

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice Subhasis Dasgupta.

IA No. GA/1/2019 (Old No.GA/490/2019)
With
CS No. 23 of 2009
In
APO No. 232 of 2018

City Centre Properties Private Limited
Vs.

Prasanta Kumar Mahapatra & Ors.

For the Petitioner/Appellant	:	Mr. Ratnanko Banerji, Sr. Adv. Mr. Srijob Chakraborty, Adv. Mr. Anurag Mitra, Adv. Mr. Pranav Sharma, Adv.
For the Respondent	:	Mr. Sakya Sen, Adv, Mr. K. K. Pandey, Adv.
For the Respondent No. 2	:	Mr. Aasish Chowdhury, Adv. Ms. Urmila Chakraborty, Adv. Mrs. Aindrila Basu, Adv.
For the Respondent Nos. 3a, 3b & 5	:	Mr. Jayanta Sengupta, Adv. Ms. H. Nafis, Adv.
For the Respondent No. 4	:	Mr. Rudrojit Sarkar, Adv. Mr. Nikunj Berlia, Adv.
Judgment on	:	09.04.2021

Subhasis Dasgupta, J:-

This appeal arises from the judgment and preliminary decree dated 16th July, 2018, in an application (GA 4050 of 2017) under Order XII Rule 6 of the Code of Civil Procedure, declaring the shares of the heirs of late Prabhat Kumar Mahapatra, in respect of the immovable properties, shown in the schedule appended to the amended plaint, and further appointing a learned advocate Commissioner to effect partition to the extent of shares declared in the preliminary decree.

A suit for partition and administration of properties, left by the late Prabhat Kumar Mahapatra came to be instituted in the year 2009.

The appellant company/defendant No. 6 along with the defendant No. 1 filed a written statement jointly in such suit. Besides filing the written statement, the appellant filed an affidavit to challenge the application under Order XII Rule 6 C.P.C. was filed.

By reason of the amendment of the plaint, the first respondent/plaintiff restricted his claim to the three (3) immovable properties, left by his father, late Prabhat Kumar Mahapatra, which is more fully described in the schedule "M" of the plaint.

The learned trial court by its impugned judgment and order, granted a preliminary decree on the alleged admission of the defendants in their respective written statement with respect to the title of immovable properties of late Prabhat Kumar Mahapatra, as covered in the scheduled properties, keeping in mind that though the defendant Nos. 2a and 2b had raised objection with regard to the representation of defendant No. 1 in the suit by her solicitor for her mental incapacity, but no objection was ever raised with regard to the entitlement of share of defendant No. 1.

Mr. Ratnanko Banerji, learned senior advocate for the appellant/ defendant no. 6 company challenging the preliminary decree, made the following submissions:

That the said three properties shown in the schedule to the plaint, though claimed by the first respondent/plaintiff to be the properties belonging to his late father, Prabhat Kumar Mahapatra, but the said properties were not the properties of late Prabhat Kumar Mahapatra but belonged to the Company. Reference was drawn to the audited balance sheets submitted for the year 1993-1994, wherein Prabhat Kumar Mahapatra had signed the audited balance sheets being a director of appellant company for challenging the title of late Prabhat Kumar Mahapatra.

That there was no conspicuous and express categorical, unequivocal and unqualified admission of appellant/defendant company admitting the title of late Prabhat Kumar Mahapatra with respect to the three (3) immovable properties shown in “M” schedule of the plaint, thereby justifying the necessity of having held a trial for determination of title of the properties, for which partition was sought for, without which preliminary decree is not sustainable.

That the assets of appellant/defendant company could no be made part of the subject matter of the partition for distribution amongst the heirs of late Prabhat Kumar Mahapatra. The shareholders were not the owners of the properties and assets belonging to the company, at best the personal shares held by late Prabhat Kumar Mahapatra in the appellant’s company might be liable for distribution amongst the heirs of late Prabhat Kumar Mahapatra, according to their entitlement.

Reliance was placed by Mr. Banerji on a decision reported in **AIR 1955 SC 74** rendered in the case of **Bacha F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay**, that the concept of partners is not akin to shareholders in a company, as the company is a separate juristic entity distinct from the shareholders. In **Halsbury’s Laws of England, Vol. 6 (3rd Edn.), Page- 234**, the law regarding the attributes of shares is stated as follows:

“A share is right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles, and are not of the nature of real estate.”

That the learned trial judge ought not to have granted the preliminary decree without enquiring into the title of the three (3) immovable properties shown in the schedule, as there was no categorical admission of title.

Mr. Banerji relied on a decision reported in **(2019) 20 SCC 425**, delivered in the case of ***Hari Steel and General Industries Limited & Anr. Vs. Daljit Singh & Ors.***, on the trite principle that no amount of evidence would be of any help, in the absence of pleading and foundation in the written statement.

That the alleged admission, sought to be capitalised by the first respondent/plaintiff must be conscious, specific, clear, categorical and unequivocal in order to reveal the deliberate act of the party making such admission, thereby revealing his intention to be bound by it. In the absence of a clear admission of title, the learned trial judge was under an obligation to exercise his judicial discretion, keeping in mind that the judgment on admission is a judgment without trial, therefore, unless the admission is clear, unambiguous and unconditional, the discretion vested to the learned trial judge ought not to have been exercised, so as to deny the valuable right of the appellant/defendant no.6 to contest the claim for obtaining a judgment on admission under Order XII Rule 6 C.P.C. Mere giving a look to a solitary statement in the written statement, would not be itself sufficient to infer even the admission of the appellant/defendant no.6 with respect to the title of the properties, shown in schedule, allegedly claimed to be belonging to late Prabhat Kumar Mahapatra.

That the title to the properties shown in the schedule of the plaint whether the properties belonged to the erstwhile owner namely late Prabhat Kumar Mahapatra or not ought to have been determined before granting preliminary decree, which should not have been left to be determined by the learned Commissioner.

Reliance was placed by Mr. Banerji, on a decision, reported in **1909 (10) CLJ 503**, delivered in the case of ***Satya Kumar Banerjee Vs. Satya Kirpal Banerjee & Ors.***, where the law was laid down that all questions involving the title of the parties and their right to any relief are judicial in character and must be determined by the court, and such determination

must be made in the interlocutory decree before any partition is made or directed.

Emphasis was further made by Mr. Banerji, citing a further decision reported in **(1910-11) 15 CWN 375**, delivered in the case of **Upendra Nath Banerjee & Anr. Vs. Umesh Chandra Banerjee** that the determination of the question whether certain properties are the joint properties of the parties or the exclusive properties of any of them, cannot be delegated by the Judge to the Commissioner for partition, and thus the necessity of conducting a trial was focused.

That the learned trial judge neither considered the written statement filed by the appellant company jointly with the defendant no. 1, nor advanced any reasons for consideration of the written statement filed by the appellant company as an admission. The impugned judgment and order is thus, without any application of mind for not offering any reasons so as to obtain hallmark of a judicial order granting a preliminary decree on admission.

That in the supplementary affidavit submitted by the appellant company, there was a disclosure of tenancy agreement, being executed by appellant/defendant company in favour of Indian Oil Corporation, dated 1st April, 2006, wherein the appellant/defendant company represented itself to be the owner of the properties, let out to Indian Oil Corporation, which is of course one of the three (3) immovable properties, mentioned in the schedule to the plaint, and it could not be taken into account by the learned trial court, while granting preliminary decree.

Upon raising such submissions, the appellant/defendant company proposed for setting aside the impugned judgment and order.

Per contra, Mr. Sakya Sen, learned advocate representing the first respondent/plaintiff, challenged the appeal advancing the following submissions:

That the written statement filed by the appellant would by itself reveal that there was no dispute with regard to the title of late Prabhat Kumar Mahapatra, in respect of three (3) immovable properties, shown in schedule "M" to the plaint, and no controversy was there with regard to the shares of heirs of late Prabhat Kumar Mahapatra.

The claim of the appellant/company, as to its entitlement to the assets of the company being irrelevant, would not require any adjudication, when apparently there was categorical and unequivocal admission of appellant/defendant, as regards title of the Prabhat Kumar Mahapatra. Incidentally reliance was drawn from Sub-Paragraph (XII) of Paragraph 2(n) of written statement of appellant/defendant company, wherein the appellant company itself admitted taking a specific averment that the inherited properties apart, all other properties acquired by late Prabhat Kumar Mahapatra were his self acquired properties, which according to first respondent, would be sufficient enough to estop the appellant/defendant company from challenging the title of late Prabhat Kumar Mahapatra with respect to the three (3) properties, shown in the plaint.

The case of the first respondent/plaintiff claiming partition, found its basis from the disclosure made in the Paragraph-3 of the amended plaint, wherein it was averred that Prabhat Kumar Mahapatra during his lifetime purchased three (3) properties, mentioned in the schedule of the plaint, out of his own income, being a businessman, who established and promoted several companies, and one of such company is "City Centre Properties Private Limited/appellant company," which was promoted as family company, and incorporated as such on 15th July, 1966.

That properties, mentioned in 54, Forest Park, Bhubaneswar, Odisha, was let out to Indian Oil Corporation by the appellant company, with the knowledge of 1st respondent. Such letting out would not itself deprive the respondent no.1/plaintiff from having his share to the extent of his

entitlement in respect of properties, left by his late father, for the apparent admission of appellant/defendant no.6 in its written statement as regards the title of his late father to the properties, as tenancy could be created without being owner of property, and appellant/company had nothing to do with the ownership and title of such property. Late Prabhat Kumar Mahapatra executed a lease of property in favour of the appellant/defendant company, and the appellant being a lessee of the demised property could not be allowed to dispute the title of Prabhat Kumar Mahapatra over the said property. The appellant/company being a lessee of the demised properties, there left no hurdle to pass a preliminary decree declaring the shares of late Prabhat Kumar Mahapatra on apparent admission of title, revealed from the written statement of appellant/defendant company.

That though, appellant/defendant company might be in possession in respect of one of the properties, mentioned in the schedule to the plaint, but the partibility of such property being a subject of decision, could be well taken in a proceeding before the learned Commissioner of partition, appointed for the purpose. Paragraph-5 of the written statement of appellant/company having dealt with the admission of title individually with the description of immovable properties, shown in the schedule of the plaint there left nothing to dispute with the admission of title of properties, and thus, such paragraph of written statement was much stressed upon to infer even the admission of title.

That by reasons of such admission of title, found in the relevant paragraphs of written statement, the balance sheet, relied upon by the appellant, not being document of title, would be without any significance. The mere entries in the balance sheet, signed by late Prabhat Kumar Mahapatra, could not be allowed to be relied upon to contradict the title of late Prabhat Kumar Mahapatra with respect to the three (3) immovable properties, mentioned in the plaint.

The judgments referred by the appellant though being on established proposition of law, but the same would not be applied in the facts and circumstances of this case.

That since, the learned trial court simply declared the shares of the heirs of late Prabhat Kumar Mahapatra to the extent of 1/4th share each pursuant to the averment made in Paragraph-42 of the plaint, claiming distribution of shares amongst the heirs of late Prabhat Kumar Mahapatra, upon sensing the apparent categorical and unqualified admission of title of defendants in their respective written statement, and that being the position, any exercise for relegating this appeal to trial, as proposed to be held by appellant in this case, would be unnecessary, and prolong the instant litigation.

Learned advocate representing respondent no. 2, 3a, 3b, 4 and 5 supported the stand taken by respondent no. 1/plaintiff that no illegality was committed by learned trial court in granting a preliminary decree for the apparent admission of title, found in the written statement of defendants.

Attempt was made by respondent nos. 3a, 3b and 5 to distinguish the judgment, rendered in the case of ***Upendra Nath Banerjee (supra)*** submitting that the same would not be applicable in the given set of facts on the simple score that such ratio requiring determination of the question whether certain properties are the joint properties of the parties, or the exclusive properties of any of them cannot be delegated by a Judge to the Commissioner for partition came to be decided prior to the Code of Civil Procedure 1908 being enacted, and during the pre-enactment period of Code of Civil Procedure, the question of granting preliminary decree was neither conceived, nor even contemplated.

According to such contesting respondents to the appeal, Commissioner of Pleader would be simply obliged to decide the dispute, as regards the distribution of extent and proportion of share amongst the heirs, and as

such no title of the properties was left to be decided by the Commissioner, as contended by the appellant/company.

We were addressed in this appeal to decide the sustainability of preliminary decree being granted by the learned trial court upon rendering a judgment on admission under Order XII Rule 6 C.P.C.

The fight between the parties claiming partition was with respect to three (3) immovable properties, shown in the schedule to the plaint. The appellant/company by filing a written statement, jointly with the defendant no. 1, proceeded to answer the claim of the respondent no. 1/plaintiff.

The learned trial court granted the preliminary decree having found admission of title, mentioned in the respective written statement of defendants. Though the respondent/plaintiff referred to some of the paragraphs in the written statement of appellant/defendant company to reveal the admission of title, but for ascertainment of categorical, unambiguous and unconditional admission, the learned trial court was under an obligation to consider each and every averments contained in the written statement of the appellant/defendant company, even to infer admission of title of the properties, if it was a deliberate, conscious act of appellant/defendant company making such admission.

It is so necessary that the learned trial court should reveal in its judgment that it duly exercised its discretion judicially to find out clear, unambiguous and unconditional admission.

There is nothing reflected in the order under appeal that the learned trial court had even taken into account the points raised in the written statement filed by appellant company.

When the appellant/defendant company responding to the summons being issued by the court, furnished its written statement jointly with defendant no. 1, the learned trial court ought to have returned a decision in terms of the averments contained in the relevant paragraphs of the written

statement of appellant/defendant company, disputing with the title of the properties.

No reasons whatsoever were assigned by learned trial court for not making consideration of the written statement, and the affidavit furnished by the appellant/defendant company.

Merely giving an isolated look at some of the paragraphs of written statement, filed by the appellant/defendant company, would not be sufficient enough in the given facts of this case to reveal the admission of title of the properties, allegedly owned by late Prabhat Kumar Mahapatra.

The learned trial court is supposed to give a decision after accepting the written statement of the appellant/defendant company for reaching its logical conclusion so as to grant a preliminary decree.

Assigning of reasons being a hallmark of an order passed in exercise of judicial authority, it would always be desirable to offer reasons, while coming to a conclusion.

In the impugned judgment and preliminary decree dated 16th July, 2018, since there has been non-consideration of the written statement, filed by the appellant/defendant company, without offering any justified reasons, the same is not sustainable.

Having considered the controversy raised over the properties, mentioned in the schedule of the plaint to its title, and bearing in mind the nature and peculiarity of averments, contained in the written statement of appellant/defendant company, disputing the title of late Prabhat Kumar Mahapatra, from whom the heirs claimed their 1/4th share each, all questions raised by appellant/defendant company involving the title of the parties, and the proposed reliefs sought ought to have determined by the learned trial court, before granting any preliminary decree under Order XII Rule 6 C.P.C.

We thus found strong force in the argument, advanced by Mr. Banerji, appearing for the appellant.

There arises the necessity of ascertaining title of properties, with respect to which partition has been sought for, before granting a preliminary decree.

Since, the appellant/defendant company claimed its exclusive title over the scheduled properties, the determination of the question, whether the properties actually are the exclusive properties of the parties proposing partition, or of some other person, as claimed by appellant/defendant company, in our considered view, is obligatory.

Ascertainment of the title of properties appears to be pre-requisite prior to effecting a preliminary decree, while rendering a judgment on admission under Order XII Rule 6 of C.P.C.

The impugned judgment and the preliminary decree dated 16th July, 2018, for the reasons as aforesaid, cannot be allowed to stand, and the same is accordingly set aside.

The application for judgment on admission (GA No. 4050 of 2017) is dismissed.

The properties and extent to which they belonged to late Prabhat Kumar Mahapatra and the share of the parties in them are to be determined on trial leading to a preliminary decree. This appeal is allowed to the above extent.

The connected application [GA No.1 of 2019 (Old GA NO. 490 of 2019)] is accordingly disposed of.

(SUBHASIS DASGUPTA, J.)

I. P. MUKERJI, J.-

I fully concur with the reasoning and conclusion reached by my learned brother, Dasgupta, J. I would like to add a few words of my own.

Under Order XII Rule 6 of the Civil Procedure Code, the court has the power to deliver judgment on the basis of an admission. This admission has to be clear, unambiguous and unequivocal. The admission should not be attached with any condition or a narration which might admit of two different interpretations or two equally plausible opinions one of which is contrary to the admission or might qualify the admission made. The admission should be such that the opinion that the court reaches on the basis of such admission is the only reasonable opinion that can be formed.

Whether there is an admission or not can be ascertained under Order XII Rule 6 from not only the pleadings but from any other source whether oral or in writing. Therefore, the learned trial court under Order XII Rule 6 was not confined to the written statement but was also obliged to examine any other document to satisfy itself whether there was an admission.

On a perusal of the written statement filed jointly by the respondent no.2/defendant No. 1 and appellant/defendant no.6, there is no doubt in my mind that the statements made therein are substantially vague, convoluted and often contradictory with one another. In fact, I do not find any clear cut admission that the three properties belonged to the late Prabhat Kumar Mahapatra (father of Prasanta Kumar Mahapatra).

In fact, a combined reading of the following averments in the affidavit-in-opposition to the application under Order XII Rule 6 and the written statement suggest the opposite:-

“3.(d) Properties shown in the Schedule to the plaint are claimed by the plaintiff/petitioner to be the properties belonging to late Prabhat Kumar Mahapatra. However, the said properties are the assets of the defendant no. 6 as duly reflected in its balance sheets including the balance sheets which are signed by late Prabhat Kumar Mahapatra himself while acting as a director of the defendant no. 6 company.”

2. (i) *It is pertinent to note that at the time of his death, Prabhat Kumar Mahapatra did not possess any shares in the City Centre Properties Pvt. Ltd. being Defendant no. 6 herein, Defendant no.7, Defendant no.8 and Carfax Investments Pvt. Ltd. and as such the plaintiff cannot seek any inheritance in such respect. Thus under no circumstances, can the shares in these Companies be said to belong to Late Prabhat Kumar Mahapatra or the Companies themselves be described as a proprietorship concern of the said Prabhat Kumar Mahapatra.”*

“(xi) Without prejudice..... It is denied that the properties of the companies can be said to be joint family property. No documents have been disclosed to show that the properties in question or any of them at any stage was regarded or treated by anyone as joint family property. Nor have those been so treated for tax purposes at any stage.”

5. *With reference to paragraphs 2 to 4 of the plaint it is stated state that there is no premises at 27, Free School Street, Kolkata – 700 087. In any event, a leasehold property cannot be a subject matter of partition as there is no partible interest in the property. The property situated at 10A, Lee Road, Kolkata – 700 020 is a two storied building and the first floor together with common passage and common amenities belongs to the said father during his lifetime and after his death it is being exclusively and illegally controlled by the defendant no.2. It is stated that Prabhat Mahapatra was never the owner of the ground floor flat at 10A, Lee Road, Kolkata – 700 020. The premises mentioned in 54, Forest Park, Bhubaneswar – 751009 has been let out to Indian Oil Corporation by the City Centre Properties Pvt. Ltd. and contrary allegations are denied and disputed.”*

“7. With reference.....The allegation of the family Companies and that the rights of the Companies are subject to equitable consideration as specifically alleged in paragraph 15 is incorrect and untenable. The Companies are not in the nature of partnership and the rights of the shareholders are not subject to equitable consideration as alleged by the

plaintiff. A Company does not recognize any concept of their being a trust created in respect of the share of a living person. The individual shareholdings of the family members are to be found in the Register of members of each of such members.”

13. With reference.....that the plaintiff is not entitled to 1/4th share in any of the properties mentioned in paragraph 42 of the plaint. Inasmuch as, the Plaintiff did not have any right, title and interest as a coparcener in any of the properties accordingly.”

In paragraph 3(d) of the affidavit-in-opposition of these defendants to the judgment of admission application (GA 4050 of 2017), it has been categorically stated that all the three immovable properties belonged to the company. A copy of the balance sheet for the year 31st March, 1993 has been annexed. A schedule to it describing the Company's fixed assets specifies that those three properties were included in them. The same is also true as regards the balance sheet of the year ending 31st March, 1994. With regard to 27, Mirza Galib Street, the affidavit-in-opposition asserted that the land was leased out to the respondent no. 6 by late Prabhat Kumar Mahapatra on 1st January, 1967 for 25 years. The company constructed a building on it. The lease was further extended by 25 years on 10th August, 1991.

There are no reasons in the impugned judgment dated 16th July, 2018 as to why his lordship thought that there was an admission on the part of the answering defendants that the said properties belonged to late Prabhat Kumar Mahapatra.

Before pronouncing a preliminary decree the court has the power to even investigate the title of the properties to ascertain whether it at all belonged to the person from whom the title is claimed. Thereafter, comes the question of determination of the shares of the parties to the partition suit. The court might adopt any course of action permissible in law to ascertain

such title. In this kind of a case the title could not have been declared on the basis of alleged admissions. It could only have been determined and declared on the basis of a trial leading to a preliminary decree.

The operative part of my order is identical to the one made by my learned brother.

Urgent certified copy of this judgment, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with the all necessary formalities.

(I. P. MUKERJI, J.)