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Ashis Kumar Das and Others Vs Rekha Mukherjee

Court: Calcutta High Court

Date of Decision: Sept. 22, 2004

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 12 Rule 6, Order 8 Rule 10, Order 8 Rule 5(1)
Constitution of India, 1950 â€" Article 141
Evidence Act, 1872 â€" Section 17, 21, 21(1), 21(2), 21(3)
Income Tax Act, 1961 â€" Section 230A
Transfer of Property Act, 1882 â€" Section 53

Citation: (2006) 1 CHN 297

Hon'ble Judges: Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench: Division Bench

Advocate: Barun Roy Chowdhury and Jaharlal De, for the Appellant; Santanu Mukherjee, for the Respondent

Final Decision: Allowed

Judgement

D.K. Seth, J.

The preliminary objection : Maintainability of the appeal:

1. Mr. Santanu Mukherjee, learned Counsel for the respondent, had taken a preliminary objection as to the maintainability of the appeal.

According to him, the decree was passed on 20th December, 2001. Against the said decree, a review application was preferred on 3rd/4th

January, 2002. This review was partly allowed by an order dated 15th July, 2002. Therefore, when the appeal was preferred on 11th September,

2002 against the judgment and decree dated 20th December, 2001, there was no judgment and decree, which stood modified by reason of the

order dated 15th July, 2002, being the decree against which the appeal could have been preferred. The subsequent dismissal of the review

application or rejection thereof on account of not being pressed by the applicant would not alter the situation and would still affect the

maintainability of the appeal. In support of his contention. Mr. Mukherjee had relied upon a decision in Sushil Kumar Sen Vs. State of Bihar, .

Relying on this decision, he contended that the principle laid down therein fully applies in the facts and circumstances of this case. Therefore, this

appeal cannot be maintained.

1.1. Mr. Barun Roy Chowdhury, learned Counsel for the appellant, on the other hand, points out that this decision in Sushil Kumar Sen (supra) is

distinguishable. According to him, the moment, the application for review was not pressed before this High Court in connection with the cross-

objection against the part of which the review was refused, the whole review episode becomes redundant and only remains on the record and it

evaporates in the eye of law. As such it is the decree dated 20th December, 2001, which remains to be appealed against. Therefore, the appeal is

very much appealable.

1.2. On the question of this preliminary objection, we find that the principles of law upon a review application being allowed or rejected are settled

proposition of law. If a review application is allowed, no matter whether the decree is reaffirmed, modified or reversed on review it is the decree

that is passed on review even though affirmed, would be the decree relevant for being appealed against. This is a settled proposition of law as was

recognized in the said decision of Sushil Kumar Sen (supra) relying on the decisions in Nibaran Chandra Sikdar Vs. Abdul Hakim and Others, ;

Kanhaiya Lal v. Baldev Prasad ILR 28 All 240; Brijbaso Lal v. Salig Ram, ILR 2004 34 All 282 and Pyari Mohan Kundu v. Kalu Khan, ILR 44

Cal 1011.

1.3. We have also occasion in this High Court in Full Bench to decide this question in K.N. Mishra Vs. Union of India (UOI) and Others, ,

following the decision in Gour Krishna Sircar and Another Vs. Nilmadhab Saha and Others, But the question remains, if the review application is

rejected at the very first stage and second stage is not reached and the third stage is not concluded in, in that event, whether the order of rejection

of the review application would have the same effect of reviving the decree as a fresh decree on the date of rejection of the review application. Mr.

Mukherjee had contended that by reason of rejection of the review application, the decree that has been passed is affirmed and as such it would

be treated as a fresh decree passed on the date of the rejection of the review application. In fact, according to him, the decree that was sought to

be reviewed stands affirmed and revived as soon review application is rejected. He also contends that it would depend on the facts and

circumstances of each case, namely, whether at one point of time the decree was reversed and the subsequent rejection would amount to revival of

the decree and would not be the same old decree, which would be appealable.

1.4. The decision in Sushil Kumar Sen (supra) seems to be distinguishable on facts. In that case on review the decree was modified, and the

appeal was preferred against both the decree including the modified one. But the grounds were taken only with regard to the modified decree not

with regard to the original decree which stood revived after the modified decree was ultimately set aside. In such circumstances, it was held that the

appeal could not be maintained against the old decree in the absence of any ground taken against the old decree. This is not the case here. Here

the appeal has been preferred against the original decree and the grounds have been taken as against the same. Therefore, the principle laid down

in the said decision is not applicable on account of the distinct feature available in the present case.

1.5. That apart, on the rejection of the application for review, no new decree is passed. Neither the original decree is affirmed. On rejection of the

review application, the original decree continues. If the review is withdrawn, the entire process evaporates. In the eye of law there remains no

review. The original decree continues.

1.6. The second ground on the maintainability raised by Mr. Mukherjee was that at the time when the appeal was preferred the original decree

stood modified by the order passed on the review application, which was allowed partly. As such at that point of time no appeal against the decree

dated 20th December, 2001 could be preferred namely at a point of time when the review application stood allowed by an order dated 15th July,

2002 when the appeal was preferred on 11th September, 2002. The contention seems to be very attractive but when the review application was

rejected or dismissed on account of being not pressed the whole process of review remains only on record and there was no review in the eye of

law in order to have any impact on the original decree that was passed. Even though at that point of time when the appeal could not have been

preferred, yet when in the ultimate result the review application ended in evaporation by reason of it is being not pressed, it cannot be said to be

not maintainable. It would be too technical a procedure when the appeal was preferred within time, may be in anticipation, by reason of the

subsequent development, in the peculiar facts and circumstances of this case, it is not possible to hold that the appeal would be unsustainable.

Therefore, we are unable to agree with the contention of Mr. Mukherjee with regard to the maintainability of the appeal and the preliminary

objection is, therefore, overruled.

Delay: Whether defeats Order 12 Rule 6 CPC :

2. Now on the question of merit of the case, it appears that the decree was passed under Order 12 Rule 6 of the CPC (CPC). Elaborate argument

was made for and against the decree by the respective counsel, which we do not like to deal with separately. We would be dealing with the

respective submissions made by the learned Counsel for the respective parties at appropriate stages as would be relevant for the present purpose.

2.1. Order 12 Rule 6 CPC empowers a Court to pass a decree on admission made by a party either in the pleadings or otherwise, whether orally

or in writing, on the basis whereof the Court at any stage may pass the decree. Mr. Roy Chowdhury had contended that when the suit was ready

for evidence, the application under Order 12 Rule 6 was filed and stressed that this provision is aimed at expediting the hearing. But this principle

of expedition would not be relevant in view of the expression used in Rule 6 itself empowering the Court to pass such decree at any stage of the

suit either on the application of any party or on its own motion without waiting for the determination of any other question between the parties.

Therefore, delay in making the application will not stand in the way of passing a decree under Order 12 Rule 6.

Order 12 Rule 6 : Admission : Test:

3. The admission has to be made in the pleading or otherwise. It may be oral. It may be in writing. In this case the admission was not made in the

pleadings. It is neither made orally nor in writing. Mr. Mukherjee contends that the expression ""otherwise"" would include any admission made in

course of any other proceedings particularly when such admission is made in another proceeding between the same parties involving the same

property. He also contends that the admission need not be made by the party himself either orally or in writing. It would be sufficient if the party

relies on or adopts a document authored by someone else containing certain statement in relation to the admission sought to be proved and such

document is adduced in evidence and is acted upon and adopted by exhibiting the same.

3.1. In support of his contention, he had referred to the texts from the Phipson on Evidence, 14th Edition, page 671. He also relied on Corpus

Juris Secundum at page 711 Article 282 and reiterated the same from 1996 Edition Volume 32 of the same book at pagesl46 and 147; and on

Evidence, Second Edition by Christopher B. Mueller and Lalrd C. Kirkpatrick. He also drew our attention to page 258 of Phipson & Elliot -

Manual of the Law of Evidence, 11th Edition, by Universal, the First India Reprint 2001; and to page 51, Volume 70, Halsbury"s Laws of

England, 4th Edition, Article 65, about the form of admission. In support of his contention, he had also relied on the decision in Brickell v. Hulse

from the English report. Volume CXII, King"s Bench Division XLI and referred to the observations made in the said judgment. He also referred to

the decision in London Syndicates v. Lord, 1878(8) Chancery Division 84. Mr. Mukherjee relied on Me Cormick - on Evidence, 5th Edition at

page 165; and upon Evidence in Trials At Common Law by John Henry Wigmore Volume 4 revised by James H. Chadbourn revision 1972 at

page 138 Article 1073. Mr. Mukherjee also supported his contention by referring to Order 32 Rule 6 of the English Code.

3.2. On the other hand, Mr. Roy Chowdhury had relied upon the decisions in Chikkam Koteswara Rao v. Chikkaram Subbarao and Ors. AIR

1972 SC 1542; M. Gulamali Abdul Hossain & Co. v. Binani Properties Private Limited and Ors., 13 CWN 591 and Balraj Taneja and Anr. v.

Sunil Madan and Anr. 1991(8) SCC 390 : 1999 SAR 885. Relying on these decisions, he contended that the admission must be clear,

unambiguous and unequivocal. It must either be made in the pleading or otherwise. But it would not include a statement made by anyone in course

of a matter contended in another proceedings between the same parties. He elaborated his submissions while placing those decisions, with which

we shall be dealing with hereafter.

3.3. Having considered the above contention of the respective Counsel, we would prefer to discuss the relevant authorities and citations referred to

by them respectively as would be relevant for our present purpose.

3.4. The reference to the passage from Phipson on Evidence (14th Edition page 671) does not help us in the present context, as would be

apparent from the passage which we better quote :

Documents which are, or have been, in the possession of a party will, as we have seen, generally be admissible against him as original

(circumstantial) evidence to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate, or his

state of mind with reference thereto. They will further be receivable against him as admissions (i.e. exceptions to the hearsay rule) to prove the truth

of their contents if he has in any way recognised, adopted or acted upon them. So, as we have seen documents which a party has caused to be

made or knowingly used as true in a judicial proceeding to prove a particular fact, are admissible against him in subsequent proceedings to prove

the same fact, even on behalf of strangers. Documents furnished by persons specifically referred to for information are evidence against the

referrer; though a mere general reference will not have this effect.

3.5. In this case, the present document has been used for a particular purpose, which was enumerated in the application on the strength whereof

the document was produced. That apart it was not a document but a part of the pleading in a suit being hotly contested between the parties

wherein the very allegation of cancellation of the agreement was the bone of contention and was ultimately decided between the parties by the

Court where the appellants herein had stood their ground denying cancellation. Therefore, the above passage would not be of any aid to us for

ascertaining the extent of the admission for the purpose of Order 12 Rule 6.

3.6. There is no doubt about the legal proposition relied upon by Mr. Mukherjee referring to Corpus Juris Secundum (page 711 Art. 282) viz. :

An admission may be contained in a writing made by a party or his authorized agent, or adopted by him by some unequivocal act."" In order to be

an admission of a party by adoption, the adoption must be made by the party against whom it is used as an admission by some unequivocal act.

Whether the adoption was made by an unequivocal act would be a question, which has to be considered on the basis of materials on record. Here,

in this case, the adoption of that document was confined to the extent and for the purpose as mentioned in the application pursuant to which the

document was produced in the ejectment suit; it cannot stretch beyond the scope of the extent and purpose indicated in the said application. This

document was purposefully exhibited by the appellant herein only to establish his claim with regard to Thika Tenancy. Admittedly, this document

being part of the pleading was subject matter of a litigation between the parties in another suit where the cancellation was being resisted tooth and

nail by the appellant herein and as such this adoption so far as it relates to the admission about the cancellation of the agreement cannot be said to

be an unequivocal act on the part of the appellant.

3.7. The reference to the 1996 Edition of Corpus Juris Secundum (Vol. 32 pages 146-147) by Mr. Mukherjee also does not clinch the issue for

him; inasmuch as a judicial admission in an affidavit used in a case is admissible against a party making or adopting the affidavit and may also be

admitted in another action to which he is a party, is a settled proposition of law. This proposition can be similarly explained in the same manner by

adopting the observation made by us in paragraphs 3.5 and 3.6 above.

3.8. In the passage from Evidence (2nd Edition by Christopher B. Muller & Lalrd C. Kirkpatrick) referred to by Mr. Mukherjee, it is commented

that:

Where, for example, a party obtains the affidavit of another and offers it in a proceeding in support of a request for a warrant, judgment, or Court

order, it is reasonable to view such conduct as adoption. Use at trial of an affidavit by a witness may waive any objection that the party offering it

might otherwise have to the substantive use of same affidavit by the other side, a result that may be explained in terms of opening the door, waiving

objection, or adopting the substance of the affidavit. Likewise use of written statements in an effort to qualify for some status, benefit, or privilege,

where the party is expected to take care in making his presentation, as in connection with applications for credit or loans, may reasonably be

viewed as adoption.

This can also be explained in the same manner as observed by us in paragraphs 3.5 and 3.6 above.

3.9. Mr. Mukherjee placed reliance on Phipson & Elliot Manual of the Law of Evidence (11th Edition, by University, the First India Reprint 2001,

page 258 viz. : ""Admission may be oral or in writing or by conduct, where a man signs or recognizes or adopts or acts upon any document, it may

be tendered against him as an admission and so as evidence of the truth of its contents."" Relying on the 10th Edition of the same book by Sweet &

Maxwell he drew our attention to the passage ""where a man signs or recognizes or adopts or acts upon any document, it may be tendered against

him as an admission and so as evidence of the truth of its contents (at page 165)."" This principle, if applied to in the present context, in that event,

the observation made in paragraphs 3.5 and 3.6 above would aptly explain the proposition. We need add no more.

3.10. The passage in Article 65 cited by Mr. Mukherjee from Halsbury''s Laws of England, 4th Edition (Vol. 70 page 51) commented that :

''Generally, any document which a party has signed or otherwise recognized, adopted, or acted upon may be tendered against him as an

admission, although mere failure to answer a letter or object to an account will not necessarily have this effect.

This may similarly be explained as in paragraphs 3.5 and 3.6 above having regard to the context of the present case so far as its application as was

sought to be attracted by Mr. Mukherjee in the present case.

3.11. Mr. Mukherjee relied upon the following observation made in Brickell v. Hulse, English Report, Volume CXII, King''s Bench Division XLI :

Lord Denman C.11. ""It is very important that this question should not be left subject to doubt. There can, I think, be no question but that a

statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him."" Patteson J. ""The statement in the

affidavit was used by this defendant for the purpose of staying proceedings. Supposing the party swearing it had been in fact an officer who merely

used the defendant''s name, the defendant is identified with him as far as this question is concerned. When a party, for any purpose, produces

document containing certain statements, such statements are, as against him, evidence of the facts which they contain.

Coleridge J. ""This is a very clear case when we attend to the facts. On one side, the defendant makes an application to a Judge, and arms himself

with a statement, which he mades his own, and uses. That is clearly evidence against him afterwards of the facts in the statement. The statement

may be of more or less avail; and it may be matter of remark that the person making the affidavit is present and is not called. But (458) that is not

the question here.

In Chancery, the depositions are sealed up from the time of their being taken until publication passes. This is like the case of a party calling a

witness, whose evidence he does not bear till it is given. The present is the case of a party using a statement which he has seen before he uses it,

and which is neither the more nor the less admissible for being made upon oath."" This is also similarly explained in the context of the present case

as in paragraphs 3.5 and 3.6 above.

3.12. Mr. Mukherjee placed reliance on the following passage from London Syndicates v. Lord, 1878(8) Chancery Division 84 viz. ""There is no,

as far as I know, any virtue in one mode of admission rather than in another.

It is a sufficient admission for the purpose of making an order for payment into Court.

It seems to me there is an ample admission for this purpose in the present case, and even if I had not arrived at the conclusion I have arrived at on

the first point. I should think the order was right on the second and, therefore, I should make the order as to the 5411."" This also would not be

applicable in the context of the present case in view of our observation made in paragraphs 3.5 and 3.6 above, which will explain the inapplicability

in the said passage in the present context.

3.13. Mc Cormick on Evidence (5th Edition, page 165), relied upon by Mr. Mukherjee commented that : ""Does the introduction of evidence by a

party constitute an adoption of the statements of witnesses so that they may be used against the party as an admission in a subsequent law suit?

The answer ought to depend upon whether the particular circumstances warrant the conclusion that adoption in fact occurred and not upon the

discredited notice that a party vouches for its own witnesses. When a party offers in evidence a deposition or an affidavit to prove the matters

stated therein the party knows or should know the contents of writing so offered and presumably desires that all of the contents be considered on

its behalf since only the portion desired could be offered. Accordingly, it is reasonable to conclude that the writing so introduced may be used

against the party as an adoptive admission in another suit."" The applicability of the above principle in the present context seems to have been

explained by us in paragraphs 3.5 and 3.6 above and we add no further.

3.14. The observation ""The party"s use of a document made by a third person will frequently amount to approval of its statements as correct and

thus it may be received against him as an admission by adoption"" made in Evidence in Trials At Common Law by John Henry Wagmore revised by

James H. Chadbourn Revision 1972 (Vol. 4 at page 138 Article 1073) is also explained by the observation made by us in paragraphs 3.5 and 3.6

above.

3.15. The phraseology of Order 32 Rule 6 of the English Code referred to by Mr. Mukherjee are identical with those of Order 12 Rule 6 of the

Code of Civil Procedure. However, we are of the view that there is no quarrel about the principles laid down in the commentaries or the works

cited by Mr. Mukherjee. The question is as to how this principle is to be applied in a particular facts and circumstances of a case. There are some

similarities in the principles followed by the Indian Courts and, therefore, though vehemently contended by Mr. Roy Chowdhury, Mr. Mukherjee''s

reference to the English decisions and the authorities and works cannot be brushed aside. On the other hand, it has to be considered and applied in

consonance with the Indian principles which generally follows the English principles unless it is statutorily contradictory.

The Indian Principle:

3.16. The English principles were adapted to suit the Indian context when the Anglo-Saxon Jurisprudence and the system of justice delivery system

were introduced in India by the British during the former''s subjugation. Though the Indian Courts had followed the English principles, but the

Indian Courts did not surrender its identity and had always moulded the principles in the Indian context and followed such principles as it used to

suit our purpose. Gradually the Indian Courts have developed its own principles and precedents. On occasions it has deviated from the English

principles. We no more can follow the English principles blindly. We are to adapt our own system, though we may not overlook the English

principles. We may draw inspiration from the English principles and follow the same as it may suit us in our own context. However, after we have

given ourselves the Constitution of India and the Apex Court has been established, we may persuade us to follow the English principles as far as

practicable but in consonance with the law laid down by the Apex Court. By reason of Article 141, the decision of the Apex Court is binding on all

Courts in India. In case there are decisions of the Apex Court, in that event, we may follow the English principles so far as those are not

inconsistent with the principles laid down by the Apex Court. Therefore, we are to examine the English principle in the Indian context having regard

to the ratio laid down by the Apex Court as well as the High Courts, though we may not ignore the persuasive value of the English principles being

conscious of the fact that those are not binding on the Courts in India.

3.17. In Chikkam Koteswara Rao AIR 1972 SC 1542 (supra) cited by Mr. Roy Chowdhury, it was held that before a right of a party can be

considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and

conclusive. There should be no doubt or ambiguity about the alleged admission. In Uttam Singh Dugal and Co. Ltd. Vs. Union Bank of India and

Others, , relied upon by the Apex Court in Chikkam Koteswara Rao (supra), it was held that Order 12 Rule 6 comes under the heading

''admissions'' and a judgment on admission could be given only after due opportunity to the other side to explain the admission, if any made; that

such admission should have been made only in the course of the pleadings or else the other side will not have an opportunity to explain such

submission; that even though the provision reads that the Court may at any stage of the suit make such order as it thinks fit, effect of admission, if

any, can be considered only at the time of trial; that the admission even in pleadings will have to be read along with Order 8 Rule 5(1) of CPC and

Court need not necessarily proceed to pass an order or a judgment on the basis of such admission but call upon the party relying upon such

admission to prove its case independently; that during pendency of other suits and the nature of contentions raised in the case, it would not be

permissible at all to grant the relief before trial; that the expression ''admissions'' made in the course of the pleadings or otherwise will have to be

read together and the expression ''otherwise'' will have to be interpreted ''ejusdem generis''.

3.18. In Rakesh Wadhawan and Others Vs. Jagdamba Industrial Corporation and Others, , relied upon by Mr. Roy Chowdhury, it was held that

admission is never a piece of evidence and can be explained; it does not conclusively bind a party unless it amounts to an estoppel. Value of an

admission has to be determined by keeping in view the circumstances in which it was made and to whom. A mere failure to object cannot be

placed on a footing higher than an admission. If the two clear cut admissions made by the tenants, referred to in the said case, were to be weighed

against the landlord''s mere failure to object about a wrong averment as to rate of rent in a case where it was not a point in issue, then no inference

other than the one of the rate of rent being Rs. 2,000/- per months could have been drawn.

3.19. In M. Gulamali Abdul Hossain & Co. 13 CWN 591 supra), it was held that it is well-settled that admission in pleadings are to be taken in

their entirety. Any document in order to be established or an admission is to be introduced into evidence by tendering that piece of admission, if it

is in the nature of document. Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions

contained in the Evidence Act. The reason for Section 31 of the Evidence Act is to give the party an opportunity of dealing with admissions to

show the circumstances under which they came into existence.

3.20. In Balraj Taneja 1991(8) SCC 390 (supra), it was held that this rule was substituted in place of the old rule by the CPC (Amendment) Act,

1976, with the objects and reasons viz.:

Under Rule 6, where a claim is admitted, the Court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on the admitted claim.

The object of the rule is to enable a 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. The rule is wide enough to cover oral admissions. The rule is being amended to clarify that oral admissions are

also covered by the rule.

21. Under this rule, the Court can, at any interlocutory stage of the proceedings, pass a judgment on the basis of admissions made by the

defendant. But before the Court can act upon the admission, it has to be shown that the admission is unequivocal, clear and positive. This rule

empowers the Court to pass judgment and decree in respect of admitted claims pending adjudication of the disputed claims in the suit.

Referring to Section 58 of the Evidence Act in the said decision, the Apex Court had held that ""The proviso to the section specifically gives a

discretion to the Court to require the facts admitted to be proved otherwise than by such admission. The proviso corresponds to the proviso to

Rule 5(1) Order 8 CPC.

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25. In view of the above, it is clear that the Court, at no stage, can act blindly or mechanically. While enabling the Court to pronounce judgment in

a situation where no written statement is filed by the defendant, the Court has also been given the discretion to pass such order as it may think fit as

an alternative. This is also the position under Order 8 Rule 10 CPC where the Court can either pronounce judgment against the defendant or pass

such order as it may think fit.

The principle vis-a-vis the present case :

4. Having regard to the discussion made above and the comparison of the English and Indian principles governing the field, it appears that both the

principles run parallel to each other with slight difference as has been laid down in the decisions of the Apex Court cited by Mr. Roy Chowdhury.

We may now propose to summarize those principles in the context of the present case and having regard to the facts and circumstances as

revealed before us.

4.1. It appears that an admission within the meaning of Order 12 Rule 6 can be accepted even if the author of the document may be someone else

if it is exhibited as an exhibit and in the process it is adopted even in different proceedings but on the principle of law as discussed above to be

applied in the facts and circumstances of each case. It is just not possible to lay down any strait-jacket formula. Each case is dependant on its own

merit. The admission must be clear and conclusive. Some liberty must be given to the person against whom such admission is being used. It is to be

ascertained in which context, purpose and to what extent such admission was made. The admission when used against a person to foreclose his

right to contest a suit must be clearly established since it operates as an estoppel against him, if proved. The adoption of the document is to be

examined in the context in which it was adopted and for what purpose and to what extent. An adoption could not amount to an admission unless

on facts it appears that it could be so construed in the context of the case. Then there is a distinction between an admission of the contents of a

document and the admission of the pleading of the other side.

4.2. In the present case, the admission was purported to be based on a statement made by the respondent in his objection to the injunction

application in the suit alleging cancellation of the agreement when on facts it is apparent that the defendant-respondent even after the alleged

cancellation of the agreement had applied for clearance u/s 230A of the Income Tax Act, 1961 for the purpose of sale of the said property under

the self-same agreement alleged to have been cancelled. This objection was contested and injunction matter was decided on contest wherein the

learned Judge had held that the question of cancellation of the agreement can be decided only on evidence at the time of trial and this finding was

not reversed in appeal before this Court or the Apex Court upto which the injunction matter had travelled. In the ejectment suit where this

objection to the injunction application, filed by the defendant-respondent in the suit for specific performance, was exhibited on the strength of an

application made by the appellant to the extent that he wanted to use the document to prove that his claim as Thika Tenant was admitted by the

defendant-respondent herein being the plaintiff in the suit for ejectment. In the said application, he had also pointed out that there was an agreement

for sale of the property in favour of the applicant by the respondent. At the same time, this was exhibited at a point of time when the evidence of

the parties in the ejectment suit was closed and that the appellant did not adduce any evidence.

The principle : Sections 17, 21 & 58 of the Evidence Act:

5. Section 17 of the Evidence Act defines admission as a statement, oral or documentary, which suggests any interference as to any fact in use or

relevant fact, and which is made by any of the persons under the circumstances mentioned in the Sections following. Therefore, the admission is to

be tested on the basis of the provisions contained in Section 17 onwards. Section 21 requires proof of admissions against persons making them.

This may be proved as against the person making the admission except the cases mentioned in Sub-sections (1), (2) and (3) thereof and the

illustrations specified therein. We may better quote the relevant portion thereof as hereafter :

Section 21. Proof of admissions against persons making them, and by or on their behalf.--Admissions are relevant and may be proved as against

the person who makes them, or his representative in interest, but this cannot be proved by or on behalf of the person who makes them or by his

representative in interest, except in the following cases :

(1) An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it

would be relevant as between third persons u/s 32.

(2) An admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or

body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its

falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.

Illustrations

(a) The question between A and B is whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged. A may prove a

statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that

the deed is genuine, nor can B prove a statement by himself that the deed is forged.

5.1. Having regard to the said provision, the present case cannot be said to have been proved when tested on the anvil of Section 21 of the

Evidence Act. That apart, Section 23 provides that no admission would be relevant if it is made on condition expressed or wherefrom the

circumstances the Court can infer that the parties had agreed together that evidence should not be given. An admission would be relevant when

there is an express condition that no evidence would be given or from the facts it appears to Court that the parties had agreed that no evidence

would be given. In the present case, the appellant had, in his application, tendering the said objection to the injunction, had pointed out that he

would not give any evidence. At the same time, the respondent also did not insist upon giving of any evidence. Thus, from the conduct of the

parties, it appears that both parties had agreed that no evidence would be given. At the same time, unilaterally the appellant had proposed not to

give any evidence by reason thereof, u/s 23 the admission would not be relevant in the present case.

5.2. Section 58 of the Evidence Act provides that ""no fact need be proved in any proceeding which the parties thereto or their agents agree to

admit at the hearing, or which, before the hearing, they agree to admit by in writing under their hands, or which by any rule of pleadings in force at

the time they are deemed to have admitted their pleadings :

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

said document is treated to be an admission by reason of its production or used by the appellant in the ejectment suit by adoption, it is the

discretion of the Court to require the respondent herein to prove the admission. This provision was incorporated in order to suit a particular

situation where there are grounds to believe that the admission relied upon by one party and denied by the other, leaves a scope of any doubtful

situation or which appears to the Court that the admission is not conclusive. In such a case, the Court has to exercise its discretion to require proof

of such admission.

5.3. On a plain reading of the application, which is at page 291, it appears that this document was exhibited only for a limited purpose. There is

nothing to indicate that the appellant had admitted the whole of the contents. That apart, this exhibit was not a document in itself. There is a

distinction between a document or writing and a pleading. Pleading is the statement of facts of the respective parties before the Court. It cannot be

treated to be a document. Even if it was exhibited, it would not lose its character as pleading, when it is part of the pleading in the same suit where

it is alleged as admission and by reason of its being marked as exhibit, it would not be converted into a document, it would remain a pleading. The

pleading has to be understood in the context in which it has been used and it only makes out the case of the party pleading. Until orally or in writing

or otherwise these pleadings are admitted, it could not be said that the pleadings are admitted. Admittedly, the pleadings made in this objection

were not admitted by the appellants with regard to the cancellation of the agreement though execution of the agreement was admitted by both the

parties. Therefore, the part of the statement relating to the cancellation of the agreement in the said objection having not been admitted by the

appellant, this objection so filed cannot become an admission when it is produced in the ejectment suit and could not be treated differently,

particularly, when the question is at issue between the parties in the suit itself where this objection was used. A pleading contested in the

proceedings, though used in another proceeding for certain purpose in particular context cannot be treated to be an admission in the same

proceedings where it is being contested. A person cannot be said to have admitted the case of the other side when he is contesting the same in a

particular suit, when this pleading was filed in another suit simply because he wanted to rely upon the same for a limited purpose, for proving or

alleging or supporting the pleadings of Thika Tenancy or otherwise or for claiming benefit of Section 53 of the Transfer of Property Act, cannot be

said to be an admission to demolish the whole case of the appellant, particularly when the suit for specific performance was being contested, and it

was held on contest that the allegation of cancellation of agreement by the defendant requires to be proved on facts at the time of trial.

Conclusion:

6. As rightly pointed out by Mr. Roy Chowdhury relying on Chikkam Koteswara Rao (supra); Uttam Singh Dugal & Co. Ltd. (supra); Rakesh

Wadhwanand Ors. (supra); M. Gulamali Abdul Hossain & Co. (supra) and Balraj Taneja (supra), admission must be clear and conclusive and is

to be understood in the context, purpose and extent in which it is made; and that the person against whom the admission is sought to be used is

given an opportunity to explain in what context, purpose and extent the admission was made. The English principles are subject to the Indian

Statute and the Indian Law on Evidence as contained in the Indian Evidence Act. The provisions of Order 12 Rule 6 is to be read having regard to

the facts and circumstances of the case and in the context in which the alleged admission is being construed.

6.1. In order to be an admission for the purpose of passing a judgment under Order 12 Rule 6, the admission must be clear and conclusive and

must be so as to estop the person against whom the admission is sought to be used to contend otherwise. It must be so that it is just improbable to

contend otherwise and that the attending circumstances surrounding the admission and the scope of the contest in the suit having regard to the

conduct of the person who is seeking to rely on such admission appearing from the materials on record in the suit in which Order 12 Rule 6 is

invoked are relevant factors, which are to be weighed with.

6.2. Having regard to the facts and circumstances of the present case, it appears that on record it is evident that even after the alleged cancellation

of the agreement the defendant-respondent had applied for clearance u/s 230A of the Income Tax Act which is also a fact contrary to the

allegation made in the affidavit-in-opposition staring on the face of the defendant-respondent seeking to use the alleged admission against the

plaintiff in a situation when after consideration of the said affidavit-in-opposition and the relevant materials placed before the Court, it was decided

that this question can only be adjudicated on evidence at the time of trial as to whether the agreement was cancelled or not and this finding of the

learned Trial Court received the seal of the High Court and the Supreme Court further; and that this alleged admission was sought to be utilized at

a point of time when the suit was ready for hearing.

6.3. Thus, it appears, from the discussion made above, that the alleged admission was not clear and conclusive so as to attract the provisions of

Order 12 Rule 6 in the peculiar facts and circumstances of the case on the principle enunciated by the different authorities, works, statutes and the

precedents relied upon by the respective parties and discussed hereinabove.

6.4. Order 12 Rule 6 empowers the Court at any stage of the suit either on the application of any period or of its own motion 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 the

admission referred to in Rule 6. Thus, Rule 6 gives a discretion to the Court whether in the facts and circumstances of the case it would be

expedient to give a judgment on admission. That discretion is a playing joins to suit a particular situation in a particular fact and circumstance of the

case. It could do so without waiting for the determination of any other question between the parties. But, in this case, the Court had already held in

an interlocutory proceeding between the parties that this question should not be determined without trial on evidence and the order having received

the seal of the High Court and the Supreme Court staring on the face of the parties and is binding between them. The principles of res judicata

operates between the parties even at different stages of the same suit and as such the order that was passed for determination of the question on

evidence could not be overcome by the defendant-respondent; nor it could be overlooked by the Court.

6.5. Having regard to the facts and circumstances of the case, as discussed above, we do not think that this was a case of admission on the

strength of which a decree under Order 12 Rule 6 could have been passed holding that the appellant had admitted the cancellation of the

agreement simply by reason of exhibiting the affidavit-in-opposition in which the respondent-defendant had alleged cancellation of the agreement.

Order:

7. In the result, the appeal succeeds and is allowed. The decree appealed against is hereby set aside. The suit shall be decided on merit from the

stage at which the Court had proceeded to pass the decree on admission. Let the hearing of the suit be expedited. It is expected that the learned

Court below shall dispose of the suit within a period of three months from the date of communication of this order, if necessary by taking up day-

to-day hearing without granting any adjournments. None of the parties shall take any adjournment and shall cooperate in the process of early

disposal of the suit.

7.1. The application being CAN 9873 of 2003 stands dismissed as not pressed.

7.2. The records be sent down to the learned Trial Court by special messenger within a month, the cost whereof is to be put in by the appellant

within a week.

8. There will, however, be no order as to costs.

9. Let the decree be drawn up within a fortnight.

10. Urgent xerox certified copy be given to the parties at the earliest, preferably within seven days from the date of such application. Xerox plain

copy of the operative part of this order be given to the parties forthwith.

R.N. Sinha, J.

I agree.