

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO.2452 OF 2021
OM
SUIT NO.947 OF 2014**

Simarpal Singh Sawhney ... Applicant/Plaintiff
versus
Madhu Bhatti and Ors. ... Defendant

Mr. Giriraj Subramaniam with Mr. Nirman Sharma, i/by Sachin Choudhari for Plaintiff.

Mr. J.A.Udaipuri with Ms. Parragnya Trivedi Manubarwala i/by Bharat and Co., for Defendant Nos.1 to 3.

CORAM: N.J.JAMADAR, J.

DATE: 30th NOVEMBER, 2022

P.C.:

1. The Applicant-Plaintiff has preferred this Application for a decree on admission purportedly under Order XII Rule 6 read with Sections 11 and 151 of the Code of Civil Procedure, 1908.

2. Though the litigation dates back to the year 1972 commencing with Suit No.332 of 1972 instituted with a Court at Delhi and traverses a chequered history, yet the background facts necessary for determination of this Application can be stated in brief as under :

2.1 Late Bajinder Singh instituted a Suit bearing No.332 of 1972, in a Court at Delhi against late Joginder Singh Sawhney, his brother in law, for a money decree. In the said Suit, Bajinder

succeeded in obtaining a money decree dated 26 February, 1975 for a sum of Rs.10,000/-.

2.2 Eventually, the decree came to be transferred to the City Civil Court at Mumbai for execution as Joginder, the judgment debtor had no property in Delhi to satisfy the decree. Bajinder, the decree holder, assigned the decree in favour of Bhupinder Singh Trilok Singh – Defendant No.5.

2.3 Mr. K.L.Malick, the father of Defendant Nos.1 to 3 allegedly purchased the flat bearing No.A/5, Ravi Darshan Co-op. Hsg. Soc. Ltd., Carter Road, Bandra (W), Mumbai – 400 050 (Defendant No.4 Society) from Abdul Gafoor Khan, the owner of the said flat ('the suit flat') under an agreement for purchase dated 4 March 1971 executed by and between K.L.Malick and Abdul Gafoor Khan, the original owner thereof. Joinder, the judgment Debtor in Suit No.337 of 1972 was allegedly witness to the said agreement. Later on, Joginder agreed to sell the flat in favour of Rajinder Malick, wife of K.L.Malick, and the predecessor in title of Defendant Nos.1 to 3. Rajinder Malick was, thus, put in possession of the Suit flat.

2.5 Post transfer of decree in Suit No.332 of 1972, a warrant of attachment of the suit flat was issued on 24 April 1989. It was

served on Rajinder Malick, and pasted at the suit flat, on 13 June, 1989.

2.6 Thereupon, Rajinder Malick took out a Chamber Summons bearing No.857 of 1989 in Suit No.332 of 1972 before the City Civil Court at Mumbai, for lifting the attachment over the suit flat. Rajinder Malick contended that the suit flat was sold and transferred to her by Joginder under an agreement dated 3 August 1971. However, Joginder failed and neglected to execute necessary documents and ensure compliances to complete the transfer. Nonetheless, Rajinder Malick became the absolute owner of the suit flat. In the alternative, Rajinder Malick contended that she had been in continuous, open and hostile possession of the suit flat since 12 November 1970 and, on that count also, levy of attachment over the suit flat was required to be removed.

2.8 The Plaintiff - decree holder in Suit No.332 of 1972 resisted the prayer in the Chamber Summons.

2.9 By an order dated 20 February 1991 the learned Judge, City Civil Court was persuaded to dismiss the Chamber Summons holding, inter alia, that late Rajinder Malick failed to prove that she was the absolute owner of the suit flat and that it was not liable to be attached and sold in execution of the decree passed in Suit

No.332 of 1972. It seems the order passed in Chamber Summons No.857 of 1989 was not carried in Appeal.

2.11 In the meanwhile, Defendant Nos.1 to 3 and K.L.Malick, the successor in interest of Rajinder Malick filed an Application in Execution Application No.8 of 2000 in Suit No.332 of 1972 seeking leave to deposit the decreetal amount, costs and expenses and lifting of the attachment over the suit flat. By a judgment and order dated 20 February 2007, the said Application came to be dismissed.

2.13 In Writ Petition No.3451 of 2007, Hon'ble Justice B.R.Gavai (as His Lordship then was), was persuaded to allow the Petition and the Defendant Nos.1 to 3 were permitted to deposit the decreetal amount with liberty to Respondent No.3 – Bajinder Singh to withdraw the decreetal amount. Consequently, the suit flat came to be released from attachment. It was however made clear that the Court had not delved into the rival claims of Defendant Nos.1 to 3 and Joginder as regards the title to the suit flat.

2.15 In the meanwhile, Joginder, grandfather of the Plaintiff, instituted the instant Suit No.974 of 2014 claiming title over the suit flat. It was averred that in or about March 1971, Abdul Gafoor Khan, the original owner of the suit flat, had sold and transferred the suit flat in favour of Joginder by transferring membership in the

Defendant No.4 Society. Rajinder Malick who was in unlawful occupation of the suit flat, based her claim on a forged letter dated 3 August 1971, whereunder late Joginder allegedly transferred the suit flat to Rajinder Malick. Joginder, thus, prayed for a declaration that the transfer of the suit flat by Defendant No.4 Society in favour of Rajinder Malick was null and void and did not affect the title of the Plaintiff over the suit flat. The Plaintiff also prayed for consequential reliefs of issue of duplicate share certificate by the Defendant No.4 society in favour of the Plaintiff and delivery of clear and vacant possession of the suit flat by Defendant Nos.1 to 3 and the persons claiming through them.

2.19 Defendant Nos.1 to 3 contested the Suit by filing a written statement.

2.20 Trial has commenced. The Plaintiff has closed his evidence.

3. The Plaintiff has taken out this Application with the assertions that in view of the admissions in the written statement filed by Defendant Nos.1 to 3 and the Affidavit of Evidence, Affidavit of Documents and Compilation of documents, a decree on admissions is required to be passed. The Plaintiff avers the Defendant Nos.1 to 3 have admitted the fact that by an order dated

20 February 1991, Chamber Summons No.857 of 1989 taken out by Rajinder Malick was dismissed by the City Civil Court. While dismissing the Chamber Summons, the learned Judge, City Civil Court had framed the very same issues which have been framed in the instant suit. The learned Judge, City Civil Court, came to be conclusion that Rajinder Malick was not the absolute owner of the suit flat and, thus, the pivotal issue reflecting upon the title of Rajinder Malick was answered against the predecessor in title of Defendant Nos.1 to 3. Since no appeal was preferred against the order dated 20 February 1991, which amounts to a decree within the meaning of Order XXI Rule 58 of the Civil Procedure Code, the said order attained finality.

4. The Plaintiff further avers that the said order, which amounts to a decree, operates as a res-judicata within the meaning of Section 11 of the Code of Civil Procedure as it was the final adjudication between predecessor in interest of the Plaintiff and the predecessor in interest of Defendant Nos.1 to 3; the subject matter in both the proceedings was same; the issue of title of the predecessor in interest of Defendant Nos.1 to 3 was directly and substantially in issue before the City Civil Court and it has been finally determined on merits. Therefore, according to the Plaintiff, a

decree on admission can be legitimately passed in accordance with the prayers in the instant suit.

5. Pursuant to the directions of the Court dated 22 September, 2021, the Plaintiff has filed an additional Affidavit.

6. An Affidavit in Reply is filed on behalf of Defendant Nos.1 to 3. At the outset, Defendant Nos.1 to 3 contended that the Application is most devious and dishonest and preferred with an oblique motive to dispossess Defendant Nos.1 to 3 by resorting to trickery. Defendant Nos.1 to 3 contended that the very institution of Suit No.332 of 1972 in a Court at Delhi, by Bajinder against Joginder, who was his brother in law, was actuated by a dubious design to usurp the suit flat in execution of a decree for paltry sum of Rs.10,000/-. The fact that Joginder, predecessor in title of the Plaintiff, made no efforts to save the suit flat from attachment in execution of the said decree, and, in fact, in Writ Petition No.3451 of 2007 took a stand that he did not want the decreetal debt to be discharged by Defendant Nos.1 to 3 as he did not desire to be under obligation a party who was willing to deposit the decreetal amount on his behalf. Joginder claimed that the suit flat be auctioned and after satisfying the decreetal debt the balance amount be paid to him. This, according to Defendant Nos.1 to 3 betrayed the intent to

dispossess Defendant Nos.1 to 3 from the suit flat by hook or crook and the present application manifests a link in the chain of dubious means adopted to achieve the desired end.

7. Defendant Nos.1 to 3 contend that the decision in Chamber Summons No.857 of 1989 can never operate as res-judicata as the said proceedings was not between Defendant Nos.1 to 3 and the predecessor in title of the Plaintiff. Rajinder Malick had sought lifting of the attachment levied at the instance of late Bajinder Singh, the decree holder. In the said proceedings, Joginder never participated. Thus by no stretch of imagination the said decision can operate as a res-judicata as there was no contest between Joginder and Rajinder Malick. In any event, according to Defendant Nos.1 to 3, the learned Judge, City Civil Court was persuaded to reject the objection to attachment on the ground that the instrument on which Rajinder Malick based her claim, was unstamped and unregistered. Thus, the issue of title over the suit flat claimed by Joginder and Rajinder Malick neither arose for determination nor decided.

8. Heavily drawing upon the observations of this Court in the order dated 6 July, 2011 in Writ Petition No.3451 of 2007, Defendant Nos.1 to 3 contended that the application deserves to be

dismissed with exemplary costs.

9. In the wake of the aforesaid pleadings, I have heard Mr. Nirman Sharma, learned Counsel for the Plaintiff, and Mr. Udaipuri, learned Counsel for Defendant Nos.1 to 3, at some length. The learned Counsel took pains to take the Court through the pleadings and the orders passed in previous proceedings which bear upon the determination of the instant application.

10. It was urged on behalf of the Plaintiff that on facts there is no controversy over the determination of Chamber Summons No.857 of 1989 by the City Civil Court by an order dated 20 February 1991. Indisputably, the said order was not carried in appeal, though it amounts to a decree under Order XXI Rule 58 of the Code. The Suit instituted by Rajinder Malick being Suit No.60 of 1994 for a declaration of title over the suit flat came to be dismissed in default by an order dated 12 September 1997. Therefore, the fact that the order in Chamber Summons No.857 of 1989 attained finality cannot be gainsaid, urged Mr. Sharma.

11. Inviting the attention of the Court to the issues framed by the learned Judge, City Civil Court in Chamber Summons No.857 of 1989, Mr. Sharma strenuously submitted that the principal issue as to whether Rajinder Malick succeeded in proving that she was the

absolute owner of the suit flat was duly framed and categorically answered against the predecessor in title of Defendant Nos.1 to 3. Comparing and contrasting the said issues with the issues framed in the instant suit, especially issue Nos.3 and 4, Mr. Sharma would urge that the decision in Chamber Summons No.857 of 1989 fully operates as a res-judicata. It was submitted that res-judicata not only amounts to a statutory bar under the Code, but also represents a substantial right which accrues in favour of the parties to judgment. To lend support to this submission, Mr. Sharma placed a strong reliance on a judgment of the Supreme Court in the case of **Union of India and Ors. V. Major P. Sharma and Ors.**¹

12. Mr. Sharma would further urge that the issue of limitation (issue No.1 in the instant suit) need not detain the Court as the Plaintiff instituted the suit based on title for which the period of limitation begins to run only after the possession of the Defendants becomes adverse to that of the true owner. Defendant Nos.1 to 3 have never set up a valid claim of adverse possession since Defendant Nos.1 to 3 do not acknowledge the ownership of predecessor in title of the Plaintiff over the suit flat. To buttress this submission, a strong reliance was placed on the judgment of the

¹ (2014) 6 SCC 351

Supreme Court in the case of **Uttam Chand (dead) through Legal representatives V. Nathu Ram (Dead) through legal representatives and Ors.**²

13. Mr. Udaipuri, learned Counsel for Defendant Nos.1 to 3 submitted that the Application is wholly misconceived. There is no admission of fact, much less a clear and unequivocal admission, which can legitimately form the foundation of a decree under Order XII Rule 6 of the Code. Amplifying the submission, Mr. Udaipuri would urge that reliance on the order passed by the learned Judge, City Civil Court in Chamber Summons No.857 of 1989 to bolster up a case of an admission is not at all sustainable. The order in Chamber Summons No.857 of 1989 was essentially on an objection to attachment or, at the most, an obstruction proceedings. Since the contest in the said Chamber Summons was not between the predecessor in title of the Plaintiff and the predecessor in title of Defendant Nos.1 to 3, the entire edifice of the case now sought to be built on the basis of the said order operating as a res-judicata crumbles traceless. To lend support to the aforesaid submission, Mr. Udaipuri banked upon the judgment of the Supreme Court in the case of **Himani Alloys Limited Vs. Tata Steel Limited**³ and the

² (2020) 11 SCC 263.

³ (2011) 15 SCC 273

judgment of this Court in the case of **K.Raheja Corp. Pvt. Ltd. Vs. Maharashtra Tourism Development Corporation Ltd.**⁴

14. Mr. Udaipuri advanced a strong criticism against the motive with which the instant application has allegedly been preferred. Taking the Court through the observations of this Court in Writ Petition No.3451 of 2007, Mr. Udaipuri would urge that the successor in interest of the deceased Plaintiff Joginder is prosecuting the proceeding in the same vein to dispossess Defendant Nos.1 to 3 by resorting to unjust devices.

15. I have given my anxious consideration to the submissions advanced across the bar. To start with, since the Plaintiff seeks a judgment on admission, of necessity the admission which the Plaintiff professes to press into service, deserve to be noted. It is averred that there are admissions in paragraphs 6,8, 9, 13 and 16 of the Written Statement. I have perused the contentions in the aforesaid paragraphs wherein Defendant Nos.1 to 3 have referred to the previous proceedings between Bajinder and Joginder and Bajinder and Rajinder Malick, the predecessor in title of Defendant Nos.1 to 3, including the Suit No.332 of 1972 and Chamber Summons No.857 of 1989 and the outcome thereof.

⁴ 2019(5) Mh.L.J.266

16. It is pertinent to note that the Plaintiff does not profess to claim that there is an admission of title of the Plaintiff either by the Defendant Nos.1 to 3 or their predecessor in interest. The thrust of the submission on behalf of the Plaintiff was that the order dated 20 February 1991 passed in Chamber Summons No.857 of 1989 precludes Defendant Nos.1 to 3 from agitating the issue of title of their predecessor in interest and contesting the title of the predecessor in interest of the Plaintiff. During the course of the submissions, a concerted effort was made on behalf of the Plaintiff to persuade the Court to hold that the order dated 20 February 1991 passed in Chamber Summons No.857 of 1989 operates as a res-judicata and since Defendant Nos.1 to 3 have referred to the said order and have not assailed its legality and correctness, it must be assumed that the Defendant Nos.1 to 3 have admitted the finding in the said order.

17. On first principles, I am afraid, the import of Order XII Rule 6 can be construed in the manner the Plaintiff desires the Court to do.

18. Order XXII, Rule 6 of the Code reads as under :-

“Order XII Rule 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 upon in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."*

19. From the phraseology of the aforesaid sub-rule (1) of Rule 6, it becomes evident that the legislature has designedly conferred jurisdiction on the Court to pass judgment on admission. The legislature has taken care to ensure that the source of admission is not of decisive significance. Firstly, the admissions can be found either in the pleadings or otherwise. Secondly, the insistence for admission being in writing is done away with. The admission may be oral or in writing. Thirdly, the stage of the suit does not matter. The Code expressly empowers the Court to pass judgment on admission at any stage of the suit. The said aspect is further reinforced by the words *"without waiting for the determination of any other question between the parties"*. Fourthly, the party, in whose favour the admission is made, need not apply. The Court, on its own motion, can pass a judgment on admission if it comes to the conclusion that

the claim or part of the claim of one party is admitted by the other. Lastly, the exercise of the said power is undoubtedly discretionary. But, in view of the wide ambit and unhinged nature of the powers conferred on the Court to pass a judgment on admission, the Court may not be justified in refusing the relief where a case falls within the four corners of the said provision. For the ultimate object of the provision is to give an expeditious relief to a party when its claim is admitted by the adversary.

20. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of ***Uttam Singh Duggal & Co. Ltd. Vs. United Bank of India & Ors.***⁵, wherein the object of the aforesaid rule was expounded and the approach expected of the Court was delineated, in the following words :

“12 As to the object of the Order 12 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. Where other party has made a plain admission entitling the former to

5 (2000) 7 SCC 120

succeed, it should apply and also wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed."

(emphasis supplied)

21. The aforesaid pronouncement was followed by the Supreme Court in the case of ***Karam Kapahi & Others Vs. Lal Chand Public Charitable Trust***⁶. The Supreme Court traced the historical backdrop of the said provision, including the amendment introduced therein by the Amendment Act, 1976, pursuant to the recommendations of the Law Commission, and, instructively, enunciated the true nature and import of the said provision. The observations of the Court are as under :

"37 The principles behind Order 12 Rule 6 are to give the plaintiff a right to speedy judgment. Under this Rule either party may get rid of so much of the rival claims about 'which there is no controversy' [See the dictum of Lord Jessel, the Master of Rolls, in Thorp versus Holdsworth in (1876) 3 Chancery Division 637 at 640].

38 In this connection, it may be noted that order 12 Rule 6 was amended by the Amendment Act of 1976. Prior to amendment the Rule read thus:-

"6. Judgment on admissions. - Any party may, at any stage of a suit, where admissions of facts have been made, either on pleadings or otherwise, apply to the Court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties and the Court may upon such application make such order or give such judgment, as the Court may think just."

39 In the 54th Law Commission Report, an amendment

⁶ (2010) 4 SCC 753

was suggested to enable the Court to give a judgment not only on the application of a party but on its own motion. It is thus clear that the amendment was brought about to further the ends of justice and give these provisions a wider sweep by empowering judges to use it `ex debito justitiae, a Latin term, meaning a debt of justice. In our opinion the thrust of the amendment is that in an appropriate case, a party, on the admission of the other party, can press for judgment, as a matter of legal right. However, the Court always retains its discretion in the matter of pronouncing judgment.

40. If the provision of order 12 Rule 1 is compared with Order 12 Rule 6, it becomes clear that the provision of Order 12 Rule 6 is wider in as much as the provision of order 12 Rule 1 is limited to admission by `pleading or otherwise in writing' but in Order 12 Rule 6 the expression `or otherwise' is much wider in view of the words used therein namely: `admission of fact.....either in the pleading or otherwise, whether orally or in writing'.

41. Keeping the width of this provision in mind this Court held that under this rule admissions can be inferred from facts and circumstances of the case [[See Charanjit Lal Mehra and others v. Kamal Saroj Mahajan \(Smt.\) and another](#), (2005) 11 SCC 279 at page 285 (para 8)]. Admissions in answer to interrogatories are also covered under this Rule [See Mulla's commentary on the Code, 16th Edition, Volume II, page 2177].

42. In the case of [Uttam Singh Duggal & Co. Ltd., v. United Bank of India and others](#), (2000) 7 SCC 120, this Court, while construing this provision, held that the Court should not unduly narrow down its application as the object is to enable a party to obtain speedy judgment.

43. In that case it was contended on behalf of the appellant, Uttam Singh Duggal, that:

(a) Admissions under Order 12 Rule 6 should only be those which are made in the pleadings.

(b) The admissions would in any case have to be read along with the proviso to Order 8 Rule 5 (1) of the Code and the Court may call upon the party relying on such admission to prove its case independently.

(c) The expression `either in pleadings or otherwise' should be interpreted ejusdem generis. [See para 11, pages 126-127 of the report]

Almost similar contentions have been raised

on behalf of the Club. In *Uttam Singh* (supra) those contentions were rejected and this Court opined no effort should be made to narrow down the ambit of Order 12 Rule 6.

44. In *Uttam Singh* (supra) this Court made a distinction between a suit just between the parties and a suit relating to Specific Relief Act where a declaration of status is given which not only binds the parties but also binds generations. The Court held such a declaration may be given merely on admission (para 16, page 128 of the report). But in a situation like the present one where the controversy is between the parties on an admission of non-payment of rent, judgment can be rendered on admission by Court.

45. Order 12 Rule 6 of the Code has been very lucidly discussed and succinctly interpreted in a Division Bench judgment of Madhya Pradesh High Court in Shikharchand v. Bari Bai reported in AIR 1974 Madhya Pradesh 75. Justice G.P. Singh (as His Lordship then was) in a concurring judgment explained the aforesaid rule, if we may say so, very authoritatively at page 79 of the report. His Lordship held : (AIR para 19)

"... I will only add a few words of my own. Rule 6 of Order 12 of the Code of civil Procedure corresponds to Rule 5 of Order 32 of the Supreme Court Rules (English), now rule 3 of Order 27, and is almost identically worded (see Annual Practice 1965 edition Part I. p. 569). The Supreme Court Rule came up for consideration in *Ellis v. Allen* (1914) Ch 904. In that case a suit was filed for ejectment, mesne profits and damages on the ground of breach of covenant against sub-letting.

Lessee's solicitors wrote to the plaintiff's solicitors in which fact of breach of covenant was admitted and a case was sought to be made out for relief against forfeiture. This letter was used as an admission under rule 5 and as there was no substance in the plea of relief against forfeiture, the suit was decreed for ejectment under that rule. Sargant, J. rejected the argument that the rule is confined to admissions made in pleadings or under rules 1 to 4 in the same order (same as ours) and said:

"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."

Rule 6 of Order 12, in my opinion, must bear the

same construction as was put upon the corresponding English rule by Sargent, J. The words "either on the pleadings or otherwise" in rule 6 enable us not only to see the admissions made in pleadings or under Rules 1 to 4 of the same order but also admissions made elsewhere during the trial."

46 This Court expresses its approval of the aforesaid interpretation of Order 12 Rule 6 by Justice G.P. Singh (as His Lordship then was). Mulla in his commentary on the Code has also relied on ratio in Shikharchand (supra) for explaining these provisions.

47

48 However, the provision under Order 12 Rule 6 of the Code is enabling, discretionary and permissive and is neither mandatory nor it is peremptory since the word "may" has been used. But in the given situation, as in the instant case, the said provision can be applied in rendering the judgment."

(emphasis supplied)

22. In the case of **Himani Alloys Limited** (Supra), on which reliance was placed by the learned counsel for the Defendant Nos.1 to 3, the Supreme Court emphasized the discretionary nature of the jurisdiction under Order XII, Rule 6. The observations of the Supreme Court in paragraph 11 are material and, thus, extracted below :

"11 It is true that a judgment can be given on an "admission" contained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to

exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is a clear "admission" which can be acted upon. (See also *Uttam Singh Duggal & Co. Ltd. vs. United Bank of India* [2000 (7) SCC 120], *Karam Kapahi vs. Lal Chand Public Charitable Trust* [2010 (4) SCC 753] and *Jeevan Diesels and Electricals Ltd. vs. Jasbir Singh Chadha* [2010 (6) SCC 601]. There is no such admission in this case."

(emphasis supplied)

23. In the light of the aforesaid position in law, in my view, Mr. Udaipuri was justified in canvassing a submission that the Application is not based on an admission of fact made either in the pleading or otherwise. As indicated above, to wriggle out of the situation a strenuous effort was made on behalf of the Plaintiff to sustain the application on the ground that the order in Chamber Summons No.857 of 1989 operates as a res-judicata.

24. This endeavour on the part of the Plaintiff is also not free from obstacles.

25. First and foremost, it is pertinent to note that in the instant suit, no issue of the order in Chamber Summons No.857 of 1989 operating as a res-judicata has been framed.

26. It is trite the Court has to examine the plaint, the written statement, the issues and the judgment in the former suit to find out whether the matter was directly and substantially in issue. A test which is considered safe is to consider whether the issue (which allegedly operates as res judicata in a subsequent suit) was “necessary” to be decided for adjudication of the principal issue (which arose in former suit) and was decided. If that was the case, such an issue would have to be treated as “directly and substantially” in issue and if it becomes evident that the judgment in the former suit was in fact based on that decision, it would operate as a res judicata in a subsequent suit. I am afraid in the absence of an issue of res-judicata having been framed in the instant suit, it would be permissible to embark upon such an elaborate inquiry in this application.

27. Secondly, there is substance in the submission of Mr. Udaipuri that Chamber Summons No.857 of 1989 was a combat between Bajinder, the decree holder, and the predecessor in interest of the Defendant Nos.1 to 3. Conversely, the predecessor in interest of the Plaintiff did not participate in the said Chamber Summons.

28. In this view of the matter, I deem it superfluous to delve

into the aspects as to whether all the pre-requisites for invoking the provisions contained in Section 11 of the Code or the principles analogous to res-judicata have been made out. Reliance on behalf of the Plaintiff on a number of judgments to bolster up a case of res-judicata does not seem to be well-placed.

29. At best, the position of Joginder, judgment debtor in Suit No.337 of 1972 and Rajinder Malick, an obstructionist, can be of co-defendant. That would pose a question as to whether the order dated 20 February 1991 passed in Chamber Summons No.857 of 1989 operates as a res-judicata between the co-defendants.

30. A useful reference in this context can be made to the judgment of the Supreme Court in the case of **Govindammal (dead) by Legal Representatives and Ors. Vs. Vaidiyanathan and Ors.**⁷ wherein the position as to when the judgment and order in a previous proceeding operates as a res-judicata qua co-defendants was expounded. The observations in paragraphs 14, 18 and 19 are instructive and, hence, extracted below :

“14. However, there exist certain situations in which the principles of res judicata may apply as between co-defendants. This has been recognized by the English courts as well as our courts for more than a century. The requisite conditions to apply the principles for res judicata as between

7 (2019) 17 SCC 433

co-defendants are that (a) there must be conflict of interest between the defendants concerned, (b) it must be necessary to decide this conflict in order to give the Plaintiff the relief he claims, and (c) the question between the defendants must have been finally decided. All the three requisite conditions are absent in the matter on hand. Firstly, there was no conflict of interest between the Defendants in the suits filed by the temple and the school. Secondly, since there was no conflict, it was not necessary to decide any conflict between the defendants in those suits in order to give relief to the temple or the school, which were the Plaintiffs. On the other hand, the father of the plaintiffs and the father of the defendant were colluding in those suits filed by temple and school. Both of them unitedly opposed those suits. In view of the same, the principles of res judicata would not apply.

18. It is true that under Section 11 CPC, when the matter has been directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, the decree in the former suit would operate as res judicata between the Plaintiff and the defendant or as between the co-plaintiffs or co-defendants. For instance, if in a suit by P against D-1 and D-2, the matter is directly and substantially in issue between D-1 and D-2 and adjudication upon that matter was necessary to determine the suit to grant relief to P, the adjudication would operate as res judicata in subsequent suits between D-1 and D-2 in which either of them is the Plaintiff or the defendant. In other words, if a plaintiff cannot get his claimed relief without trying and deciding a case between the co-defendants, the Court will try and decide the case in its entirety including the conflict of interest between the co-defendants and the co-

defendants will be bound by the decree. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other.

19. This Court in **Mahboob Sahab V. Syed Ismail**⁸ considering the applicability of the doctrine of res judicata between the co-defendants held that the following four conditions must be satisfied, namely (SCC p. 698 para 8)

(1) there must be a conflict of interest between the defendants concerned;

(2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims;

(3) the question between the defendants must have been finally decided; and

(4) the co-defendants were necessary or proper parties in the former suit.

To reach the conclusion mentioned above, this Court relied upon the judgments in **Syed Mohd. Saadat Ali Khan V/s. Mirza Wiquar Ali Beg**⁹, **Shashibhushan Prasad Misra V/s. Babuaji Rai**¹⁰ and **Iftikhar Ahmed V/s. Syed Meharban Ali**¹¹.” (emphasis supplied)

31. In the case at hand, the aforesaid conditions cannot be said to have been fulfilled as the predecessor in title of the Plaintiff did not participate in the Chamber Summons and, prima facie, it cannot be said that the conflict of interest between the predecessors in title of the Plaintiff and the Defendant Nos.1 to 3

8 (1995) 3 SCC 693

9 1943 SCC Online PC 15

10 AIR 1970 SC 809

11 (1974) 2 SCC 151

was decided as a lis between them. It is a different matter that the executing Court was called upon to evaluate the merits of the claim of the predecessor in interest of Defendant Nos.1 to 3 to decide the objection to attachment levied at the instance of the decree holder in the said case.

32. The matter can be looked at from another perspective. The exercise of the power to pass judgment on admission is undoubtedly discretionary. Even if it is assumed that the order in Chamber Summons No.857 of 1989 binds Defendant Nos.1 to 3 to such an extent as to amount to an admission within the meaning of Order XII Rule 6 of the Code, the Court would be required to pose unto itself the question as to whether, in the facts of the case, the Plaintiff deserves exercise of the discretion.

33. It would suffice to extract observations of the Court in Writ Petition No.3451 of 2007 wherein the prayer of the Defendant Nos.1 to 3 to satisfy the decree by paying the decretal amount was opposed tooth and nail by the decree holder as well as the judgment debtor. The observations in paragraphs 29 to 32 are material and hence, extracted below :

“29. Admittedly, in the present case the parents of the Petitioners and the Petitioners along with mother

were in possession of the said flat. Admittedly, after the demise of their parents, petitioners are in possession of the said flat. Admittedly, there are certain documents placed on record by the petitioners, supported to be an agreement of sale, in respect of the said flat between the petitioner's mother and the respondent No.2. There are certain documents allegedly addressed by Respondent No.2 in the nature of indemnity bond and request to the Society for transferring the shares in the name of the petitioner's mother. I do not wish to commend anything about the genuineness or otherwise of the said documents, inasmuch as any observation in that regard may prejudice the rights of the petitioners or the respondent No.2, but certainly it cannot be said that the petitioners are not at all interested in the said flat. I do not find it appropriate to go into the question as to what would be extent of their interest in the flat concerned.

30. The matter can be viewed from another angle. It is the allegation of petitioners that the suit in question was filed against the respondent no. 2, by his own brother-in-law. It is contended that suit is a collusive suit and was filed with an intention to circumvent the agreement entered into between petitioner's mother and respondent no. 2. I do not wish to go into the said controversy, again for the same reason, that any observation in that regard may prejudice

rights of either of the parties. However, let us consider and examine a hypothetical situation. An unscrupulous litigant after entering into an agreement of sale of a property, after receiving consideration thereof and after delivering possession does not want to honour the agreement. He may very well instigate someone close to him, to file a suit for money decree for a paltry sum. The suit may be decreed. He may very well put up a claim that he does not have any other property and the only property that he has is the one in respect of which the agreement of sale is entered and possession delivered. In the proceedings for execution of said money decree, the said property would be attached and put to an auction. Can a person who has paid a consideration for the said property in pursuance to an agreement and is in possession of the said property, be said to be a person not entitled to make payment and satisfy the decree, so as to avoid auction of the said property? If the answer to this question is 'No', then it would result in giving a tool in hands of unscrupulous cantankerous litigants to circumvent the rights they have transferred in favour of third parties after receiving a consideration, to realise huge amount by auction of said property.

31. In the present case, the matter is remanded by their Lordships of the Apex Court, basically on the ground that notice of present writ petition filed by the present

petitioners was not issued to the appellant, before the Apex Court (i.e. the respondent no. 2 herein). However, it is pertinent to note that the respondent no. 2 had addressed a communication to this Court on 10th May, 2007, i.e. much earlier to the order passed by the Apex Court. The relevant portion of the said letter reads thus:-

“This is to bring under your kind information that I have come to know that your Hon’ble Court have passed the order on May 04, 2007 on the above mentioned Ritz Petition. I have no Advocate and nor I have been informed for the same, therefore, I was not present in your Hon’ble Court.

That the Petitioners should deposit the decree amount of Rs.36,474.00 in the Sheriff of Bombay Office within one week time etc.

I, Joginder Singh Sawhney R/o. C-12, Malviya Nagar, New Delhi-110017, is Defendant / Judgement Debtor in this case.

Whereas I have not been informed by the concerned Department regarding the said case hearing in High Court Bombay.

I have written so many letters by Speed Post, A/D to Sheriff Office that I have “No Objection” for the sale of my Flat No. A-5, Ravi Darshan Co-operative Housing Society Ltd., Carter Road, Bandra (West), Bombay-400 050, which is already attached by City Civil Court, Bombay by Warrant of Attachment dated 24th April, 1989.

I request your honour that I do not want any obligation of any Party/Parties to deposit my Decree amount in the Sheriff Office as per your Order dated 04.07.2007.

I humbly request you that you please pass necessary orders that my above mentioned flat of which I am the owner should be put on Auction (Sale) and out of which Decree amount should be paid to Decree holder and the balance amount should be paid to me for which I have no objection.

Once again I request your honour that please pass necessary orders for Auction that flat

in question and after detecting the Decree amount, the Balance amount should be paid to me. I do not want any obligation of any Party or Parties to deposit Decree amount on my behalf.”

32. It can thus be seen that the respondent no. 2, is insisting that the said flat should be put on auction and out of which the decree amount should be paid to the decree holder and the balance amount should be paid to him. He states that he does not want any obligation of any party to deposit the decree amount on his behalf. From the perusal of the order passed by this Court dated 4th May, 2007 and 26th July, 2007, it would reveal that the amount payable under the decree is Rs. 36,474/- which is already deposited by the petitioners in this Court, which is in addition to the amount which was already deposited by the petitioner's mother in the suit filed by her. From the order passed by the learned City Civil Judge dated 9th December, 1994, it would reveal that the reserve price for auction, has been set as Rs. 49,50,000/-. A period of about 16 years has lapsed therefrom. Undisputedly, with passage of time, the price of the said flat would be atleast more than a crore. The question, therefore, would be whether the decree passed against the respondent no. 2, against which the amount payable is about 36,474/- could be permitted to be used by him to receive an amount in crores by auctioning the said flat. It is a known fact that the price received after

auctioning the property under the orders of the Court would be less than the prevailing market rate. It is difficult to understand as to why the respondent no. 2, who claims to be the owner of the property, does not want to pay the paltry sum of Rs. 36,474/- and save his valuable property from being auctioned. Certainly, there appears to be much more in the present matter than what meets the eye..... Taking into consideration this aspect, the contention of the petitioner that the decree is a collusive decree with intent to get the flat auctioned cannot be outrightly disbelieved. However, I make it clear, that I do not intend to make any observation regarding the rights of the petitioners or the respondent no. 2 in the said flat. Inasmuch as, limited question that arises for consideration is, as to whether the petitioners can be permitted to make the payment and satisfy the decree. In case the respondent has any rights in the said flat, he is always at liberty to take such steps, as are permissible in law to establish his right. If the respondent no. 2 is the owner of the flat, he can also take such steps for evicting the petitioners, from suit premises as permissible in law. The only question is whether he can be permitted to use the machinery of law to get the flat in question auctioned, which is admittedly in possession of the petitioners and atleast prima-facie they have semblance of right in the said flat. I am of the considered view that if this

is permitted, it will amount to nothing else than abuse of process of the Court.”

34. The aforesaid observations, in the least, indicate that the Defendant Nos.1 to 3 deserve an opportunity to contest Joginder’s claim of the title over the suit flat. It is safe to assume, in the context of aforesaid observations, Joginder instituted this suit based on title. Serious issues of the suit being barred by limitation, acquisition of title to the suit flat by Joginder and Rajinder Malick, and perfection of title by prescription by Rajinder Malick arise for determination in the instant suit. Such determination on merit cannot be interdicted by seeking a decree on perceived admission.

35. For the foregoing reasons, especially the controversy over the very existence of admission, I am inclined to hold that no case for judgment on admission is made out.

36. By way of abundant caution it is, however, clarified that the observations in this order are confined to the determination of the prayer for judgment on admission and it may not be construed as an expression of opinion on the merits of the claim including the question as to whether the order in Chamber Summons No.857 of 1989 operates as a res-judicata.

37. Hence, the following order :

ORDER

The Application stands rejected.

(N.J.JAMADAR, J.)