

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

**APPEAL NO.344 OF 2019
IN
NOTICE OF MOTION NO.1228 OF 2016
IN
SUIT NO.3598 OF 1996
WITH
INTERIM APPLICATION NO.636 OF 2020
IN
APPEAL NO.344 OF 2019**

Dileep Nevatia and anr.

: Appellants/Applicants
(Org.Defendant Nos.1 & 2)

Vs.

Harish Loyalka and ors.

: Respondents
(R1 & R2 Org. Plaintiffs &
R-3 to R-5 Org. Defendant
Nos.3, 4 & 5)

**WITH
APPEAL NO.345 OF 2019
IN
NOTICE OF MOTION NO.1696 OF 2016
IN
COUNTER CLAIM NO. 10 OF 2016
IN
SUIT NO.3598 OF 1996
WITH
INTERIM APPLICATION NO.638 OF 2020
IN
APPEAL NO.345 OF 2019**

Dileep Nevatia and anr.

: Appellants/Applicants
(Org.Plaintiff Nos.1& 2
to the Counter Claim)

Vs.

1(a) Harish Loyalka and ors. : Respondents
(Org. Defendants
to the Counter Claim)

Mr. Dileep Nevatia – Appellant/Applicant No.1 present in person in both the Appeals.

Mr. Gaurav Joshi, Senior Advocate a/w Ms. Neeta Jain with Mr. Avinash Joshi and Mr. Shivam Chitlangia i/by M/s. Mulla & Mulla & Craigie Blunt & Caroe for Respondent Nos.1(a) and 1(b) in Appeal No.345 of 2019 and for Respondent Nos.1 and 2 in Appeal No.344 of 2019.

Ms. Urvi Joshi a/w Ms. Preeti Shah, Mr. Santosh Jadahv for Respondent No.3 in Appeal No.345 of 2019 and for Respondent No.4 in Appeal No.344 of 2019.

Mr. Rohan Sawant with Ms. Meghna Vijan for Respondent No.4 in Appeal No.345 of 2019 and for Respondent No.5 in Appeal No.344 of 2019 i/by Bali Associates.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.
Reserved on : 22nd August 2023
Pronounced on : 12th September 2023**

P.C. : (Per ARIF S. DOCTOR, J.)

The present Appeal impugns a common order dated 26th February 2019 by which the Learned Single Judge has dismissed two Notices of Motion, i.e., Notice of Motion No. 1696 of 2016 (“the First Motion”) and Notice of Motion No. 1228 of 2016

("the Second Motion") filed by the Appellants. The Appellants are Defendant No. 1 and 2 in the captioned Suit ("the said Suit") and the Plaintiffs in the captioned Counter Claim ("the said Counter Claim").

2. The said Suit was filed by one Snehlata Nevatia ("Original Plaintiff") *inter alia* seeking a declaration that a Family Agreement dated 22nd September 1990 ("the Family Agreement") entered into between the Original Plaintiff, her husband and essentially her children in the said Suit is void and not binding upon the Original Plaintiff. The Appellants have filed a Counter Claim *inter alia* seeking specific performance of the Family Agreement as also specific performance of what the Appellants have referred to as a Writing of Family Arrangement which infact is a declaration by original Plaintiff dated 27th November 1992 ("the said Declaration") executed by the Original Plaintiff.

3. The Original Plaintiff in the course of her cross examination in answer to a question put to her on the said Declaration, has answered as follows, viz.

"9. (*Shown the writing dated 27th November 1992*).

This writing is signed by me.

[*P.C. :*

By consent, the writing dated 27th November 1992 be marked as Exhibit D-20.]"

It is basis the above that the Appellants contend that the original Plaintiff has admitted the said Declaration and basis this they have taken out the said Notices of Motion. In the First Notice of Motion the Appellants have *inter alia* sought a decree on admission in terms of prayer clauses (c), (d), (e), (f), (g), (h), (i), (l), (m) and (n) of the Counter Claim which read thus, viz.

- (c) *that this Hon'ble Court be pleased to declare that the Plaintiff in the suit is not entitled to dispossess these Defendants from the said property "Shashi Deep" or any part thereof;*
- (d) *that this Hon'ble Court be pleased to declare that the said Writing of Family Arrangement dated 27/11/1992 is valid, subsisting and binding on the parties including the Plaintiff in the suit and is irrevocable and is specifically enforceable even independently of the Family Arrangement/Agreement dated 22nd September 1990;*
- (e) *that this Hon'ble Court be pleased to order and decree the Plaintiff to specifically perform unperformed part of the said Writing of Family Arrangement dated 27/11/1992 by executing a*

Will in respect of the said property known as "Shashi Deep" as undertaken under cl.3 of the said Writing of Family Arrangement dated 27/11/1992 and direct nullification and/or revocation of all other documents executed by the Plaintiff in the suit, if any, which are contrary to and/or inconsistent with the obligations of the Plaintiff in the suit under cl.3 of the said Writing of Family Arrangement dated 27/11/1992;

- (f) that this Hon'ble Court be pleased to declare that the agreement to bequeath the said property "Shashi Deep" in favour of the Defendant No.1 was executed by the Plaintiff in the suit for lawful consideration as a part of the Family Arrangement/Agreement and the Plaintiff in the suit having taken full advantage and benefit under cl.2 of the said Writing of Family Arrangement dated 27/11/1992 as enforceable in law and the action of the Plaintiff taken by the Plaintiff in deviation thereof, if any, is null and void and the specific covenants contained in the family arrangements herein is specifically enforceable.*
- (g) that this Hon'ble Court be pleased to declare the Defendant No.1 is and will be the only successor and sole owner in respect of the property known as "Shashi Deep" on the death of the Plaintiff in the suit and for the purpose of effectuating the Family Arrangement/Agreement dated 22nd September 1990 all necessary directions be issued and orders be passed;*
- (h) that this Hon'ble Court be pleased to declare that the Defendant No.1 and the members of his family are entitled to the sole and exclusive possession, occupation and use of the entire second floor of the said bungalow "Shashi Deep";*

- (i) *that this Hon'ble Court be pleased to declare that the Defendant No.1 and the members of his family alone are entitled to possess, occupy and use the ground and first floors of the bungalow "Shashi Deep" along with the Plaintiff in the suit during her lifetime and to the exclusion of all others;*
- (l) *that this Hon'ble Court be pleased to restrain the Plaintiff in the suit by permanent injunction from interfering with possession, occupation and user of the said bungalow by these Defendants and members of his family and from their right of succession in terms of cl.10 of the Family Arrangement/Agreement dated 22nd September 1990 and cl.3 of the said Writing of Family Arrangement dated 27/11/1992;*
- (m) *that this Hon'ble Court be pleased to restrain the Plaintiff in the suit from taking any steps or executing any document or writing, in favour of anyone whosoever, which is contrary to and inconsistent with the contents of the Family Arrangement/Agreement dated 22nd September 1990 and the said Writing of Family Arrangement dated 27/11/1992;*
- (n) *that this Hon'ble Court be pleased to restrain the Defendant No.5 in the suit from entering upon the said property "Shashi Deep" and from causing any interference whatsoever in respect of the right of these Defendants to use the said bungalow and all rights of possession, occupation, user and succession vested in the Defendant No.1 in any manner whatsoever;*

Consequent to the above being granted, the Appellants have in the Second Notice of Motion, *inter alia* sought rejection/dismissal

of prayer clauses (c) and (d) of the Suit. However, both the said Notices of Motion came to be dismissed by the Impugned Order dated 26th February 2019 and it is thus that the present Appeals have been filed.

4. At the outset Mr. Nevatia - Appellant No. 1 appearing in person, submitted that the Learned Single Judge had completely overlooked the above admission and had proceeded solely on the basis of what was recorded in the order dated 29th June 1998 namely, viz.

"8. At this stage, as the things have come on record, the Plaintiff has not backed from her undertaking given in document No.1 to the effect that Defendant No.1 and his family will be successor after her life time."

He submitted that while the above position continued to subsist, the said observation was not the sole basis on which the Appellants had sought a decree on admission. He submitted that it was also on the basis of the answer given by the Original Plaintiff in cross examination as reproduced above which fact had been completely ignored by the Learned Single Judge.

5. He invited our attention to the prayers made in the captioned Suit and pointed out therefrom that the Original Plaintiff had not challenged the said Declaration. He then invited our attention to the said Declaration and pointed out that the same *inter-alia* provided as follows, viz.

"3. I also confirm that Dileep and his family will be the successors of myself after my lifetime as far as the entire property Shashi Deep is concerned."

Mr. Nevatia, in light of the above read with the answer given by the original Plaintiff in cross examination, submitted that the Original Plaintiff had (a) not challenged the said Declaration and (b) in cross examination unequivocally accepted the said Declaration. He submitted that this therefore was an admission on the part of the Original Plaintiff as to the First Appellant's entitlement to Shashi Deep ("the said Bungalow"). Basis this, he submitted that the Appellants were entitled to a decree on admission under the provisions of Order XII Rule 6 of the CPC as more particularly prayed for in the First Notice of Motion and consequently prayer clause (a) of the Second Notice of Motion.

6. Mr. Nevatia then placed reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Karam Kapahi and Ors vs. M/s. Lal Chand Public Charitable Trust and Anr***¹ to submit that an admission under Order XII Rule 6 of the Code of Civil Procedure, 1908 ("the CPC") included an admission by "*pleading or otherwise in writing*". From the said judgement he pointed out that an admission under Order XII Rule 6 of the CPC was very wide in its scope and that a party relying upon such admission of the other party made in pleading or otherwise, can press for judgment, as a matter of legal right. Basis this, he submitted that the evidence of the Original Plaintiff read with the said Declaration constituted an admission under Order XII Rule 6 of the CPC. He therefore submitted that basis this the Appellants were entitled to a decree on admission as prayed for in the First Notice of Motion.

7. Mr. Nevatia then pointed out that the Original Plaintiff had specifically stated that she was a builder by profession and was aware of the procedure for re-development etc. Basis this he

1 AIR 2010 SC 2077

submitted that the Original Plaintiff was therefore presumed to be someone who was aware of the nature and effect of a document when executing the same and was not a lay person. He submitted that this coupled with the fact that in cross-examination the original Plaintiff had not in any manner disputed and/or denied either the execution and/or the contents of the said Declaration nor had challenged the same in the said Suit made clear and unambiguous that the original Plaintiff had unequivocally admitted that the first Appellant was entitled to the said Bungalow, i.e., Shashi Deep. Mr. Nevatia pointed out that this fact had been wholly overlooked by the Learned Single Judge in the Impugned Order. Basis this, he submitted that both the Notices of Motion deserved to be allowed.

8. *Per contra*, Mr. Joshi, the Learned Senior Counsel appearing on behalf of Respondent No. 1(a) and 1(b) in Appeal No. 345 of 2019 submitted that the Original Plaintiff had passed away on 23rd June 2011 and had by her last will and testament dated 17th June 2009 bequeathed the said bungalow i.e., Shashi

Deep to Respondent No.5 namely Shishir Nevatia. Mr. Joshi submitted that the very fact that the original Plaintiff had filed a Suit in the year 1996 coupled with the fact that she had left a will bequeathing the said bungalow i.e., Shashi Deep to Respondent No. 5 itself made explicit that the Original Plaintiff *inter alia* disputed the First Appellant's entitlement to the said bungalow. He submitted that the reliance placed upon the cross-examination of the Original Plaintiff was in isolation and out of context and thus would not qualify even remotely as being an admission under the provisions of Order XII Rule 6 of the CPC much less entitle the Appellants to a decree on admission.

9. He then submitted that an admission under Order XII Rule 6 of the CPC had to be one which was unambiguous, clear and unconditional and the law would not permit an admission by inference as the same was a matter of fact. He submitted that an admission of fact had to be clear from the record itself and cannot be left to the interpretative determination by the Court unless there was a complete trial, and the finding of an admission was on

the basis of cogent and clear evidence on record. In support of his contention, he placed reliance upon a judgment of a Division Bench of this Court in the case of ***Shantez and Anr. vs. Applause Bhansali Films Ltd. Co. Mumbai and Ors***². Basis this, he submitted that in the facts of the present case, there was infact no admission, much less a clear and cogent admission. He submitted that what the Appellants sought to rely upon as an admission, was infact something which had to be inferred. Basis this, he submitted that the question of a decree on admission being granted thereon under the provisions of Order XII Rule 6 of the CPC did not arise since the same was not clear and unambiguous as was required under Order XII Rule 6 of the CPC.

10. Mr. Joshi then invited our attention to the Suit and pointed out that the original Plaintiff was the sole lessee in respect of the said Bungalow. He pointed out that the original Plaintiff had sought cancellation of the Family Agreement since Appellant No.1 had not performed his obligations thereunder. He then invited our attention to the prayers made in the Counter Claim and pointed

2 2009 SCC Online Bom. 405

out that the Appellants had primarily sought specific performance of the Family Agreement and would therefore have to first establish that Appellant No. 1 had infact performed his obligations under the Family Agreement. He submitted that this would have to be established from *inter-alia* the evidence of Appellant No. 1. Mr. Joshi submitted that both the Notices of Motion were taken out at this belated stage only because Appellant No. 1 had in his evidence failed to establish that he had discharged/performed his obligations under the Family Agreement. In support of his contention Mr. Joshi invited our attention to the Family Agreement and pointed out that Appellant No. 1 was required to do the following viz.

- "3. *Dileep Nevatia will sell his shares in Elegant Industries (and/or other associated concerns of Elegant Industries Pvt. Ltd., if any.) to Mr. B. K. Nevatia at face value.*"
4. *Dileep Nevatia (and/or companies controlled by him) will vacate premises occupied by them at Udyog Bhavan, whether by paying rent or not.*"

He then invited our attention to the cross-examination of Appellant No.1 and pointed out the following answers given by

him: -

"Q26. Have you sold or transferred any shares held by you in Elegant Industries Pvt. Ltd., to any person?"

Ans. No.

Q27. Have you agreed / offered to sell your shares in Elegant Industries Pvt. Ltd. to any person at any point of time?"

Ans. I had offered to transfer my shares in the name of my father in terms of the Family Agreement of 1990.

Q28. Did you transfer the shares as offered by you as stated in your previous answer?"

Ans. The transfer could not take place because by this time, my mother had filed the present suit."

Basis the above, Mr. Joshi submitted that Appellant No.1 had admittedly not performed/discharged his obligations under the Family Agreement. He submitted that basis this, the Appellants could not therefore seek specific performance thereof much less be granted a decree as prayed for in the Counter Claim.

11. Mr. Joshi then submitted that another factor that ought to be taken into consideration was that the so-called admission

which the Appellants sought to place reliance upon was of the statement recorded in the cross-examination in the year 2009. He submitted that the Notices of Motion was taken out by the Appellants only in the year 2016 which was not only well after the framing of Issues but also after the cross examination of all, but one witness being completed. Mr. Joshi then submitted that the Original Plaintiff was infact constrained to file the said Suit since Appellant No. 1 had failed and neglected to perform his obligations under the Family Agreement. He submitted that the conduct of the Original Plaintiff post 1992 made explicit that the Original Plaintiff did not want to act on both the Family Agreement as well as the said Declaration and hence the question of the grant of a decree on admission at this stage did not arise.

12. Mr. Joshi, then placed reliance upon a judgment of the Hon'ble Supreme Court in the case of ***Hari Steel and General Industries Ltd. and Anr. Vs. Daljit Singh and Ors***³ to submit that the grant of a decree under Order XII Rule 6 of the CPC was a discretionary relief. He pointed out from the said judgment that

3 (2019) 20 SCC 425

when the trial had already commenced, it was desirable to record findings on various contentious issues and disputes in the Suit on merits by appreciating evidence and it was not proper in such a fact scenario to make a roving inquiry for disposal of the application filed under Order XII Rule 6 CPC. Mr. Joshi submitted that given the fact that the issues, in the captioned Suit, had been framed far back in the year 2006 and the cross-examination of the Defendants was almost complete, the findings of the Hon'ble Supreme Court in the case of ***Hari Steel General Industries Ltd. and Anr.*** (supra) were squarely applicable to the facts of the present case and the question of this Court at this stage of the trial considering an Application under Order XII Rule 6 of the CPC without appreciating the evidence as a whole does not arise.

13. Basis the above, the Learned Senior Counsel submitted that there was no question, in the facts of the present case, of the Appellants being entitled to any order, much less an order of a decree on admission under the provisions of Order XII Rule 6 of the CPC. He submitted that consequently, the question of the

Appellants at this stage being granted any relief in the Second Notice of Motion also did not arise and basis this he submitted that the Appeals ought to be dismissed.

14. We have heard Mr. Nevatia – Appellant No.1 in person and Mr. Joshi, the Learned Senior Counsel for Respondent Nos 1(a) and 1(b) in Appeal no. 345 of 2019. We have also perused the copies of both the Notices of Motion and the documents annexed thereto as also the case law cited and after a careful consideration of the same, find that there is absolutely no infirmity in the Impugned Order. We find that both the Appeals deserve to be dismissed for the following reasons, viz.

- i. *Firstly*, we are unable to read the answer given by the Original Plaintiff in cross examination as being an admission which would entitle the Appellants to a decree on admission as has been prayed for. We say so because as has been held by this Court in the case of ***Shantez and anr.*** (supra) an admission for the purposes of Order XII Rule 6 of the CPC has to be

unambiguous, clear and unequivocal. While there is no dispute that the original Plaintiff has admitted execution of the said Declaration dated 27th November 1992, the facts remain that the original Plaintiff has (a) filed a suit for cancellation of the Family Agreement; (b) left a Will bequeathing the said bungalow "Shashi Deep" to Respondent No.5; and also that (c) the Appellants have themselves sought specific performance of the Family Agreement as also of the said Declaration dated 27th November 1992. Given the totality of these facts, we cannot at this stage read the answer given in the cross-examination whereby the original Plaintiff has admitted execution of the said Declaration dated 27th November 1992 as being an admission under Order XII Rule 6 of the CPC by ignoring all the other attending circumstances. This so called "admission" is something which would have to be decided at the time of final hearing of the Suit after weighing in all the evidence which has come on record. Thus we are not persuaded

to read the same as being an admission basis which the Appellants would be entitled to a decree at this stage.

- ii. *Secondly*, we cannot lose sight of the fact that the Hon'ble Supreme Court in the case of ***Hari Steels and General Industries Ltd. and Anr.*** (supra) has specifically held that (a) the grant of relief under Order XII Rule 6 of the CPC is a discretionary one; and (b) when the trial has already commenced, it is desirable to record findings on the various contentious issues and disputes raised by the parties on merits by appreciating the evidence and not to make a roving enquiry for the disposal of an application filed under Order XII Rule 6 of the CPC.

15. In this context, we cannot ignore the fact that the said Declaration upon which reliance is placed is dated 27th November 1992, the Issues were framed in the year 2006 and the cross-examination of the original Plaintiff took place in the year 2009.

Presently the cross-examination of all but one witness is completed. The Notices of motion were taken out in the year 2016 which is after approximately 7 years from the date of the so called admission and at an advanced stage of trial. Hence in these facts, the ratio laid down in the judgment of the Hon'ble Supreme Court in the case of ***Hari Steels and General Industries Ltd. and Anr.*** (supra) would squarely apply and therefore occasion to exercise the discretionary jurisdiction under Order XII Rule 6 of the CPC would not arise.

16. In view of the aforesaid findings, both the Appeals are dismissed.

17. In view of the dismissal of both the Appeals, the captioned Interim Applications do not survive and the same are also dismissed.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)