16th March, 2018 and 20th March, 2018 once again contended that the consent terms dated 12th December, 2008 did not affect her right to seek a partition of the suit properties. The plaintiff terminated the writing dated 12th December, 2008 and took a categorical stand that the right of the plaintiff, her children, defendant nos.1 to 4, to have the suit properties partitioned was not affected by the said writing dated 12th December, 2008. By her advocate's letter dated 20th March, 2018, the plaintiff set out the details of the documents which according to the plaintiff had evidenced the fact that late S.M. Nanavati had 60% share in Nanavati Constitution Company.

17. By a letter dated 20th March, 2018, the plaintiff through her advocate responded to the letter dated 26th February, 2018 and denied the allegations made therein. On 5th April, 2018, the plaintiff's filed this suit *inter-alia* praying for a declaration that the plaintiff and the defendant nos.1 to 4 had undivided ½ share in the six properties described in prayer clause (a) of the plaint, and sought partition of each of those properties and for various other reliefs. Prayer clause (d) was for judgment on admission under Order XII Rule 6 of the Code of Civil Procedure, 1908 or for passing a preliminary decree of partition under Order XX Rule 18(2) of the Code of Civil Procedure, 1908 in respect of those properties. The defendants filed the detailed written statement in the suit raising various issues.

18. The plaintiff filed a Notice of Motion bearing No.955 of 2018 *inter-alia* praying for a judgment on admission under Order XII Rule 6 of the Code of Civil Procedure, 1908 in terms of prayer clause (a) of the plaint, by way of a preliminary decree of partition and for other reliefs.

19. On 11th January, 2019 after hearing the parties, 24 issues were framed in the suit as suggested by the learned senior counsel for

the parties. This Court also framed separate issues insofar as the Notice of Motion No.955 of 2018 is concerned. Learned senior counsel appearing for the plaintiff and the defendant nos.5 to 8 jointly agree that those issues will have some bearing on the reliefs sought in the Notice of Motion No.955 of 2018 and for seeking relief under Order XII Rule 6 of the Code of Civil Procedure, 1908.

Those issues are reproduced as under :-

- 1). Whether the plaintiff is not entitled to file a suit for partition in respect of selected lands/properties held by the two groups as alleged in paragraphs 20 and 23(i) of the written statement of the defendant nos. 5 to 8 (paragraphs 5, 7 and 8 of the plaint) ?
- 2) Whether the plaintiff cannot seek partition as “the distribution and division of the properties of the two groups has been agreed upon and provided for in the consent terms/agreement which have been acted upon by both parties”, as alleged in paragraphs 23(i) and (k) pages 513 and 514 of the written statement of the defendant nos. 5 to 8 (paragraph 5 of the plaint) ?
- 3) Whether the plaintiff is not entitled to seek partition – as the disputes were settled as per so-called consent terms – alleged agreement dated 12th December, 2008 and parties have acted as per the same and have altered their position as alleged in the said written statement at paragraph 14 page 424 ?
- 4) Whether as the consent terms have been acted upon by the benefits have been received by the

Nanavati group [as stated in paragraph 9(m) sub-paragraphs (i) to (xiii) pages 417 and 418 of the said written statement] and by the Rajwani Group [as stated in paragraph 9(o) sub-paragraphs (i) to (xii) page 419 of the said written statement], the plaintiff and the Nanavati Group are estopped from seeking to resile therefrom as alleged in paragraph 19 page 509 and paragraph 23(rr) page 527 of the said written statement ?

5) Whether the suit is barred by the law of limitation (paragraph 4 of the written statement) ?

6) Whether the suit is bad for misjoinder of causes of action (paragraph 3 of the written statement) ?

7) Whether the suit is bad for non-joinder of necessary parties (paragraph 5 of the written statement) ?

8). Whether the alleged termination of the consent terms dated 12th December, 2008 is valid as alleged in paragraph 48 of the plaint ?

9) Whether there is no merit in the contentions of defendant nos. 5 to 8 that the consent terms dated 12th December, 2008 is valid or subsisting as mentioned in paragraph 58 of the plaint?

(10) Whether the plaintiff proves that the consent terms dated 12th December, 2008 does not create or confer any enforceable right on any of the parties as alleged in paragraph 58 of the plaint ?

(11) Whether the plaintiff proves that the consent terms dated 12th December, 2008 is not an agreement and an enforceable contract for the reasons alleged/set out in paragraphs 61 to 63 of the plaint ?

(12) Whether the plaintiff proves that the agreement/writing dated 12th December, 2008 (Exhibit 'C' to the plaint) has been abandoned as alleged in paragraph 63 of the plaint ?

(13) Whether the plaintiff proves that the consent terms dated 12th December, 2008 is no longer enforceable on account of fundamental change in circumstances as alleged/set out in paragraph 64 of the plaint?

(14) Whether the plaintiff proves that there is any repudiatory breach by the Rajwani Group as alleged/set out in paragraph 65 of the plaint?

(15) Whether the plaintiff's claim that it has been brought an end to the arrangement as contained in the consent terms dated 12th December, 2008 as alleged in paragraph 66 of the plaint is valid and legal?

(16) Whether the plaintiff proves that the consent terms dated 12th December, 2008 is void *ab-initio* as alleged in paragraph 67 of the plaint?

(17) Whether the plaintiff failed and neglected to cooperate and take necessary steps for reconstitution of partnership of the Firms M/s.Habitat Construction and M/s.Nanavati Construction Company as per the consent

terms dated 12th December,2008 by the plaintiff (at pages 635, 639 and 642 of the written statement)?

(18) Whether there are outstanding liabilities to be discharged by the partnership firms in relation to Baitul Karim and Versova property including statutory liabilities (page nos. 640, 643, 645, 647- 650 of the written statement) ?

(19) Whether the plaintiff proves that the firm Nanavati Construction Company stood dissolved on 9th February, 2009 as alleged in paragraph 4(b) of the plaint?

20. Mr.Chinoy, learned senior counsel for the plaintiff made a statement before this Court that none of those issues are triable issues of fact and thus can be disposed of on the legal and other factual submissions, if advanced by the parties. Mr.Sancheti, learned senior counsel for the defendant nos.5 to 8 did not accept the said submission made by the learned senior counsel for the plaintiff. None of the parties accordingly led any oral evidence on those issues framed by this Court on 19th January, 2019 in the Notice of Motion No.955 of 2018.

21. It is submitted by the learned senior counsel that though large number of properties were jointly owned by Nanavati Group and Rajwani Group, the plaintiff has filed this suit inter-alia praying

for partition only of six properties out of large number of properties. He submits that insofar as this notice of motion is concerned, the plaintiff is pressing the relief of partition only in respect of four properties.

22. Learned senior counsel invited my attention to some of the averments made in the suit and also in the written statement filed by the defendants and also the clauses of the consent terms filed by the parties on 12th December, 2008 in the suit filed before the Bombay City Civil Court. It is submitted by the learned senior counsel that even in the said consent terms dated 12th December, 2008, the parties have clearly admitted the equal right of Nanavati Group and Rajwani Group in various properties, including the six properties and their right of partition in the said properties. The right of the plaintiff to apply for partition of those properties by metes and bounds and for possession is not affected merely because the parties had filed the consent terms in the said BCCC Suit No.4008 of 2005.

23. It is submitted by the learned senior counsel that insofar as Baitul Karim property, St. Martin's Road Property, J.D. Alves's Property, Symons' Property and Sherly Rajan Road property are concerned, no development of any nature whatsoever has taken

place since December, 2008 till date as contemplated in various paragraphs of the consent terms entered into between the parties. None of the obligations under those consent terms have been complied with by the defendants no.5 to 8. It is submitted by the learned senior counsel that the said writing dated 12th December, 2008 is not enforceable on account of fundamental changes in situation, prevailing in December, 2008 when the said writing was signed. The plaintiff has already terminated and rescinded such writing dated 12th December, 2008. He submits that the status of all the properties have remained the same.

24. It is submitted that prayer clauses (a) to (d) of the plaint deal with the reliefs for partition sought by the plaintiff. He invited my attention to clauses 8 and 12 of the consent terms and would submit that it was categorically admitted by the parties that various properties described therein were jointly held by the parties. The parties had agreed to reconstitute the firm referred in the consent terms. Various steps were to be taken by the parties under the said consent terms which were not at all taken. In support of this submission that the plaintiff was not required to pray for partition of all the joint properties in the same suit, learned senior counsel placed reliance on the judgment of this Court in case of **Tukaram Niraji Patil vs. Hanmantrao Vithalrao Patil, 1978 BCR 98** and

in particular relevant paragraphs at pages 99, 101 and 103.

25. Learned senior counsel placed reliance on the judgment of the Allahabad High Court in case of **Chandar Shekhar vs. Kundan Lal & Anr., XXXI, ILR Allahabad 3** and more particularly relevant paragraph at page 4 in support of the submission that the plaintiff can file a fresh proceedings for partition of each property jointly held. He submits that there is a separate cause of action for partition of each joint property and a fresh application is permissible.

26. Learned senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of **Shub Karan Bubna vs. Sita Saran Bubna & Ors. (2009) 9 SCC 689** and in particular paragraphs 4, 7, 17, 18 and 20 to 22 in support of the submission that there are three stages in a partition suit. He submits that in this suit, there is a prayer not only for a declaration of the share of the plaintiff in the suit properties, but also for division of her shares by metes and bounds. He submits that one of the stage in such partition suit is “how and in what manner, the property / properties should be divided by metes and bounds”. He submits that the Court has to decide at what stage of the partition suit what steps have to be taken.

27. Learned senior counsel for the plaintiff placed reliance on

the judgment of the Hon'ble Supreme Court in case of **Raveesh Chand Jain vs. Raj Rani Jain, (2015) 8 SCC 428** and in particular paragraph 8 in support of the submission that under Order XII Rule 6 of the Code of Civil Procedure, 1908, the Court has wide discretion to pass a judgment at any stage of the suit on the basis of admission of facts made in the pleadings and without waiting for determination of other questions arising between the parties. He submits that none of the issues are triable issues of fact and thus in view of the defendants admitting an undivided share of the plaintiff with the defendants in the consent terms in the correspondence and also in the written statement, this Court has ample power to pass a judgment based on such admission in this notice of motion filed by his client. He submits that the Court has power to pass more than one decree.

28. Learned senior counsel for the plaintiff invited my attention to the averments made by the defendant nos. 5 to 8 in paragraphs M, N and O of the written statement filed in this suit and would submit that those benefits under the consent terms alleged to have been taken by the plaintiff as alleged by the defendant nos. 5 to 8 do not relate to the four properties which are admittedly the joint properties in which the parties have equal share.

He placed reliance on the judgment of Delhi High Court in case of **Umang Puri vs. Lt.Col.Pramode Chandra Puri, 165 (2009) Delhi Law Times 245** and in particular paragraphs 13 to 17, 26, 34 to 36, 38 and 39 and would submit that the court has ample power to pass the judgment under Order 12 Rule 6 of the Code of Civil Procedure, 1908 not only on the basis of the admission made expressly in the pleadings but even on constructive admissions.

29. Learned senior counsel placed reliance on the judgment of Delhi High Court in case of **Delhi Jal Board vs. Surendra P. Malik, 104 (2003) Delhi Law Times 151 (DB)** and in particular paragraphs 4, 6, 8, 9 to 11 and would submit that the powers under order 12 Rule 6 of the Code of Civil Procedure, 1908 are the powers granted to the court which can be exercised in case of admission which need not be made specifically or expressly and could be a constructive admissions also. He submits that such discretion cannot be exercised only if there involves disputed facts, claims and counter claims requiring evidence of parties for determination of issues or where the defence of a party touches the root of the matter and not otherwise. He submits that in that matter, the court had exercised jurisdiction under Order 12 Rule 6 even at the admission stage. He submits that in this case, the joint ownership of the parties in four properties has been admitted specifically in the written

statement and also in the correspondence. The plaintiff has ascertained the joint ownership in respect of those properties in the plaint which is not denied by the defendants in the written statement.

30. Learned senior counsel invited my attention to issue nos. 1, 2 and 3 framed by this court insofar as this notice of motion is concerned and would submit that all these issues are on law and thus can be answered by this court even without the plaintiff leading any oral evidence. Insofar as issue no.4 is concerned, he submits that no benefits are taken by the plaintiff in respect of those four properties in respect of which the plaintiff has pressed for judgment in this notice of motion.

31. Insofar as issue no.5 is concerned, it is submitted by the learned senior counsel that the said issue of limitation is raised by the defendants in respect of the partnership dispute and more particularly in respect of the two properties in respect of which the plaintiff has not pressed any judgment at this stage and thus the said issue need not be answered by this court at this stage.

32. Insofar as issue nos. 6 and 7 are concerned, it is submitted that there is no misjoinder of cause of action. He submits that there

is no misjoinder of cause of action, nor any non-joinder of any necessary party. The plaintiff has not sought the enforcement of the agreement against Mrs. Mumtaz Nanavati, the wife of the defendant no.1. The said Mrs. Mumtaz Nanavati did not claim any right in any property. In support of this submission, learned senior counsel invited my attention to the paragraph (3) of the written statement. He submits that the plaintiff has not applied for dissolution of any partnership firm. He submits that since the reliefs are claimed under Order 12 Rule 6 of the Code of Civil Procedure, 1908, there is no question of suit being a bad for non-joinder of Mrs.Mumtaz Nanavati.

33. Insofar as issue nos.8 to 10 are concerned, it is submitted by the learned senior counsel that the answer to those issues would be depend upon the view taken by this Court whether by virtue of filing the consent terms dated 12th December, 2008, the plaintiff is precluded from pressing any relief of partition of the joint properties or not. If this court takes a view that the consent terms does not preclude the petitioner from seeking judgment under Order 12 Rule 6 of the Code of Civil Procedure, 1908 in respect of those four properties, those issues can be answered by this court, accordingly.

34. Mr.Zal Andhyarujina, learned counsel appearing for the defendant nos.1 to 4 invited my attention to various paragraphs of the written statement filed by the defendant nos. 5 to 8 and would submit that those defendants have not disputed the fact that all the properties which are subject matter of the plaint are joint properties in which all the parties have certain rights. He submits that in any event, there is no dispute raised by the defendant nos. 5 to 8 at least in respect of the four properties which are admittedly the joint properties out of those six properties. In support of this submission, learned counsel invited my attention to various sub-paragraphs of paragraph (17) of the written statement filed by the defendant nos. 5 to 8.

35. Insofar as issue no.6 is concerned, it is submitted by the learned counsel that it is the case of the defendant nos. 5 to 8 that the partnership properties are mixed up with the joint properties. He submits that the plaintiff has not prayed for dissolution of the partnership firm but has only prayed for partition of the properties. He placed reliance upon Order 12 Rule 6 of the Code of Civil Procedure, 1908 and would submit that even if there is any mis-joinder of cause of action, such issue can be waived.

36. Insofar as issue raised by the defendant nos.5 to 8 that there was a mis-joinder of cause of action is concerned, it is submitted that even if the submission of the defendant nos. 5 to 8 is considered as correct, it would amount to mere irregularity. He also placed reliance on Order 1 Rule 13 of the Code of Civil Procedure, 1908 in support of this submission. The defendant nos. 1 to 4 are supporting the case of the plaintiff.

37. Mr.Sancheti, learned senior counsel for the defendant nos. 5 to 8 submits that by entering into the consent terms dated 12th December,2008, the parties have agreed the method and manner of distribution of the joint properties. He submits that in the suit filed by the plaintiff before the City Civil Court, the plaintiff had prayed for partition of the joint properties. He invited my attention to paragraphs 4 and 15 of the plaint and would submit that the suit is basically for Baitul Karim property. The plaintiff wanted the separation of the joint assets. There is also similar averments in paragraphs 17 and 23 of the plaint. He submits that the plaintiff herself alleged in various paragraphs the plaint as to why consent terms dated 12th December, 2008 could not be implemented for the reasons alleged by the plaintiff. All these allegations of the plaintiff are covered by issue nos. 8 to 16 framed by this Court.

38. Learned senior counsel strongly placed reliance on clause (8) of the consent terms and would submit that the parties had specifically agreed to distribute, authorize and/or allocate amongst and unto themselves, all such jointly held lands, assets, properties, liabilities, firms, and the development rights. The parties had also agreed upon the distribution and the manner thereof for their firms, properties and lands, assets with liabilities, development rights, responsibilities etc. so that effectively all the existing disputes *inter se* were resolved mutually and an appropriate understanding of a complete and overall distribution of development rights and their subsequent separation is recorded vide joint venture Ex.A and joint venture Ex.B. He submits that the said consent terms was an agreement recording the complete package.

39. Learned senior counsel invited my attention to various clauses of the consent terms in respect of St. Martin's Road Property and would submit that it was clearly agreed that the said property shall be jointly held by Nanavati Group and Rajwani Group in equal and joint holding as owners. He submits that under the said consent terms, one of the group were appointed as Persons-In-Charge to do various acts exclusively in respect of those specific properties including right to negotiate with tenants/occupants and were to be

conferred with various additional benefits. The said group was required to incur various expenses for removal of those tenants/occupants. He submits that the Persons-In-Charge were exclusively given specific role to be played under the consent terms in respect of specific properties. The Persons-In-Charge in respect of such properties were also given exclusive obligation including right to develop.

40. Learned senior counsel placed reliance on clause 3(a) and 3(b) of the consent terms and would submit that the Persons-In-Charge were under an obligation to start following up due diligence at their cost and expenses any/all ongoing and/or pending litigations in any courts and to start attending the the High Court Suit No.48 of 1989 of the vendors. Such Persons-In-Charge were also entitled to certain proportionate or in the said property. He strongly placed reliance on clause (4) to (9) of the consent terms which provides for development, construction of flats for vendors, role of Persons-In-Charge, right of sale in the project, payment option and final handing over of property.

41. Insofar as Baitul Karim property is concerned, it is submitted by the learned senior counsel that it was clearly admitted in the said consent terms that the partnership firm would be

continue to be the owner of the said property.

42. Insofar as unsold premises are concerned, certain flats were to be divided between the parties in the manner provided therein. He submits that the construction of the said building is already completed. The flats have been already distributed amongst the parties. Learned senior counsel submits that it is thus clear that the part of the said consent terms is acted upon by both the parties.

43. It is submitted by the learned senior counsel that insofar as Versova property is concerned under the said consent terms, the rights are created in favour of various parties under joint venture project. The rights are created in entirety in favour of various firms. He placed reliance on the relevant paragraphs on pages 81 to 91, 96 to 99 of the plaint. He submits that some of the flats are also reserved for third parties in view of the pending litigations. The pending litigations were handled jointly by the parties. All properties forming part of the said consent terms were developed and sold.

44. Learned senior counsel for the defendant nos. 5 to 8 invited my attention to paragraph (12) of the consent terms stating

that in view of the joint venture agreement annexed to the consent terms, the parties to the consent terms were concurred that all their disputes were resolved and thus the suit stood disposed of as withdrawn by the plaintiff to the said suit. Learned senior counsel invited my attention to various paragraphs of the written statement in support of his submission that various steps were taken by the parties pursuant to the said consent terms dated 12th December, 2008. He submits that his clients have also specifically demonstrated in the written statement as to how the plaintiff has also acted upon the said consent terms. The defendant no.1 has also filed an application before the Small Causes Court. The defendant no.1 who is son of the plaintiff has filed affidavit for himself and on behalf of other defendants. The plaintiff herein was a party defendant no.1(a) before the Small Causes Court.

45. Learned Senior Counsel strongly placed reliance on the letter dated 4th July, 2016 from the defendant no.2 to Mr.Amin Abdul Aziz Rajwani, defendant no.5 alleging that the land and the building Baitul Karim is the property of Nanavati Construction Company of which the Nanavati and Rajwani factions are the partners and thus the defendant no.5 did not have any right to restrict and/or restrain the entry to the defendant no.2 to the said

building. He submits that in the said letter, the defendant no.2 has also strongly placed reliance on the consent terms dated 12th December, 2008 and had contended that the defendant no.2 along with his brother Mr. Tazaldin Sadruddin Nanavati were the Persons-In-Charge of the Baitul Karim property. He submits that the plaintiff or the supporting defendants i.e. defendant nos. 1 to 4 cannot be now allowed to urge that the consent terms dated 12th December, 2008 were never acted upon.

46. Learned senior counsel invited my attention to the letter dated 9th August, 2012 addressed by Sheridan Kalpavraksh Co-operative Housing Society to the learned Tahsildar which was signed by the defendant no.1 requesting for permission to carry out development. He invited my attention to various portions of para (9) (p) of the written statement in support of his submission that the consent terms were acted upon and were relied upon by the plaintiff and the defendant nos. 1 to 4 in various correspondence and in the legal proceedings.

47. Learned senior counsel invited my attention to the written statement in Suit No.810 of 2017 which written statement was filed by the plaintiff herein and Mr. Tazaldin Sadruddin Nanavati

(defendant no.1) herein. He submits that admittedly in the said suit, Nanavati Group as well as Rajwani Group were parties. In the said written statement in the said suit filed by a third party Mr.Mark Henriques, the plaintiff herein and the defendant Mr.Tazaldin Sadruddin Nanavati had alleged to have carried out various acts in compliance with the consent terms.

48. Learned senior counsel placed reliance on the letter dated 19th January, 2009 which was signed by one of the member of the Group. In the said letter, both the parties have recorded that the promoter had executed a consent terms dated 12th December, 2008 and amicable solution having been reached, it was agreed and understood that the unilateral letters and the allegations made inter se between the parties be ignored and be treated as inconsequential so that the task of sharing the responsibilities and completing the various works be taken up forthwith. The parties requested the authority under the Urban Land Ceiling Act to withdraw the notice.

49. Learned senior counsel for the defendant nos. 5 to 8 invited my attention to the averments made by the defendant nos. 5 to 8 in paragraphs (9) (m), (n) and (o) of the written statement in support of his submission that the defendant nos. 5 to 8 have

demonstrated in detail as to which party had taken what benefit under the said consent terms dated 12th December, 2008. He submits that the consent terms are the compendium of the set of rights in respect of the joint properties agreed upon by the parties. He submits that various rights already accrued upon in favour of the parties in the said consent terms cannot be undone. Various properties forming part of the consent terms are of different value and thus the plaintiff cannot be allowed to select any part of the property for partition. He submits that no partition of any property is possible at this stage.

50. Learned senior counsel for the defendant nos. 5 to 8 placed reliance on the averments made in paragraph 18 (xxxv) and 18 (xxxvi) of the written statement and would submit that under the said consent terms, the plaintiff had sold flat no.401 for consideration which flat was transferred to her name pursuant to the execution of the consent terms. Learned senior counsel for the defendant nos. 5 to 8 submits that on 22nd January, 2011, the defendant nos. 1 to 4 had sent a draft for Reconstitution of Partnership Firms, viz., M/s. Habitat Constructions and M/s. Nanavati Construction Co. and also had sent a reminder by e-mail on 6th September, 2011 and 16th September, 2011.

51. Learned senior counsel for the defendant nos. 5 to 8 invited my attention to the letter dated 9th May, 2016 from the defendant no.1 to City Survey Officer, Bandra regarding property bearing C.T.S.Nos. F/1018 to F/1022 claiming certain rights in the said property based on the consent terms. He also invited my attention to the letter dated 12th July, 2011 from Sheridan Kalpavraksha Co-operative Housing Society signed by Mr.A.F.Rajwani to the architect forwarding a copy of the proposed layout plan to be submitted for amendment and sanction. A copy of the said letter was sent to the defendant no.1 also. He also placed reliance on the letter dated 13th July, 2011 addressed by Mr.A.F.Rajwani through his advocate M/s. Bina Rao & Co. to Mrs.Jacinta D'Silva, advocate who was representing both the parties at that time. In the said letter also, there was a reference to the consent terms dated 12th December, 2008.

52. Learned senior counsel for the defendant nos. 5 to 8 invited my attention to the averments made in paragraph (29) of the plaint alleging that various obligations in respect of Baitul Karim properties and condition of development thereof were to be complied with as per Schedule-1 remained uncomplied from December 2008 to March 2018 set out in the statement annexed to

the plaint. He also invited my attention to the averments made in the plaint in paragraphs 35, 36, 37 and 39 and also to the prayers in the plaint and would submit that the plaintiff has not prayed challenging the validity of the consent terms in the plaint. He submits that the said consent terms are binding on all the parties. Learned senior counsel submits that his clients have already filed a suit *inter alia* praying for enforcement of the said consent terms/agreement dated 12th December, 2008 or in the alternate for partition of those properties.

53. Learned senior counsel invited my attention to the letter dated 16th March, 2018 addressed by the plaintiff through her advocate purporting to terminate the consent terms. He submits that in the said notice of termination, the plaintiff has vehemently contended that the work done by the defendant nos. 5 to 8 if any in respect of the J.D.Alves' Property was done without first complying with the pre-condition and was unilateral, without authority or consent of the co-owners which included the plaintiff. He submits that in the said notice, the plaintiff had alleged two repudiatory breaches by the Rajwani Group of various fundamental terms contained in the said consent terms dated 12th December, 2008.

54. Learned senior counsel strongly placed reliance on paragraph (37) of the said notice of termination and would submit that the plaintiff herself had relied upon paragraph (1)(f) of the Joint Venture, Ex.A to the consent terms dated 12th December,2008 and had contended that the Nanavati Group was permitted to sale Flat nos. A/102 and A/401 of Panorama at Versova and further admitted that by agreement for sale dated 27th August,2009, the plaintiff had sold flat no.A/102 of Wing A of Panorama at Versova to Mr.Parshotam Tikamdas Sukhwani for lumpsum consideration of Rs.56 lacs. It is submitted by the learned senior counsel that the plaintiff thus cannot be allowed to urge that the plaintiff did not act upon the said consent terms and did not take any benefit under the said consent terms.

55. Learned senior counsel submits that insofar as issue nos. 2 to 4 are concerned, all those issues are based on the fact that the parties have jointly acted upon the consent terms. Issue nos. 10 to 15 are also based on the factual aspect relating to enforcement of the consent terms. He submits that all those issues are framed bearing factual aspects and thus decision cannot be rendered by this court in piecemeal. The documents and pleadings cannot be read in part.

56. Insofar as issue no.21 framed by this court in suit is concerned, it is submitted by the learned senior counsel that though properties are incapable of partition, the consent terms provided for determination of these properties. There cannot be any piecemeal distribution of assets and on this ground itself, no relief can be granted by this court for judgment in respect of the part of the judgment under Order 12 Rule 6 of the Code of Civil Procedure, 1908.

57. Learned senior for the defendant nos.5 to 8 placed reliance on section 46 of the Indian Partnership Act, 1932 and also the judgment of the Delhi High Court in case of **Jai Rattan Bhalla & Anr. vs. Puri Investments & Ors., 2011 SCC OnLine Del. 5560** and in particular paragraphs 36, 39, 45 to 48, 52, 56, 57, 59 and 61 in support of the submission that the assets / properties belonging to the partnership vests in the firm and not in the individuals and upon dissolution, after settling accounts of the firm, realization out of the assets of the firm properties/accounts are is divided amongst the partners to the extent of their profit sharing as a surplus. He submits that there is no concept of co-ownership amongst the partners during subsistence of the partnership. The partnership properties are not held by the partners as co-owners. The

property belongs to the firm. He submits that admittedly two of the properties out of six properties belonged to the firm. It is submitted that since the joint properties have been brought into hotchpotch of the joint venture business by virtue of the consent terms dated 12th December, 2008, the plaintiff cannot now seek partition of those properties. All the properties which are subject matter of the suit will have to be dealt with only in accordance with the provisions of the consent terms.

58. It is submitted by the learned senior counsel that the parties are bound to accept the entire document as a whole and no part of the said consent terms can be dissected. He submits that the parties having accepted the benefits under the consent terms, cannot be allowed now to seek partition of the properties with the original status. In support of this submission, learned senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of **Karam Kapahi & Ors. vs. Lal Chand Public Charitable Trust & Anr., (2010) 4 SCC 753** and in particular paragraphs 37, 41, 45 and 49 to 54.

59. It is submitted by the learned senior counsel that in any event the powers under Order XII Rule 6 of the Code of Civil

Procedure, 1908 vests in the Court are discretionary powers and such discretionary powers have to be exercised judicially and not casually. He submits that the alleged admissions in the consent terms cannot be severed by this Court. He submits that a bare perusal of the consent terms filed by the parties would clearly indicate that all the parties had jointly agreed that all the joint properties have to be developed jointly and further agreed to share the developed property in a particular manner. Learned senior counsel for the defendant nos.5 to 8 distinguished the judgment of the Delhi High court in case of **Umang Puri** (supra) relied upon by the learned senior counsel for the plaintiff. He invited my attention to paragraphs 34 and 37 of the said judgment and would submit that in that judgment the admissions of liability were clear and thus the Court had exercised its discretion. In this case, there is no such clear admission either in the consent terms or in any of the documents or pleadings.

60. Learned senior counsel distinguished the judgment of the Hon'ble Supreme Court in case of **Shub Karan Bubna** (supra) and invited my attention to paragraph 7 of the said judgment and would submit that in this matter there is a serious debate on the issue as to whether jointly owned properties of the parties were governed by the

rights and obligations of the parties recorded in the consent terms and thus whether the parties can seek partition of the properties as per the original status or those properties would be governed only by the terms and conditions of the consent terms arrived at between the parties. Learned senior counsel placed reliance on paragraph 18.2 of the said judgment and would submit that since the properties in question cannot be divided by metes and bounds in view of the terms and conditions of the consent terms, there is no question of passing any judgment under Order XII Rule 6 of the Code of Civil Procedure, 1908 in this case. He submits that in this case the parties have already agreed to the mode and manner of division of the joint properties in the consent terms and thus the entitlement of the parties would be only after the terms and conditions of the consent terms are complied with by both the parties.

61. Learned senior counsel for the defendant nos.5 to 8 distinguished the judgment of the Delhi High Court in case of **Delhi Jal Board** (supra) relied upon by Mr.Chinoy, learned senior counsel for the plaintiff. He invited my attention to paragraph 9 of the said judgment and would submit that since the objections raised by the defendant nos.5 to 8 against rendering the judgment to the root of the matter, it would be impossible for the plaintiff to succeed in its prayer for partition in view of the consent terms arrived at

between the parties. The principles laid down by the Delhi High Court in case of **Delhi Jal Board** (supra) would not assist the case of the plaintiff. He submits that since the plaintiff has received various benefits under the said consent terms, the plaintiff is estopped from challenging the validity of the said consent terms. The plaintiff has not agreed to return the benefits arrived at under the consent terms.

62. Learned senior counsel for the defendant nos.5 to 8 placed reliance on the judgment of the Hon'ble Supreme Court in case of **Punjab & Sind Bank & Anr. vs. S. Ranveer Singh Bawa & Anr.** (2004) 4 SCC 484 and in particular paragraphs 5 to 8 in support of the submission that the plaintiff already having obtained the benefits under the consent terms is estopped from terminating the said consent terms.

63. Learned senior counsel for the defendant nos.5 to 8 placed reliance on the judgment of the **Muralidhar Chatterjee vs. International Film Company Limited, XLVI, BLR 178** and more particularly relevant paragraphs at pages 181 to 183 in support of the submission that the person who has taken the benefit under an agreement is bound to return the benefit first before challenging the said document. No such relief for partition thus can be granted by

this Court under Order XII Rule 6 of the Code of Civil Procedure, 1908.

64. Learned senior counsel submits that this Court even otherwise cannot grant any partial partition of the property. He submits that there are large number of properties which were jointly held between the two groups. The plaintiff has prayed for partition in this suit only in respect of six properties and is pressing for the judgment under Order XII Rule 6 of the Code of Civil Procedure, 1908 only in respect of four properties. In support of this submission, learned senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of **R. Mahalakshmi vs. A.V. Anantharaman & Ors., (2009) 9 SCC 52** and in particular paragraphs 2, 6, 10, 19, 21, 22 and 24. He also placed reliance on the judgment of the Hon'ble Supreme Court in case of **R. Mahalakshmi vs. A. Kanchana & Ors., (2017) 11 SCC 548** and in particular paragraphs 6 to 12 in support of this submission.

65. Learned senior counsel placed reliance on the judgment of this Court in case of **Shivmurteppa vs. Virappa & Ors. XXIV, the Indian Law Reports 128** and more particularly relevant paragraphs at pages 133 and 134 and would submit that since the plaintiff has

not prayed for general partition of all the joint properties but has prayed for few properties, the said partition is not permissible. In support of the same submission, learned senior counsel placed reliance on the judgment of this Court in case of **Govindrao Gangaramji Ajmire vs. Dadarao @ Shrawan Gangaramji Ajmire & Ors.** 2004(4) Mh.L.J. 653 and in particular paragraphs 17 and 20 in support of the submission that the suit for partition has to be for seeking reliefs of partition in respect of all the joint properties and not the selected properties.

66. Learned senior counsel invited my attention to the averments made by the defendant nos.5 to 8 in the written statement, in reply to the averments made in paragraph 26 in the plaint by the plaintiff denying that there was no development in respect of the suit properties. He specifically placed reliance on paragraph 4 of the written statement in this regard. He also placed reliance on paragraph (vii), (xv), (xvi), (xxiv), (xxvi), (xvii) and (m) and paragraph 28 of the written statement and would submit that the defendant nos.5 to 8 have denied the allegations of the plaintiff that there was no development of any of the properties.

67. It is submitted that the parties in this case have not agreed

that the properties were not to be partitioned in this case. It is submitted that the partition in this case had already been taken place in the consent terms in the mode and manner prescribed and agreed upon by the parties. It is not the case of the defendant nos.5 to 8 that the plaintiff did not have right of partition. Such right has been already exercised by both the parties by recording their agreement in the consent terms. He vehemently placed reliance on clause (F) at page 99 of the plaint which is part of the consent terms. He submits that the discretion vests in this court under Order XII Rule 6 of the Code of Civil Procedure, 1908 can be exercised to balance the equities between the parties. The Court can consider the effect of the consent terms entered into between the parties and can consider all the properties and their status only at the stage of final hearing of the suit.

68. Insofar as issue no.1 is concerned, it is submitted by the learned senior counsel that the Court has ample power to pronounce the judgment on all the issues under Order XIV Rule 2 of the Code of Civil Procedure, 1908. He submits that under Order XIV Rule 6 of the Code of Civil Procedure, 1908, the Court can decide an issue as a preliminary issue only if such issue can be decided first in isolation which conditions in this case are not satisfied.

69. Mr.Chinoy, learned senior counsel for the plaintiff in rejoinder submits that no triable issues are raised by the defendant nos.5 to 8 as to why the powers vested in the Court under Order XII Rule 6 of the Code of Civil Procedure, 1908 to pass a judgment cannot be invoked by the plaintiff in this case.

70. Insofar as the issue raised by the defendant nos.5 to 8 that there cannot be any partial partition of the parties is concerned, it is submitted that it is not the case of the plaintiff or the defendant nos.5 to 8 that all these properties were coparcenary properties and thus there could not be any partition in respect of any part of the properties. He submits that admittedly it is the case of the plaintiff and also the defendant nos.5 to 8 that all the properties were joint properties and thus cause of action for each property is separate cause of action and the joint owner is not required to file a composite suit for seeking partition in respect of all the properties. Learned senior counsel once again placed reliance on the judgment of this Court in case of **Tukaram Nirji Patil** (supra).

71. It is submitted that the question of hotchpotch of the properties does not apply to the joint properties. He submits that at

least in respect of four properties referred to aforesaid, the defendant nos.5 to 8 have not denied that no development on those properties had taken place. He submits that none of the paragraphs of the written statement refers to these four properties or alleges that these four properties were developed.

72. It is submitted by the learned senior counsel that the consent terms arrived at between the parties cannot be construed as a deed of partition. The parties had agreed to keep the joint family property joint till the development of the properties would have taken place. He placed reliance of page 140 of the plaint forming part of the consent terms and would submit that in case of St.Martin's Road Properties, it was specifically provided that the suit properties shall be jointly held by the parties. He submits that all the joint owners have agreed to continue to be joint holders and held those properties jointly. By virtue of entering into a document by the parties, the parties had only deferred a partition till development would have taken place. He submits that *ex-facie* for last ten years, there was no development on any of the properties at all. None of the parties can be considered to have acted upon the consent terms.

73. It is submitted by the learned senior counsel that right of

partition granted to a party in law cannot be destroyed by entering into any consent terms. The defendant nos.5 to 8 cannot be allowed to make divisible properties into indivisible properties. He submits that the consent terms cannot fetter the rights of the plaintiff to seek partition of the joint properties. The plaintiff has not asked for a declaration that the agreement entered into between the parties is bad and illegal. He submits that the admissions of the defendant nos.5 to 8 in various paragraphs of the written statement and in the consent terms itself were not the conditional admissions. He submits that the said consent terms cannot be construed as the partition on the date of such consent terms, but such partition was required to take place after the development of the suit properties.

74. In so far as the issue raised by the defendant nos.5 to 8 that the suit cannot be filed for partition only of some of the properties out of several properties is concerned, it is submitted by the learned senior counsel for the plaintiff that out of those 31 properties, some of the properties were already developed partly which position is indicated in the consent terms itself. In all remaining properties, the parties have 50% share each. He submits that each of the joint properties is treated as a separate property and were to be shared equally. He submits that there is a separate

cause of action in each of those joint properties. The plaintiff is not required to file one suit for partition of all the properties together in the same suit.

75. Learned senior counsel for the plaintiff distinguishes the judgment of this Court in the case of *Govindrao Gangaramji Ajmire Vs. Dadarao @ Shrawan s/o Gangaramji Ajmire (dead) Lrs. Indrani wd/o Shrawan Ajmire & Ors. (supra)* on the ground that in this case, the properties which are subject matter of the suit are not coparcenary properties, but held in common and were joint properties. He strongly placed reliance on the judgment of Orissa High Court in the case of *Harihar Rajguru Mohapatra & Anr. Vs. Nabakishore Rajaguru Mohapatra & Ors., AIR 1963 Orissa 45* which judgment is adverted to in this judgment in the case of *Govindrao Gangaramji Ajmire (supra)*. He submits that the principle applicable for partition of co-parcenary properties does not apply to the suit for partition in respect of the properties held in common or joint properties or jointly owned properties.

76. Learned senior counsel placed reliance on the judgment of *Syed Habibur Rasul Abdul Faiz Vs. Ashita Mohan Ghosh & Ors., 1908 SCC OnLine Cal 55* and in particular paragraph 2

thereof in support of the submission that only in case of joint family properties or co-owners properties, partial partition may be prohibited since the partition of such properties has the effect of breaking up a joint Hindu family. It is submitted that rule of hotchpotch does not apply in case of joint properties or co-owners properties. He submits that none of the issues framed by this Court for the purpose of deciding this notice of motion under Order XII Rule 6 of the Code of Civil Procedure, 1908 are triable issues. He submits that the provisions of Order XIV Rule 2 of the Code of Civil Procedure, 1908 does not prevail over the the provisions of Order XII Rule 6 of the Code of Civil Procedure, 1908. He submits that under Order XII Rule 6 of the Code of Civil Procedure, 1908, if the facts are admitted and there are no triable issues raised, then the Court has ample power to pass a judgment by exercising powers under Order XII Rule 6 of the Code of Civil Procedure, 1908.

77. Learned senior counsel for the plaintiff once again referred to and relied upon the judgment of the Hon'ble Supreme Court in the case of **Raveesh Chand Jain** (*supra*) in support of the submission that the purpose and objection of Order XII Rule 6 of the Code of Civil Procedure, 1908 is to give the plaintiff a right to

speedy judgment so that either party may get rid of the rival claims which are not in controversy. He submits that since there is no dispute in respect of joint ownership of two groups at least in respect of four properties, the plaintiff is entitled to a judgment by invoking the provisions of Order XII Rule 6 of the Code of Civil Procedure, 1908 at least in respect of those properties and is not required to wait till the full-fledged trial.

78. Mr.Andharujina, learned counsel for the defendant nos.1 to 4 who are supporting the case of the plaintiff submits that since partial partition of jointly owned properties in common is permissible in law, there is no question of dissecting admissions. He submits that by passing a judgment for partition of the undisputed joint properties would not amount to dissenting any admissions.

79. Learned counsel placed reliance on the judgment of this Court in the case of Sitaram Vinayak Hasabnis & Ors. Vs.Narayan Shankarro Hasabnis & Ors., AIR (30) 1943 Bombay 216 and in particular relevant paragraphs at pages 217 and 218 thereof. He submits that the principle for partition of the properties in case of coparcenary properties is different than the

principle for joint properties held in common. He submits that when a suit for partition is between co-parceners, it should embrace the whole family property and a member of a joint family suing his coparceners for the partition of joint family property is bound to bring into hotchpotch all the property that may be in his own possession in order that there may be a complete and final partition. He submits that in this case, since it is not the case of any of the parties that the suit properties are the coparcenary property, the question of principle applicable for partition in the suit in case of coparcenary properties cannot be extended to the reliefs sought for partition in respect of the joint properties held in common.

80. Learned counsel also placed reliance on the judgment of Orissa High Court in the case of **Harihar Rajguru Mohapatra & Anr. (supra)** and in particular paragraph 6 thereof in support of the aforesaid submissions. He submits that though the parties had entered into the consent terms dated 12th December 2008, there is no fetter on the parties to seek partial partition in the joint properties. He submits that various paragraphs of the written statement relied upon by Mr.Sancheti, learned counsel for the defendant nos.5 to 8 would not indicate that the assertion made by

the plaintiff in the suit that all these properties continued to be joint properties of two groups is disputed by the defendant nos.5 to 8. He submits that in none of the paragraphs of the written statement, the defendant nos.5 to 8 have disputed that the properties which were subject matter of the suit were held jointly and had equal share therein.

81. Ms.Panda, learned counsel for the defendant nos.5 to 8 submits that none of the judgments cited by the plaintiff or by the defendant nos.1 to 4 have considered the principles of law laid down by the Hon'ble Supreme Court in the case of ***R. Mahalakshmi (supra)*** and thus would not assist the case of the plaintiff. The Hon'ble Supreme Court in that matter had remanded the matter to the trial Court. The trial Court in subsequent judgment clarified the same position. She submits that by entering into consent terms by parties, all such joint family properties are brought into common hotchpotch and would be held to be governed by the terms and conditions of the said consent terms. She submits that the answer of this Court on issue nos.8 to 16 would have bearing on issue no.1. She submits that the parties in this case have already agreed for distribution of properties on the terms and conditions recorded in the consent terms and if this Court passes any judgment for

partition of the properties at this stage, the suit for specific performance of the consent terms/agreement filed by the defendant nos.5 to 8 would be infructuous. She submits that both the parties are given different benefits under the consent terms in the properties based on the efforts taken by each of them. She submits that some of the flats are distributed among the parties by acting upon the some of the provisions of the consent terms.

REASONS AND CONCLUSIONS

82. A perusal of the record indicates that the Nanavati Group filed a suit on 26/9/2005 before the Court of City Civil Court being Suit No.4008 of 2005 for various reliefs in respect of the some of the properties against defendants No.5 to 8 and others. There was series of exchange of correspondence and negotiation meetings, as also mediation proceedings between the parties. The parties thereafter mutually recorded the consent terms dated 12.12.2008 and filed the same in the said suit. By an order dated 12.12.2008, the said suit came to be disposed of as the matter was settled.

83. A perusal of the said consent terms indicates that the Nanavati as well as Rajwani groups have given consent, so as to distribute, authorise and/or allocate amongst and unto themselves

all the jointly held lands, assets, properties, liabilities, firms and the development rights where the said two groups had joint interest and concern. The parties agreed upon the distribution and manner thereof for their firms, properties, lands, assets and liabilities, development rights, responsibilities, etc. for the immovable properties jointly held so that effectively all the existing disputes *inter se* were resolved mutually and an appropriate understanding of a complete and overall distribution of development rights and their subsequent arrangement came to be recorded vide joint venture Exhibit A and joint venture Exhibit B executed and annexed as A and B to the consent terms. The parties also mutually undertook to adopt and set out their terms in those joint venture agreement.

84. Paragraph 12 of the consent terms provided that in view of the joint venture agreement annexed to the consent terms, the parties had concurred that all their disputes were resolved and thus the suit stood disposed of as withdrawn by the plaintiff. A perusal of the record further indicates that late Mr. Sadruddin Nanavati and the late Mr. Abdulaziz Rajwani had acquired/dealt with/obtained the benefits in respect of 31 properties. A perusal of the consent terms further indicates that under the said consent terms, the parties had provided for mechanism to distribute the properties after

completion of the projects mentioned in the consent terms. The parties had decided the mode, manner and distribution of the properties after completion of various projects. Both groups were given exclusive rights in respect of one or other property to develop and incur various expenses and to do various acts exclusively. Such group was also conferred with various exclusive benefits in exclusion of other group.

85. A perusal of the record further indicates that both the groups have obtained various benefits under the said consent terms. Some of the properties were already divided under the said consent terms. Both the parties have partly taken benefits under the said consent terms and have acted upon those consent terms. The learned Senior Counsel for the plaintiff could not dispute these facts summarized in the written statement filed by defendants No.5 to 8 contending that various benefits were received by both the groups under the said consent terms while acting upon those consent terms partly.

86. In my view, though there was no dispute that prior to the execution of the consent terms both the groups had equal share in various properties, some of which were subject-matter of the suit

filed by the plaintiff, in view of the consent terms arrived at between the parties by bringing those properties into the hotchpotch of various joint venture projects on the terms and conditions set out in great detail in the consent terms, both the parties jointly agreed to deal with and divide those joint properties in the mode and manner prescribed therein, after carrying out development of various properties.

87. It is not in dispute that defendant No.1 representing Nanavati Group, including the plaintiff had filed an application dated 4th May, 2012 before the Small Causes Court in RAE Suit No.305/506 of 2006 in request of the Henriques property. In the said application filed by defendant No.1, it was confirmed that Nanavati and Rajwani Groups had purchased land, along with structure and were the two co-owners in respect of the said property. Defendant No.1 had strongly placed reliance on the said consent terms executed between the two groups.

88. In the letter dated 4th July, 2016 addressed by defendant No.2 to defendant No.5, defendant No.2 made a reference to the consent terms/agreement and claimed the rights in respect of the premises in the Baitul Karim property, which the Nanavati Group

was to be entitled to under the said consent terms. Late Mr. Abdulaziz Rajwani and Tazaldin Nanavati had filed a joint application dated 9th August, 2012 before the Tehsildar Andheri and placed reliance on the said consent terms for asserting their rights under the said consent terms. The defendant No.1 also filed an affidavit-in-reply dated 19th September 2016 in Chamber Summons No.1528 of 2016 in High Court Suit No.1714 of 1985 and placed reliance upon various provisions of the said consent terms. The plaintiff and defendant No.1 also filed their written statement dated 16 August 2017 in Suit No.810 of 2017 filed by Mr. Mark Henriques against Rajwani and Nanavati Groups before the City Civil Court at Dindoshi, and strongly placed reliance on the consent terms.

89. In so far as various unsold premises in Baitul Karim property are concerned, certain flats were to be divided between the parties in the manner provided therein. It is not in dispute that the construction of the said building is already completed and the flats have been already distributed amongst the parties.

90. In respect of Versova property, under the said consent terms rights have been accrued in favour of various parties under the joint venture project. Some of the flats have been reserved for third

parties in view of the pending litigation. Such pending litigations were handled jointly by the parties. A perusal of the letter dated 19th January, 2009 which was signed by one of the members of the group, indicates that it was clearly admitted in the said letter that both the parties have agreed that the promoter had executed the consent terms dated 12th December, 2008 and amicable solution having been reached, it was agreed and understood that the unilateral letters and the allegations made *inter se* between the parties be ignored and be treated as inconsequential, so that the task of sharing the responsibilities and completing the various works could be taken up forthwith. The parties jointly requested the authority under the Urban Land Ceiling Act to withdraw the notice issued by the said authority.

91. A perusal of the record further indicates that it is an undisputed position that under the said consent terms, defendants No.1 to 4 had sent a draft for Reconstitution of Partnership Firms, namely M/s. Habitat Constructions and M/s. Nanavati Construction Co. A perusal of the letter dated 9th May, 2016 from the defendant No.1 to the City Survey Officer, Bandra regarding the property bearing C.T.S. Nos. F/1018 to F/1022 indicates that defendant no.1 was claiming certain rights in the said property

based on the consent terms. A perusal of the letter dated 12th July, 2011 from Sheridan Kalpavraksha Co-operative Housing Society, signed by Mr. A.F. Rajwani to the Architect forwarding a copy of the proposed layout plan to be submitted for amendment and sanction, a copy of which was also sent to the defendant No.1, shows that there was no objection raised by the defendant No.1 to the said letter. The letter dated 13th July, 2011 addressed by Mr. A.F. Rajwani, through his Advocate M/s. Bina Rao & Co. to Ms. Jacinta D'Silva, Advocate who was representing both the parties at that time, also refers to the said consent terms dated 12.12.2008.

92. A perusal of the complaint and more particularly paragraph 29 clearly indicates that it is the case of the plaintiff that there has been no development in respect of Baitul Karim property from December, 2008 till that date contemplated by Schedule 1 to the document annexed to the consent terms. Several facts of Baitul Karim property and conditions of development thereof which were to be complied with as per Schedule 1 have remained to be complied from December 2008 to March, 2018. The plaintiff has averred that the contents of Exhibit-D annexed to the plaint may be incorporated as part of the plaint. Similar averments are also made in respect St. Martin's Road property, Pali Mali Road property and Sherly Rajan Road property. The plaintiff has also

alleged in respect of the J.D. Alves's property and Symon's property that there has been no development from December, 2008 till date as contemplated in Schedules 6 and 7 respectively of the consent terms.

93. A perusal of the letter dated 16th March, 2018 addressed by the plaintiff through her Advocate terminating the consent terms, indicates that in the said notice it was alleged by the plaintiff that the work done by defendants No.5 to 8, if any, in respect of the J.D. Alves's property was done, without first complying with the preconditions, without authority and consent of the other co-owners, which included the plaintiff.

94. In paragraph 37 of the said notice of termination, the plaintiff had strongly placed reliance on paragraphs (1)(f) of the joint venture (Exh.A to the consent terms dated 12.12.2008) and had contended that the Nanavati group was permitted to sell Flat Nos. A/102 and A/401 of Panorama at Versova. She further admitted that by agreement for sale dated 27th August, 2008, the plaintiff had sold Flat No.A/102 of Wing A of Panorama at Versova to Mr. Parshotam Tikamdas Sukhwani for a lump sum consideration of Rs.56.00 lakhs. It is thus clear beyond reasonable doubt that both the parties have partly acted upon the consent terms and have also

taken various benefits under the said consent terms and. In my view, all the rights in the immovable property, prior to the date of filing of the consent terms in the said suit filed by the Nanavati Group, are superseded by a fresh agreement by way of the consent terms entered into between the parties. All the rights and obligations of the parties in respect of all these properties thus would be governed by the terms and conditions of the agreement recorded in the said consent terms. In my view, in view of the agreement between the parties recorded in the said consent terms, neither the plaintiff, nor the defendants can claim their right in the properties based on the conditions prevailing prior to the date of filing of the consent terms. It is not in dispute that the defendants No.5 to 8 have already filed a separate suit, *inter alia*, praying for enforcement of the consent terms against the plaintiff and the defendants No.1 to 4. The said suit is pending adjudication.

95. A perusal of the prayers in this suit indicates that the plaintiff has prayed for a declaration that the plaintiff and the defendants No.1 to 4 have an undivided one half share in respect of those properties and has prayed for a decree of partition in respect of those properties. In the alternate to prayers (a) and (b), the Plaintiff has prayed for sale of those properties and for a direction to pay one half share in the net sale proceeds to the plaintiff

and defendants No.1 to 4. In prayer (d), the plaintiff has prayed for a judgment on admission under Order XII, Rule 6 of the Code of Civil Procedure, 1908 (for short 'the CPC'), or in the alternate by way of a preliminary decree or partition under Order XX, Rule 18(2) of the CPC in respect of those properties.

96. In so far as issue no.1 is concerned, it is vehemently urged by the learned Senior Counsel for the plaintiff and defendants No.1 to 4 that since none of the suit properties were coparcenary properties, but were joint properties, there is a separate cause of action for seeking partition in respect of each of such properties and thus, the suit, *inter alia*, filed for seeking partition of six properties out of several other properties is maintainable. On the other hand, it was vehemently urged by the learned Counsel for Respondents No.5 to 8 that there was no question of any partition since the parties herein have agreed to the partition of their properties in the mode and manner prescribed under the consent terms, after carrying out development and, in any event, the plaintiff had no option to seek partition only of selected properties in view of the parties already having agreed upon partition of the properties under the consent terms and having taken benefits thereunder.

97. In my view, since the parties have brought their share and interest in the joint properties into hotchpotch in the joint venture by recording various terms and conditions, the said properties can be dealt with only in the mode and manner prescribed under the said consent terms. The suit filed by the plaintiff, *inter alia*, praying for partition, is pending and at the same time, the suit filed by defendants No.5 to 8 seeking enforcement of the consent terms is also pending. The rival claims of both the parties in the said suit arising under the said consent terms, can be decided in both these suits. In my view, the issue raised by Mr. Chinoy, learned Senior Counsel for the plaintiff and Mr. Andhyarunjina, the learned Counsel for defendants No.1 to 4 that there would be a separate cause of action for filing a suit for partition in respect of each of the joint properties, is an academic issue in the facts of this case.

98. There is no dispute about the proposition of law laid down by the Courts in various judgments, some of which are relied upon by the learned Senior Counsel for the plaintiff and also by the learned Counsel for defendants No.1 to 4 that if the property is not coparcenary or alien property, one of the co-owners of such property is entitled to file a separate suit for partition in respect of each

property. These principles, however, will not apply to the facts of this case in view of the parties having recorded their terms and conditions to bring their joint properties into the hotchpotch of the joint venture project. Various judgments relied upon by Mr. Chinoy, learned Senior Counsel for the plaintiff and Mr. Andhyarunjina, learned Counsel for defendants No.1 to 4 would not assist the case of the plaintiff or the defendants No.1 to 4. Issue no. 1 is answered in the negative.

99. In so far as issue no.2 is concerned, since the parties have agreed upon and provided for in the consent terms, the mode, manner, distribution and division of the properties of the two groups, the plaintiff cannot seek partition of those properties in this suit. Issue no.2 is accordingly answered in the affirmative.

100. So far as issue no.3 is concerned, the same is also answered in the affirmative for the reasons recorded in respect of issue no.2.

101. In so far as issue no.4 is concerned, in my view, both the parties have acted upon the consent terms partly and have availed of the benefits under the said consent terms partly. Issue no.4 is answered accordingly on the aforesaid terms.

102. In so far as issue no.5 i.e. as to whether the suit is barred by law of limitation is concerned, Mr. Chinoy, learned Senior Counsel for the plaintiff urged that since the issue of limitation was raised by the defendants in respect of the partnership dispute and more particularly, in respect of the two properties for which the plaintiff has not pressed for any judgment under Order XII, Rule 6 of the CPC. This issue need not be answered by this Court, at this stage and as such not answering the said issue at this stage. Issue no.5 to be tried along with the other issues already framed by this court on 11.1.2019 in suit.

103. In so far as issues no.6, 7, 8 and 9 are concerned, these two issues also may require evidence. These two issues also may be decided along with other issues framed on 11.1.2019.

104. In so far as issues No.10 to 16 are concerned, these issues are in respect of validity of the consent terms, whether such consent terms does not create or confer any enforceable right on any of the parties, whether the consent terms amounts to an agreement and is

an enforceable contract, whether there is any repudiatory breach committed by the Rajwani Group, or whether such consent terms are void *ab-initio* ? All these issues can be decided only along with other issues already framed on 11/1/2019 only after the parties lead oral evidence , if they so desire to lead , is led.

105. In so far as issues No.17 to 19 are concerned, Mr. Chinoy, learned Senior Counsel for the Plaintiff, during the hearing held on 17.01.2019 made a statement that these three issues are qua the alleged partnership properties and thus his client does not propose to press these issues at this stage. This Court, thus, need not deal with these issues at this stage. These issues can be dealt with along with other issues at the time of hearing of the suit.

106. In my view, there is no substance in the submission made by Mr. Chinoy, learned Senior Counsel for the plaintiff that none of the issues framed by this Court are triable issues on facts and thus can be disposed of on the basis of legal and factual submissions only. Some of the issues which are not dependent upon the oral evidence are already being decided by this Judgment.

107. In so far as the submission of the learned Senior Counsel

for the Plaintiff that even in the consent terms dated 12.12.2008, the parties had clearly admitted equal rights of Nanavati Group and Rajwani Group in various properties is concerned, in my view, there is no dispute between the parties that prior to the date of execution of the consent terms both the groups had equal share in those joint properties. However, in view of both these groups, brought it these joint properties into the hotchpotch of the joint venture projects, recorded in great detail in the consent terms, the reliance placed by the learned Senior Counsel on those paragraphs of the consent terms would be of no assistance to the plaintiff. Defendants No. 5 to 8 also had not disputed this fact that prior to the date of execution of the consent terms both the groups had equal share in the joint properties.

108. It is the case of the plaintiff herself that in respect of most of the properties, there was no development carried out by any of the parties to the consent terms. In my view, merely because the plaintiff has terminated the said consent terms dated 12.12.2008, the joint rights of the parties to those properties cannot be restored status quo ante, but will have to be dealt with in accordance with the terms recorded in the agreement by way of the consent terms, subject to the decision of this Court on the issue of validity thereof,

challenged by the plaintiff and the relief of enforcement of the consent terms claimed by defendants No.5 to 8 in a separate suit filed by them.

109. In so far as the Judgment of the Hon'ble Supreme Court in the case of *Raveesh Chand Jain vs. Raj Rani Jai*, (supra), relied upon by Mr. Chinoy, learned Senior Counsel for the plaintiff is concerned, the Hon'ble Supreme Court has held that Order XII, Rule 6 of the CPC confers wide discretion on the Court to pass a judgment at any stage of the suit on the basis of admissions of facts made in the pleadings or otherwise without waiting for determination of other question arising between the parties. It is also held that there can be a more than one decree that may be passed at different stages of the same suit by the Court. The principle behind Order XII, Rule 6 is to give the plaintiff a right to speedy judgment so that either party may get rid of the rival claims which are not in controversy.

110. The Hon'ble Supreme Court in the said Judgment held that it is equally well settled that the provision of Order 12, Rule 6 of the Code is not a mandatory provision, but is discretionary. It is held that while exercising power of passing judgment on admission

made in the pleadings or otherwise, the Court must keep the matter pending for adjudication so far as other issues are concerned. In my view, the discretionary power under Order XII, Rule 6 of the CPC has to be exercised judicially and not in a casual manner. There has to be a clear admission of facts made in the pleadings or otherwise and the Court has to thus clearly examine whether in fact there is any admission of facts in the pleadings or otherwise, or such admission, even if any, is subject to compliance of any other condition or depending on any other circumstance or not.

111. In the facts of this case, a perusal of the written statement filed by defendants No.5 to 8, clearly indicates the that the joint properties of the parties have been brought in by the parties into the joint venture projects and due to such hotchpotch of the properties, the original rights of the parties in these properties prior to the date of filing of such consent terms have merged with the terms and conditions agreed upon by the parties in the said consent terms, has not been seriously disputed by the plaintiff. The Court has to read the averments made by the parties in pleadings in toto and not in isolation few paragraphs. There is no dispute about the proposition of law laid down by the Hon'ble Supreme Court in the case of of *Raveesh Chand Jain vs. Raj Rani Jain*,

(supra).

112. In so far as the Judgment of the Delhi High Court in the case of *Delhi Jal Board vs. Surendra P. Malik* (supra), in which it is held that admission of facts must be clear, unequivocal, unconditional, unambiguous and may be related to the whole claim or a part of it. These need not be made specifically or expressly and could be constructive admissions also. Whether or not such admission arose in the suit would depend on the facts and circumstances of the case. If it involved disputed facts, claims and counter-claims requiring evidence of parties for determination of issues or where the defence of a party touched the root of the matter, a judgment could not be passed under Order 12, Rule 6 of the CPC dispensing with the trial because the valuable right of going to trial could not be taken away from the party unless the claim was admitted.

113. A duty is thus cast on the Court to ascertain the admission of facts and to render a judgment on these either in respect of the whole claim or a part of it. It is the case of the plaintiff herself that the parties had recorded the terms in the form of consent terms, providing for various obligations of both the parties.

It is also alleged by the plaintiff herself that the defendants No.5 to 8 had failed to comply with their part of the obligations in terms of the consent terms. There is no clear admission of facts by defendants No.5 to 8 as sought to be canvassed by the plaintiff. The Judgment of the Delhi High Court in the case of ***Delhi Jal Board vs. Surendra P. Malik*** (supra) thus would not assist the case of the plaintiff.

114. In so far as the submission of Mr Chinoy, learned Senior Counsel for the plaintiff that the consent terms arrived at by the parties cannot be construed as a deed of partition is concerned, in my view, there is no substance in this submission of the learned Senior Counsel. In this case, the parties have brought their joint properties into hotchpotch of the joint venture and have agreed to the mode, and manner of such partition at a particular stage. Both the parties have even partly agreed upon an agreement, which was recorded by way of consent terms. I am not inclined to accept the submission of the learned Senior Counsel that by virtue of entering into a document by the parties, the parties had only deferred the partition till development would take place.

115. In my view, the conditions agreed by the parties in

respect of those properties have been recorded in the said agreement entered into between the parties by way of the consent terms. Even if the argument of Mr. Chinoy, learned Senior Counsel for the plaintiff is accepted that there was no development for a period of 10 years in respect of most of the properties is accepted, such a situation would not revert back to the status quo ante position qua the joint claims in respect of the properties is concerned, in view of such joint interest in the properties having been culminated in the consent terms entered into between the parties. In my view, there is no substance in the submission of the learned Senior Counsel for the plaintiff that the consent terms cannot fetter the rights of the plaintiff to seek partition of the joint properties on the basis of the rights prevailing prior to the date of the consent terms. Be that as it may, this Court has already framed the issues whether the consent terms dated 12/12/2008 is not an agreement and an enforceable contract or not, or whether such consent terms are void *ab initio* or not ? These issues would be tried at the stage of hearing of the suit.

116. In so far as the submission made by Mr. Andhyarujina, learned Counsel for the defendants no.1 to 4 as to whether the suit for partial partition of the jointly owned properties is maintainable or not is concerned, this issue has been already dealt with in the part

of this judgment. The Judgment of the Orissa High Court in the case of **Harihar Rajguru Mohapatra & Anr.** (supra) is distinguishable in the facts of this case and would not assist the case of the plaintiff.

117. In so far as submission of Mr. Chinoy, learned Senior Counsel for the plaintiff that the right of partition conferred in law cannot be taken away by entering into consent terms is concerned, in my view, the right of partition in this case is not taken away, but the mode, manner and time of such partition is recorded in the consent terms signed by both the parties. There is, thus, no substance in this submission of the learned Senior Counsel for the plaintiff.

118. The Hon'ble Supreme Court in the case of **Karam Kapahi and ors. vs. Lal Chand Public Charitable Trust and anr.** (supra), has held that under Order XII, Rule 6 of the CPC, either party may get rid of so much of the rival claims about which there is no controversy. Under Order XII, Rule 6 admissions can be inferred from the facts and circumstances of the case. The Rule applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed. It is held by the

Hon'ble Supreme Court that the provision under Order XII, Rule 6 of the CPC is enabling, discretionary and permissive and is neither mandatory nor it is peremptory since the word “may” has been used. The principles laid down by the Hon'ble Supreme Court in the case of **Karam Kapahi and ors. vs. Lal Chand Public Charitable Trust and anr.** (supra), would apply to the facts of this case. I am respectfully bound by the said judgment.

119. In so far as the judgment of the Hon'ble Supreme Court in the case of **Shub Karan Bubna vs. Sita Saran Bubna and ors.** (supra) relied upon by Mr. Chinoy, learned Senior Counsel for the plaintiff is concerned, Mr. Sancheti, learned Senior Counsel for defendants no.5 to 8 invited my attention to paragraph 7 of the said Judgment, in which it is held by the Hon'ble Supreme Court that in a suit for partition or separation of a share, the prayer is not only for declaration of the plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues, namely (i) whether the person seeking division has a share or interest in the suit property/properties; (ii) whether he is entitled to the relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds ?

120. The learned Senior Counsel strongly relied on paragraph 18.2 of the said judgment in which it is held that in regard to immovable properties i.e. buildings, plots, etc. or movable properties where the Court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the Court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds. The learned Senior Counsel submits that in this matter, the parties have agreed the mode and manner of development of these properties and the method of distribution of those properties in the manner prescribed under the consent terms. The Judgment relied upon by the learned Senior Counsel for the plaintiff thus would assist the case of the defendant Nos. 5 to 8 and not the plaintiff.

121. In so far as the Judgment of the Hon'ble Supreme Court in the case of **Punjab & Sind Bank and anr. vs. S. Ranveer Singh Bawa and anr.** (supra), the Hon'ble Supreme Court has held that the doctrine of estoppel is a branch of the rule against assumption of inconsistent positions. One who knowingly accepts the benefit of

a contract is estopped from denying the binding effect on him of such contract. Since both the parties have partly acted upon the consent terms and have availed of part of the benefits under the said consent terms, the principles laid down by the Hon'ble Supreme Court in the case of **Punjab & Sind Bank and anr. vs. S. Ranveer Singh Bawa and anr.** (supra) would apply to the facts of this case. I am respectfully bound by the said Judgment.

122. Judgment of this Court in the case of **Muralidhar Chatterjee vs. International Film Co. Ltd.** (supra) on the issue that a person who has taken the benefit under an agreement, is bound to return the benefit first before challenging the said document, relied upon by Mr. Sancheti, learned Senior Counsel for defendants No.5 to 8 would apply to the facts of this case. I am in agreement with the view expressed by the High Court. The plaintiff has not even averred in her plaint that she is ready and willing to return the benefits availed of by her under the provisions of the consent terms.

123. In so far as the Judgments of the Hon'ble Supreme Court in the case of **R. Mahalakshmi vs. A.V. Anantharaman and ors.** (2009) 9 SCC 52 and in the case of **R. Mahalakshmi vs. A.**

Kanchana and ors. (2017) 11 SCC 548 relied upon by Mr. Sancheti, learned Senior Counsel for defendants No.5 to 8 are concerned, both these Judgments have dealt with the issue of partition in case of joint family property and thus would not apply to the facts of this case and are clearly distinguishable. The same would not apply to the facts of this case.

124. Similarly, this Court in Judgments in the case of **Shivmurteppa vs. Virappa** (supra) and in the case of **Govindrao s/o. Gangaramji Ajmire vs. Dadarao @ Shrawan s/o Gangaramji Ajmire and ors.** (supra) relied upon by Mr. Sancheti, learned Senior Counsel for defendants No.5 to 8 has also dealt with the issue of partition in case of Hindu joint family and thus clearly distinguishable of this case and would not assist the case of defendants No.5 to 8.

125. Be that as it may, the Judgment relied upon by the learned Senior Counsel for the plaintiff in support of the submission that there is no bar in filing a suit for partition of some of the properties jointly owned by the parties is concerned, the said issue raised by the plaintiff is academic in view of the parties having got jointly acquired the properties in the hotchpotch of the joint venture

business and thus could not assist the case of the plaintiff.

126. In the facts of this case and for the reasons recorded aforesaid, I am not inclined to exercise the discretion vested in this Court under Order XII, Rule 6 of the Code of Civil Procedure, 1908.

127. I, therefore, pass the following order :

The Notice of Motion No.955 of 2018 is dismissed. There shall be no order as to costs.

(R.D. Dhanuka, J.)