

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.11106 OF 2018

Manoj Brijlal Kapoor

...Petitioner

Versus

Khandelwal Laboratories Pvt. Ltd. and
Anr.

...Respondents

....

Ms Sonal Kapoor with Ms Rosy Kapoor and Mr. R.P. Shirole i/b. Mr. R.P. Shirole for the Petitioner.

Mr. Kunal Dwarkadas with Mr. Vaibhav Bajpai and Mr. Swapan Samdani for Respondent No.1.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 18th MARCH, 2021.

JUDGMENT:-

Rule. Rule made returnable forthwith. With the consent of learned counsel for the parties, heard finally.

2. The Petitioner-Defendant No.5 (hereinafter referred to as Defendant No.5) has filed this petition assailing order dated 21/04/2018 of learned Judge, City Civil Court, Greater Bombay dismissing the application at Exh.7 filed under Order XII Rule 6 of CPC in S.C. Suit No.7468 of 2013.

3. The brief facts necessary to decide this petition are as

under:-

The Respondent No.1 -Plaintiff (hereinafter referred to as 'Plaintiff') instituted a suit for recovery of money and possession of immovable and movable properties more specifically described in the plaint. The case of the Plaintiff -Company is that it had employed Rakesh Kapoor (Defendant No.1) brother of the Defendant No.5, as a Chief Accounts Officer. The Plaintiff alleged that from May-1982 to October-1982 the Defendant No.1 defalcated and misappropriated an amount of Rs.47,01,135/- from Plaintiff-Company and purchased several immovable and movable properties from the defalcated /embezzled amount. It is averred that the Defendant No.1 converted his sole proprietorship concerns into partnership firms and transferred the said properties in the names of these partnership firms of which Defendants are the partners. The Plaintiff claims that the deeds of partnership are sham, bogus and fabricated and that the transfer of these immovable and movable properties is a colourable transaction without any consideration. Based on these pleadings the Plaintiff filed a suit for recovery of Rs.59,04,736- with interest @ 21% on the principal amount of Rs.47,01,135/-. The Plaintiff sought declaration that the partnership deeds are void and invalid and has prayed for possession of the said properties allegedly purchased from the embezzled amount and transferred in the names of the partnership firms.

4. The Defendants contested the suit by filing written statements in which they disputed defalcation/embezzlement of the amount by Defendant No.1. The Defendants denied purchase of the properties described in the plaint were from embezzled amount and fraudulent transfer of these properties in the names of the partnership firms. They have specifically pleaded that the said properties were purchased from the money derived from sale of the family properties.

5. Some other relevant facts are that pursuant to the FIR lodged by the Plaintiff crime was registered against Defendant No.1- Rakesh Kapoor for offences of cheating, misappropriation, etc. In the course of investigation the amount allegedly misappropriated and the properties purchased therefrom were recovered /seized. By order dated 08/03/1984, this Court appointed the Court Receiver and put the Court Receiver in charge of the money and properties recovered/seized in criminal proceedings with direction to allow the Defendants to occupy the properties on terms including payment of compensation as the Court Receiver deems fit and proper. It is on record that the Court Receiver has permitted Defendant No.5 to occupy flat No.501,502 which is one of such seized properties, on payment of compensation/royalty.

6. It is also a fact that the trial has concluded and Defendant No.1 has been held guilty of the alleged offence. During the pendency of the criminal appeal filed by Defendant No.1, the Plaintiff and Defendant Nos.1, 2 and 7 filed consent terms wherein these Defendants consented that the Plaintiff is entitled to recover Rs.59,04,735/- with interest. These Defendants also conceded that the properties described in the plaint, were purchased from the amount withdrawn from the Plaintiff's account and that the Plaintiffs are entitled for possession of the said partnership properties on as is where is basis.

7. Subsequent to filing of the consent terms, the Defendant No.5 filed an application purported to be under Order XII, Rule 6 of CPC offering to pay the money claimed by the Plaintiff with simple interest @ 6% without prejudice to his rights and without accepting the claim of the Plaintiff or terms agreed between the Plaintiff and Defendant No.1. In addition to the said offer the Defendant No.5 has sought the following reliefs:-

“(a) The Court Receiver High Court Bombay to stand discharged without passing of any accounts.

(b) The Court Receiver, High Court Bombay to handover the possession of all the properties in custody the

Court Receiver High Court, Bombay to the Defendant No.5.

- (c) Defendant nos.1, 2 6 & 7 to resign from their respective partnership firms in respect of the 3 suit immovable properties and all movable properties and Defendant nos. 1 & 6 to release their interest in the estate of their deceased parents, i.e. Defendant nos.3 and 4 in favour of Defendant no.5 i.e. Manoj B. Kapoor;
- (d) The Court Receiver High Court, Bombay to act for all other Defendants to change the status of all the other respective Partnership firms into proprietorship firms in the name of Defendant no.5 as a Proprietor."

8. By the impugned order dated 21/04/2018, learned Judge dismissed the application on the ground that the Petitioner-Defendant No.5 has not admitted the claim but has filed the application without prejudice to his right. Learned Judge further held that the suit is not merely for recovery of money but is also for recovery of possession of movable and immovable properties. Learned Judge further held that the prayers (c) and (d) of the application are beyond the scope and ambit of the suit. This order is challenged in the present petition, filed under Article 227 of the Constitution.

9. Ms Sonal Kapoor, learned counsel for the Petitioner submits

that the trial court has erred in holding that the offer made by the Petitioner was conditional. She submits that in the course of hearing the Petitioner had made unconditional offer to pay the amount claimed by the Plaintiff. She contends that the Trial Court has rejected the oral offer even though Order XII and Rule 6 empowers the Court to pronounce judgment on admission, whether oral or in writing.

10. Learned counsel for Defendant No.5 further contends that the suit is basically for recovery of money. She contends that no issue has been framed as regards the right of the Plaintiff to recover possession of the property. She states that the Plaintiff is not entitled for the amount which was allegedly embezzled as well as the properties purchased from the said amount. Granting such relief will amount to unjust enrichment. She submits that the Plaintiff in collusion with other Defendants in the suit is attempting to take possession of the properties in which the Defendant No.5 has substantiated right and interest. She submits that the learned Judge has rejected the application without proper application of mind and that the order is contrary to law and equity.

11. Per contra, Mr. Kunal Dwarkadas, learned counsel for the Plaintiff submits that the application does not contain unequivocal

admission, which is a requirement of Order XII Rule 6 CPC., but contains only an offer to pay the amount. He submits that the application does not meet the requirement under Order XII Rule 6 of CPC. Hence, reliance has been placed on the decision of the Apex Court in ***Hari Steel and General Industries Limited and Anr. vs. Daljit Singh and Ors. (2019) 20 SCC 425.***

12. Before advertng to the facts of the case and the rival contentions of the learned counsel for the respective parties, it would be relevant to consider the scope of powers under Order XII and Rule 6 of the CPC, which reads thus:-

“6. Judgment on admissions:- (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under Sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on

which the judgment was pronounced.”

13. In ***Balraj Taneja Vs. Sunil Madan and Anr.***(1999) 8 SCC 396

the Apex Court has considered the scope of powers under Order XII, Rule 6 of CPC and has held thus:-

“23. Under this rule, the court can, at an interlocutory stage of the proceedings, pass a judgment on the basis of admissions made by the defendant. But before the court can act upon the admission, it has to be shown that the admission is unequivocal, clear and positive. This rule empowers the court to pass judgment and decree in respect of admitted claims pending adjudication of the disputed claims in the suit.

24. In Razia Begum v. Sahebzadi Anwar Begum [AIR 1958 SC 886 : 1959 SCR 1111] it was held that Order 12 Rule 6 has to be read along with the proviso to Rule 5 of Order 8. That is to say, notwithstanding the admission made by the defendant in his pleading, the court may still require the plaintiff to prove the facts pleaded by him in the plaint.

25. Thus, in spite of admission of a fact having been made by a party to the suit, the court may still require the plaintiff to prove the fact which has been admitted by the defendant. This is also in consonance with the provisions of Section 58 of the Evidence Act which provides as under:

"58. Facts admitted need not be proved.--No fact need be proved in any proceeding which the parties

thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

26. The proviso to this section specifically gives a discretion to the court to require the facts admitted to be proved otherwise than by such admission. The proviso corresponds to the proviso to Rule 5(1) Order 8 CPC.

27. In view of the above, it is clear that the court, at no stage, can act blindly or mechanically. While enabling the court to pronounce judgment in a situation where no written statement is filed by the defendant, the court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under Order 8 Rule 10 CPC where the court can either pronounce judgment against the defendant or pass such order as it may think fit."

14. In ***Hari Steel*** (supra) the Apex Court has referred to the decisions in ***Balraj Taneja*** (supra), ***Himani Alloys Ltd. Vs. Tata Steel Ltd. (2011) 15 SCC 273*** and ***S.M. Asif vs, Virendra Kumar Bajaj (2015) 9 SCC 287*** and reiterated that Order XII, Rule 6 of CPC being an enabling

provision, it is neither mandatory nor peremptory but discretionary. The discretion conferred under Order XII Rule 6 of CPC is to be exercised judiciously only when 'admission' is clear, categorical, unequivocal and unconditional. The Apex Court has held that when there is serious factual dispute it is not permissible to make a roving enquiry for disposal of the application filed under Order XII, Rule 6 of CPC.

15. Reverting to the facts of the present case, the Plaintiff has filed a suit for recovery of money, which was allegedly embezzled by Defendant No.1. The Plaintiff has also sought for possession of the properties purchased from the said amount and transferred in the names of the partnership firms by executing sham, bogus and fabricated partnership deeds. The Defendants have filed written statement and contested the claim of the Plaintiff. Issues have been framed and the evidence has been recorded. In the application purported to be under Order XII, Rule 6 of CPC, filed at the fag end of the trial, the Defendant No.5 has stated that the Plaintiff has colluded with Defendant No.1 to submit to certain orders by consent in respect of three properties in exchange of withdrawal of criminal complaint, wherein Defendant No.1 has been convicted. The Defendant No.5 inter alia states that the said three properties were purchased by their father

with the money generated from sale of previously purchased flats. The Defendant No.5 claims that the Plaintiff-Company has filed the suit to save itself from the clutches of the Income Tax Authorities. The Defendant No.5 states that he is in exclusive possession of one of the flats and has been paying royalty since 2012. He has serious health issues and therefore desires to put an end to the litigation. In paragraph 7 of the Application, the Defendant No.5 has stated that *"without prejudice and without accepting the claim of the Plaintiff or any terms that the Plaintiff and Defendant No.1 may agree, is ready to settle the Plaintiff's money suit amount as per prayer (a) of the plaint, along with simple interest thereon at the rate of 6% p.a. or any other rate at the discretion of the Hon'ble Court may deem fit and dismissing all the other claims or prayers and that all the properties mentioned in the suit be handed over, be given to this Defendant i.e. Defendant No.5."*

16. A plain reading of the application indicates that the Defendant No.5 has not admitted the claim of the Plaintiff. While seriously disputing the facts averred in the plaint, the Defendant No.5 has given an offer of settlement and sought possession of the suit property and further sought several reliefs against the co-Defendants.

17. As noted above, emphasis in Order XII Rule 6 of CPC is on admission of relevant facts. The application with an offer of settlement

with reliefs prayed for does not satisfy the requirement of Order XII, Rule 6 of CPC. The Plaintiff having declined the offer, cannot be compelled to give up the other reliefs in respect of the movable and immovable properties allegedly purchased from the embezzled amount. This is not the scope of Order XII Rule 6 of CPC. Furthermore, the merit or the demerit of the Plaintiff's claim in respect of the immovable property cannot be decided while deciding the application under Order XII Rule 6 of CPC. Considering the pleadings and the defence and the serious factual disputes, the contentious issues and disputes need to be decided on its own merits on appreciating the evidence, which has already been adduced by the respective parties.

18. For the aforesaid reasons, learned Judge was justified in rejecting the application. The impugned order does not warrant interference. Accordingly, the writ petition is dismissed. Rule is discharged. There shall be no order as to costs.

(SMT. ANUJA PRABHUDESSAI, J.)