IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:
The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Siddhartha Roy Chowdhury

FA 339 of 2013

Pradip Chowdhury &Ors.
Vs.
Dilip Chowdhury

For the Appellants	:Mr. Hirak Kr. Mitra, Sr. Adv Mr. Debdutta Sen, Adv. Mr. Siddhartha Chatterjee, Adv. Mr. Malay Seal, Adv. Ms. L. Dasgupta, Adv.
For the Respondent	:Mr. Sanjib Kr. Mukhopadhyay, Adv. Ms. Nargish Parveen, Adv.
Hearing concluded on	: 25th July, 2022
Judgement on	: 26th July, 2022

Siddhartha Roy Chowdhury, J.: This appeal preferred by the plaintiffs, assails the judgement passed by learned 5th Court of Civil Judge (Sr. Div.), Alipore on 3rd September, 2012.

To appreciate the lis, we need to indicate the facts of the case in brief.

Depicting themselves as sons of late Samar Chowdhury, the plaintiffs/appellants contended that inter alia that Samar Chowdhury was the original owner of the properties in suit, who died intestate on 17th December, 1983 leaving behind him surviving his widow, Smt. Bina Chowdhury and four sons as his legal heirs and successors, who acquired 1/5th each share in respect of the suit properties. Smt. Bina Chowdhury died intestate on 6th August 2006 leaving behind four sons as her legal heirs and representatives. Thus the four sons of late Samar Chowdhury and late Smt. Bina Chowdhury became owners having 1/4th share each in respect of the suit properties. By filing the suit for partition against their brother Dilip Chowdhury, the plaintiffs Sri Pradip Chowdhury, Sanjib Chowdhury and Rajib Chowdhury prayed for preliminary decree in respect of their 3/4th share in the suit property.

The defendant Dilip Chowdhury contested the suit by filing written statement before the Trial Court, wherein he admitted that after demise of his parents Samar Chowdhury and Smt. Bina Chowdhury he has acquired 1/4th share in respect of the assets set out in the schedule of the plaint. Learned Trial Court framed following issues :

1) Is the suit maintainable in its present form and in law?
2) Do the plaintiff have any cause of action to file the suit?
3) Is the plaintiff a co-sharer in respect of the suit property?
4) Is the plaintiff entitled to get the Decree as prayed for?
5) What other relief if any plaintiff is entitled to get?

Parties were called upon to adduce evidence in support of their respective case.

Learned Trial Court after considering the evidence on record was pleased to answer the issue no 4 & 5 against the plaintiffs and was pleased to dismiss the suit on the ground that the parties failed to produce any document to establish the title of Samar Chowdhury in respect of the properties in suit.

This judgement fails to satisfy the plaintiffs and aggrieved plaintiffs have preferred this appeal.

Assailing the impugned judgement, learned Senior Counsel Mr. Harik Kr. Mitra submits that the parties before the learned Trial Court did not raise any dispute regarding their share in the suit property rather admitted the share both in pleading and deposition. Therefore the suit ought to have been decreed on admission by the learned Trial Court. But learned Trial Court, without considering the pleadings properly framed issues and directed parties to lead evidence but failed to appreciate the evidence on record and thereby dismissed the suit, instead learned Trial Court ought to have pronounced judgement granting preliminary decree on admission taking into consideration the provision of Order XII Rule 6 of the Civil Procedure Code, soon after the first hearing of the suit, having found that parties are not at issue in respect their extent of share in the suit properties.

Taking us through the pleadings of the parties and their oral testimony Mr. Mirta, learned Senior Counsel submits that the impugned judgement may be set aside and decree in the preliminary form may be passed declaring the admitted share of the parties.

It is pertinent to mention here that during pendency of appeal, one of the appellants Sanjib Chowdhury died and consequent upon the death of Sanjib Chowdhury and his transfer of 1/5th share in respect of property at Behala, the extent of share of the parties got changed. On 27th June, 2022 the parties to the appeal exchanged their notes depicting the extent of share of respective parties and they are found to be not at issue; excerpt of which is reproduced herein below :

Note filed by the Appellants showing the respective shares of the Appellants and the Respondents in the immoveable and moveable properties.

Chart-1

Particulars of property	**Admission of shares**	**Shares of parties**			
		Dilip (R)	Pradip (A1)	Sanjib (A2)	Rajib (A3)
1.Golf Green Property	Admission of Dilip at pg 17 of PB				
Prior to the death of Sanjib on 29.12.2019		1/4	1/4	1/4	1/4
After death of Sanjib		+1/12	+1/12		+1/12
Total		**1/3**	**1/3**	**X**	**1/3**
2.Andaman Property (Land, Building and Business)	Admission of Dilip at pg. 107 of PB R's letter dated 3.8.2007				
Note : Business is owned by Company which is separate					
Prior to the death of Sanjib on 29.12.2019		1/4	1/4	1/4	1/4
After death of Sanjib		+1/12	+1/12		+1/12
Total		**1/3**	**1/3**	**X**	**1/3**
3.**Behala/Diamond Harbour Road property**	Admission of Dilip pg 68 of PB				

After death of Sanjib on 29.12.2012 (See Annexure-I –Sub-chart relating to Behala property)		11/30	11/30	X	4/15

Moveable Properties

1/4th share of Dilip, Pradip, Sanjib and Rajib is admitted in paragraph 2(xv) of Dilip's Written Statement at page 55 of PB

Chart-2

Showing how the shares in the Behala/Diamond Harbour Road property have been arrived at

	Bina (Mother)	Dilip (R)	Pradip (A1)	Sanjib (A2)	Rajib (A3)
Before mother died on 7.8.2006	1/5	1/5	1/5	1/5	1/5
Sanjib sold his 1/5th share to Dilip and Pradip in 2005		+1/10	+1/10		
Mother died on 7.8.2006. Mother's 1/5th share developed upon Dilip, Pradip, Sanjib and Rajib each getting 1/4th share of Mother's 1/5th share		+1/20	+1/20	+1/20	+1/20
		7/20	**7/20**	**1/20**	**5/20**
Sanjib died on 29.12.2019. Sanjib's 1/20th share developed upon Dilip, Pradip and Rajib each getting 1/3rd of Sanjib's 1/20th share		+1/60	+1/60		+1/60
Total		**11/30** (7/20+1/60)	**11/30** (7/20+1/60)		**4/15** (7/20+1/60)

Synopsis of argument by the defendant/ respondent

1. Golf Green Property = The defendant/respondent admits that he is entitled to 1/3rd share in the undivided property subject to note 3.

2. Andaman Property (Land, building and business) = The defendant/respondent states that the business and building belongs to the company and a proceeding is pending before the Company Law Board at the instance of the appellants.

    - The plaintiffs/appellants should not have any right over the land measuring 965 square meter acquired by the defendant/respondent during 1984. The land emerged from the sea.

3. Property situated at TC/2, Phase I, Uday Shankar Sarani, Golf Green, Police Station Jadavpur, District South 24 Parganas, Pin-700 095 = The defendant/respondent admits that he is entitled to 11/30 share in the property. However the defendant/respondent is entitled to get back the amount of the tax and impositions paid by him in respect of this property on behalf of the plaintiffs/appellants. The defendant/respondent is also entitled to get back the amount he has already spent for repairing the building.

4. Property lying and situated at premises no. 77, Diamond Harbour Road, Police Station Behala, Kolkata 700 038 = The property has been developed by a promoter firm on the basis of a Development Agreement dated June 27, 2005. The defendant/respondent is entitled to his share in terms of this Development Agreement dated June 27, 2005.

5. The Fixed Deposit Certificate of Rs. 2,00,000/- lying in the joint names of the defendant/respondent and late Sanjib Chowdhury at Canara Bank, Jadavpur Branch is to be encashed and distributed among the parties after obtaining the original Fixed Deposit Receipt from the custody of the concern Bank Manager.

6. Jewelries of Late Bina Chowdhury are lying in the locker of Canara Bank, Jadavpur Branch.

In order to incorporate such change in their pleadings the remaining plaintiffs/appellants filed the petition seeking amendment of plaint which, being formal in nature was allowed for proper adjudication of the lis. The department was directed to carry out the amendment by inserting paragraphs 5b, 9A, 9B, 9C, 9D, 9E, 9F as set out in the petition for amendment. Defendant/respondent was given liberty to amend his pleading, based on admission, but defendant/respondent did not take out any amendment and thereby reaffirmed his acceptance regarding share of the parties in respect of the suit properties.

Mr. Sanjib Kr. Mukhopadhyay, learned Advocate for the defendant/respondent submits that there is no dispute that the parties to this appeal are full blood-brothers who have acquired the suit property by way of inheritance and the defendant as well as plaintiff no. 1 purchased 1/5th share of their deceased brother Sanjib Chowdhury in respect of the property at 77 Diamond Harbour Road, Kolkata.

It is further adverted by Mr. Mukhopadhyay, that the plaintiffs/appellants since have incorporated the movable properties as pointed out by his client within common hotchpot, more particularly described in schedule B, he has no objection to admit the fact that each of the three brothers do have 1/3rd share in respect of the movable properties left by their parents and by their deceased brother Sanjib Chowdhury who died during pendency of the appeal. But Mr. Mukhopadhyay, learned Advocate for the plaintiff argued strenuously that there are certain issues beyond admitted facts. The defendant/respondent submits that the parties entered into an agreement with developer in respect of 77, Diamond Harbour Road, Kolkata-700 095 where the defendant/respondent is supposed to get a flat and a garage. He is to get 965 square meters of alluvial land at Andaman, which he has acquired.

In this appeal, we are primarily concerned with the extent of share of the parties in respect of properties they have acquired by way of inheritance. If the share of the parties is determined in preliminary decree it will be open for them to raise the issue of garage and flat at the time of drawing up of final decree. The assertion of the learned Advocate for the respondent at this stage is misplaced and would be relevant only at time of allotment of property in terms of preliminary decree at the time of passing of final decree. So far alluvial land is concerned if there is any, it should be considered to be an accretion to the land allotted to the father of the parties unless of course, it is shown that Andaman & Nicobar Administration has transferred the same in favour of the defendant/respondent in terms of Regulation 38 of the of the Andaman & Nicobar Islands Land Revenue and Land Reforms

Regulation 1966. We make clear that such demand is bereft of any pleadings.

The plaintiffs/appellants filed the suit against the defendant/respondent claiming inter alia their 3/4th share in respect of properties which they have acquired by way of inheritance. The defendant/respondent upon receipt of summon entered into the appearance in the suit and on 12th November, 2008, filed a written statement in response to the averments made in the plaint. In paragraph 2 (o) he has stated that "Andaman Wood Products (India) Pvt. Ltd. took over all the immovable/movable assets except landed property at Port Blair and Kolkata of the dissolved partnership firm w.e.f. April 1, 1988 against valuable consideration by virtue of an agreement made on April 18, 1988 executed by and/or on behalf of the said company and ex-partners of the dissolved firm. A true copy of the said agreement dated April, 1988 is annexed hereto and marked with the letter 'B'."

In paragraph 2(z) it is stated "The assets and properties of the said company are not the assets or properties of its shareholders or directions."

In paragraph 3 (xv) the defendant stated that "He is also entitled to 1/4th share of the following assets which are not disclosed by them in Schedule 'B' to the plaint."

In paragraph 9 of the written statement the defendant stated that "The plaintiffs and the defendant are entitled to get 1/4th share each of the jewellery and money, if any, lying in the said Bank lockers and bank accounts."

In paragraph 10 it is contended: "The defendant states that the plaintiffs and the defendant are entitled to get 1/4th share each of the jewellery and money, if any, lying the bank locker and bank account at Canara Bank, Jadavpur Branch and also property at TC/2, Golf Green, Kolkata-700 095. As states above the plaintiff No. 2 out of his undivided 1/5 share in the vacant landed property at 77, Diamond Harbour Road, Kolkata-700 038, has sold 50% thereof to the defendant in consideration of Rs. 2,00,000/- on May 24, 2005."

Sanjib Chowdhury, since deceased, adduced evidence as PW 1 on behalf of the plaintiffs. He submitted his affidavit-in-chief under Order 18 Rule 4 of the Civil Procedure Code, wherein he stated that the parties to the suit are full blood-brothers. Their father was Late Samar Chowdhury who died intestate on 17th December, 1983 leaving behind Bina Chowdhury, the widow, and four sons as legal heirs and representatives. His mother died intestate on 6th August, 2006, leaving behind four sons as legal heirs. His father had a business under style of Andaman Wood Products (India) Pvt. Ltd. It was owned by his father and converted to partnership firm and after his demise the said business was converted to Private Limited Company. The Company has been using the joint family properties situated at Port Blair. The Company is totally managed and controlled by Dilip Chowdhury and he is the custodian of all the documents. They do not have any copy of the document. It is his further evidence all the deeds of conveyance in respect of immovable properties are in the custody of their eldest brother Dilip Chowdhury who refused to part with the same. During cross-examination he admitted to have sold his 1/5 share to plaintiff no. 1 and defendant and each of them acquired 1/10th share by purchase in respect of 77, Diamond Harbour Road, Kolkata-700 095. However, he was not cross-examined on the point that all relevant documents are in the custody of defendant Dilip Chowdhury.

Dilip Chowdhury in his affidavit under Order 18 Rule 4 of the Civil Procedure Code stated that Samar Chowdhury was the tenant in respect of the landed property at Port Blair. The Andaman & Nicobar Administration is the owner of the land who granted license to Samar Chowdhury to run the business. Pradip Chowhdury, Sanjib Chowdhury and Rajib Chowdhury remained silent about the partition of properties at Port Blair as well as at Kolkata throughout the span of time from December 18, 1983 onwards to July 3, 2007. Samar Chowdhury, the father of the plaintiffs and defendant was the owner of TC/2, Golf Green Kolkata-700 095, he has the right to live in his ancestral house at TC/2, Golf Green Kolkata-700 095. The owner of the landed property at 77, Diamond Harbour Road, Behala was Andaman Wood Products India Pvt. Ltd. and after the dissolution the firm property was mutated in the joint names of Bina Chowdhury, Pradip Chowdhury, Sanjib Chowdhury and Rajib Chowdhury and the defendant Dilip Chowdhury having 1/5th share each out of which Sanjib Chowdhury sold his 1/5th share to the defendant and plaintiff no. 1. Subsequently, the property has been handed over the builder/promoter for construction of residential flats on 50-50 ratio. The defendant further contended that Pradip Chowdhury, Sanjib Chowdhury and Rajib Chowdhury suppressed material facts that after the demise of Samar Chowdhury and Bina Chowdhury, the defendant has also become one of the joint successors of the movable and immovable assets of their parents. During cross-examination he stated that land of Andaman is not assets of the Company, his wife has no share in the landed property of Andaman. Till now the Andaman property is not mutated in their names. Tax is paid in the name of their father.

The defendant/respondent in his written statement did not make any whisper about the 965 square meters of land emerged from the sea which he claimed to have acquired in 1984 but he has admitted the fact that the Andaman & Nicobar Administration granted license to his father Samar Chowdhury since deceased.

Regulation 38 (1) of the Andaman & Nicobar Islands Land Revenue and Land Reforms Regulation 1966, says :-

> *"38. (1) All land in the Union territory of Andaman and Nicobar Islands is vested is vested absolutely in the Government, and, save as provided by or under this Regulation, no person shall be deemed to have acquired property therein or any right to or over the same by occupation, prescription or conveyance or in any other manner whatsoever except by a conveyance executed by, or under the authority of, the Government."*

In the absence of any document to the contrary it is to be presumed that competent authority under the said Regulation conveyed the property in favour of Samar Chowdhury, since deceased, and this fact is getting corroboration from the averment of defendant who stated inter alia that his father obtained license of land to run his business. Land of Andaman is not the assets of the Company and his wife Ruchira Chowdhury has no share in the landed property of Andaman till now. Andaman property was not mutated in their name. Tax is being paid in the name of their father.

This statement of Dilip Chowdhury unerringly indicates that their father acquired property at Andaman and the parties to the proceeding stepped in the shoes of their father and acquired 1/3rd share each in respect of the suit property.

Therefore, from the evidence as well as from the pleadings of the parties we find that they are not at issue as to their entitlement in respect of suit properties as co-sharer. We have already pointed out that Sanjib Chowdhury died during pendency of the appeal and as he was bachelor his share devolved upon the three brothers except his 1/5th share in respect of 77, Diamond Harbour Road. Consequent upon the death of Sanjib Chowdhury, share of the parties, in respect of property in suit got changed. An amendment has been made in the plaint incorporating such changes in share after learned Counsel for the parties exchanged their notes and defendant/respondent was given liberty to amend his pleading which he did not do.

As we have already pointed out the defendant/respondent entered into appearance upon received of summon and on 12th November, 2008 he submitted written statement. Learned Trial Court fixed 4th June, 2009 for framing of issues but without holding first hearing of the suit under Order X of the Civil Procedure Code.

Order X of the Civil Procedure Code envisages :

1. *"Ascertainment whether allegations in pleadings are admitted or denied.—At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.*

   1A. Direction of the court to opt for any one mode of alternative dispute resolution.—After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

   1B. Appearance before the conciliatory forum or authority.—Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

   1C. Appearance before the court consequent to the failure of efforts of conciliation.—Where a suit is referred under rule 1A, and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to

> *proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it.”*

Order XV of the Civil Procedure Code enunciates that where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgement under Order XV Rule I of the Civil Procedure Code.

Under Order 3 of Rule XV C.P.C. jurisdiction has been conferred upon the Court to pronounce judgement under certain circumstances as set out therein, even where parties are at issue.

We have already pointed out that the parties in their pleadings have admitted their share in the suit properties which they have acquired by way of inheritance.

Be that as it may learned Trial Court after framing of issues called upon parties to adduce evidence, but did not consider the admission made by the parties in their oral testimony based on which learned Trial Court could have passed decree under Order XII rule 6 of the Civil Procedure Code.

Provision of Order XII Rule 6 can be pressed into service by the Court at any stage of the suit either on the application of any party or of its own motion without waiting for the determination of any other question between the parties by the Courts.

Learned Trial Court did not exercise his discretion vested under Order X, Order XV Rule 1, Order XII Rule 6 of the Civil Procedure Code and did not assign any reason for not invoking these provisions, aimed at securing speedy justice.

The legislatures when in their wisdom have found these provisions as effective tools to secure the rights of the litigants to have speedy trial, learned Trial Court cannot afford to demonstrate stoic ignorance to such provisions, instead of pressing them into service particularly when the provisions safeguard the right of litigants to have speedy trial.

Hon'ble Supreme Court in ***Uttam Singh Dugal & Co. Ltd. vs. Union Bank of India & Ors.*** reported in **AIR 2000 SC 2740** held :

> *"12. As to the object of the Order XII Rule 6, we need not say anything more than what the Legislature itself has said when the said provision came to be amended. In the objects and reasons set out while amending the said rule, it is stated that "where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled." We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment."*

Their Lordships further held :

> *"17. Learned Counsel for the petitioner contended that admissions referred to in Order XII, Rule 6 CPC should be of the same nature as other admissions referred to in other Rule preceding this Rule. Admissions generally arise when a statement is made by a party in any of the modes provided under Sections 18 to 23 of the Evidence*

Act, 1872. Admissions are of many kinds : they may be considered as being on the record as actual if that is either in the pleadings or in answer to interrogatories or implied from the pleadings by non-traversal. Secondly as between parties by agreement or notice. Since we have considered that admission for passing the judgment is based on pleadings itself it is unnecessary to examine as to what kinds of admissions are covered by Order XII, Rule 6 CPC."

In another case ***Balraj Taneja and Ors. vs. Sunil Madan and Ors.*** reported in **AIR 1999 SC 3381** Hon'ble Supreme Court held :

"22. There is yet another provision under which it is possible for the Court to pronounce judgment on admission. This is contained in Rule 6 of Order 12 which provides as under :

Rule 6 Judgment on admissions.

(1) Where admissions of fact have been made either in the pleadings 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."

It is rightly argued by Mr. Mitra that judgement and decree passed in a suit for partition is not a judgement in rem, it is the judgement in personam.

Upon careful perusal pleadings as well as evidence adduced by the parties including uncontroverted amended pleadings, we find that the plaintiff/appellant no. 1 and defendant/respondent have got 11/30th share each while the other plaintiff Rajib Chowdhury has acquired 4/15th share in respect of immovable properties described in the schedule of the amended plaint and 1/3rd share each in respect of movable properties described in amended schedule of plaint.

In our view it is a fit case to invoke the provision of Order XII Rule 6 of the Civil Procedure Code and to pass a decree in preliminary form declaring the share of the parties as aforesaid, on admission which we accordingly do.

The impugned judgement and decree passed by learned Trial Court is hereby set aside.

Consequently, the Appeal succeeds but without cost.

We make it clear that :

1. The suit is decreed in preliminary form declaring the share of the parties in respect of properties described in the schedule of the plaint invoking the provision of Order XII Rule 6 of the Civil Procedure Code.

2. The parties shall be at liberty to get the property partitioned amicably within the one month from the date of decree. If they fail to do so, the learned Trial Court may be approached for appointment of an Advocate-Commissioner for effecting

partition in terms of preliminary decree by metes and bounds. The parties shall have to produce the documents in support the movable and immovable properties before the Advocate Commission either in original or certified copy thereof for proper identification of the properties and for assessing the valuation.

3. While effecting partition by metes and bounds learned Advocate Commissioner may maintain possession of the parties in respect of immovable properties as far as practicable and also keep in mind the amicable or agreed arrangements of the parties including formal agreement if any.

Thus the appeal is disposed of.

Department to draw up preliminary decree accordingly.

Lower Court record be sent down along with a copy of the judgement.

I agree

(Siddhartha Roy Chowdhury, J.)

(Soumen Sen, J.)