Karam Kapahi

v.

M/S Lal Chand Public Charitabl Trus.&Anr

(Supreme Court Of India)

HON'BLE MR. JUSTICE G.S. SINGHVI HON'BLE MR. JUSTICE ASOK KUMAR GANGULY

Karam Kapahi v. M/S Lal Chand Public Charitabl Trus.&Anr

Civil Appeal No. 3048 Of 2010 With Civil Appeal No. 3049 Of 2010 | 07-04-2010

Ganguly, J.

1. Leave granted in both the petitions, being SLP(C) No. 9080/2009 filed by Karam Kapahi and three others and SLP(C) No. 9091 of 2009 filed by M/s South Delhi Club Ltd.

2. Both the appeals impugn the judgment and order dated 9.1.2009 passed by a Division Bench of Delhi High Court in RFA (OS) No. 34/2002.

3. In the appeal filed by Karam Kapahi, Sujit Madaan, Anup Malik and Neeraj Girotra, it is asserted that as members of the M/s South Delhi Club Ltd. (hereinafter referred to as the 'Club') they are directly affected by the judgment and decree passed in Suit (Suit No. 518 of 1999) filed by the respondent Trust. Challenging the judgment and decree in the suit, Appeal RFA (OS) No. 34 of 2002 was filed by the Club. Their main contention in the SLP is that they were not parties to the Suit but they may be affected by the orders passed therein. On such representation a Bench of this Court by an order dated 9.4.2009 permitted them to file a special leave petition and also issued notice and stayed further proceedings for the execution of the judgment and decree of the High Court.

4. About a fortnight thereafter, the Club filed another Special leave petition (C) No. 9091/2009 challenging the same judgment of the Appellate Bench of the High Court and a Bench of this Court on 24.4.2009 in view of the previous notice already against the same judgment issued notice in that special leave petition filed by the Club and directed it to be tagged with the earlier special leave petition (C) No. 9080/2009 filed by the members. Both the matters were heard together in view of common questions of fact and law in these matters.

5. The material facts are as under.

6. Respondent No. 1 – M/s Lal Chand Public Charitable Trust and Anr., a registered charitable trust (hereinafter, 'the Trust') was the lessor and the Club was the lessee. On or about 16.12.1998 the Trust and some of its members filed a Suit, being Suit No. 518/1999, before the Delhi High Court against the Club in view of termination of club's lease for non-payment of lease rent by the Club. The suit was for possession in respect of its land and building situated at Central Park, Greater Kailash-I, New Delhi and also for recovery of an amount of Rs. 11,60,000/- as damages and mesne profit and also for future damages.

7. In the said plaint the stand of the plaintiff-trust was that by a sub-lease dated 4.11.1965 property in question (fully described in the plan attached to the plaint) was leased to the Club for 25 years. Thereafter, Supplementary deed of Sub-lease dated 25.7.1979 was also executed between the parties and the same was duly registered. As the supplementary lease dated 25.7.1979 expired on 3.11.1990, the Club requested the Trust for a further renewal and further renewal was given for a period of 35 years from 4.11.1990 on the terms and conditions as stipulated in the Agreement and the said lease was also duly registered.

8. In terms of the sub-lease, the Club undertook to pay quarterly to the Trust on account of monthly lease rent by the 10th of the beginning of each quarter month, and a sum equivalent to 14% of the monthly subscription paid or payable by the members of the Club. It is also averred in the plaint that it is agreed between the parties that in case of default in payment of lease rent for two consecutive quarters, the Trust will be entitled to terminate the said sub-lease.

9. The case of the respondent-Trust is that the Club defaulted in payment of rent and before the filing of the Suit the Trust issued several letters dated 25.12.1996, 14.1.1997 and 18.6.1997 calling upon the Club to pay the rent but as the Club failed to pay the amount, the respondent-Trust served a legal notice dated 25.7.1997, again calling upon the Club to pay the entire lease rent failing which, it was made clear, that the Trust will take legal action. The exact averment in the plaint is as follows:

"...thus compelling the plaintiff to serve a legal notice dated 25.7.1997 and by the said notice, the defendant was called upon to pay the entire lease money failing which the defendant was informed that the plaintiff shall be left with no option but to terminate the sub-lease and take further legal action in the matter. The said notice was duly received by the defendant and despite receipt of the notice; the defendant did not pay the amount."

10. In the Written Statement filed by the Club, paragraph (9) of the plaint was dealt with in paragraph (9) of the Written Statement but the aforesaid fact was not denied.

11. Prior to suit another legal notice dated 28.10.1997 was issued by the Advocate on behalf of the Trust to the Club wherein it was expressly stated that the Club has deliberately committed default in making payment for the quarters ending September 1996, December, 1996, March 1997, June 1997, September 1997, December 1997, March 1998, June, 1998 despite service of previous notices.

12. It appears that the Club did not respond to the said notice. This has been stated in paragraph 10 of the plaint and it has been further averred that the said notice dated 28.10.1997 sent by the Advocate on behalf of the trust was received by the Club but the Club did not give any reply. This fact was not denied in paragraph (10) of the Written Statement filed by the Club.

13. Thereafter a legal notice dated 2.12.1997 was sent on behalf of the Trust terminating the tenancy of the Club in view of non-payment of lease rent and the arrears and calling upon the Club to hand over the peaceful vacant possession. The said notice has been disclosed by the Club in its special leave petition before this Court.

14. After the Trust terminated the tenancy of the Club by its notice dated 2.12.1997, a reply was sent by the Club on 6.12.1997 with a plea that the Trust is not the lessor of the suit premises and has no right to let out the same to the Club and thus inter alia the title of the Trust over the suit premises was challenged. In the said reply, the Club pointed out to a suit filed by it, namely, Suit No. 1605 of 1997 (South Delhi Club Limited v. DLF Housing and Construction and others). However, prior thereto the Trust gave its notice dated 25.7.1997 demanding rent.

15. The main contention in Club's suit, inter alia, is that the Trust has divested itself from its ownership over the suit property and has ceased to be its owner and as such is not entitled to any beneficiary interest. In the suit a declaration was sought to the effect that the Trust has no right, title and interest in the suit premises and also for cancellation and revocation of the sub-lease dated 23.09.1992 and with a further prayer to restrain the Trust from claiming and demanding any lease rent from the Club.

16. To that suit, being 1605 of 1997, the Trust filed a written statement on 17.08.1998 and also filed an application for rejection of plaint (I.A. No. 7294 of 1998). The Club was to file its replication to the written statement filed by the Trust. The matter was repeatedly adjourned on 18.3.1995, 15.9.1999 and 19.1.2000 but the Club did not file its replication nor did it take steps to effect service on defendant no. 5. Under those circumstances, the Court declined the prayer of the Club for further adjournment to file their replication and directed the matter to be listed on 21.2.2002. It appears that the Club was not taking any step and the matter was adjourned from time to time. On 10.12.2001, the matter again appeared and it was recorded that there was no appearance on behalf of the plaintiff i.e. the Club and the matter was directed to be listed on 8.4.2002. Nobody appeared for the Club on 8.4.2002, and the Court was pleased to pass the following order:–

"There is no appearance on behalf of the plaintiff. On the last date also, nobody had turned up on his behalf.

In the circumstances, the application as well as suit are dismissed for default."

17. Then on 8.5.2002 the Club filed its application for restoration of the suit and the restoration application was listed for disposal on 1.10.2002. Then again by an order dated 11.12.2002 the restoration application was ordered to be listed on 6.2.2003.

18. In the course of hearing of the matter before this Court nothing was produced to show that the said suit has been restored. It appears that the said application for restoration was kept pending and the last order for its listing was passed on 16.5.2006.

19. Now coming beck to the suit filed by the Trust, it appears that in that suit (No. 518 of 1999) the Club filed its written statement on 14.2.2000.

20. On a perusal of the written statement of the Club, the following position will emerge:

(a) The club has admitted that there was an execution of sub-lease dated 4.11.1965 between the parties though the title of the trust over the suit property was disputed. It was also admitted in paragraph 8 that the Club withheld the payment or rent and was ready to deposit the same before the Registrar of the High Court. In paragraph 15 of the written statement the arrears of rent were worked out. In paragraph 10 of the written statement non-payment has been admitted but the Club gave its reasons for such non-payment. In paragraph 11, 12 and 13 the notice of termination of the lease was acknowledged.

(b) In the said suit the Club filed an I.A. being 1724 of 2000 inter alia praying that the Trust be restrained from receiving the lease money.

(c) The said I.A. came up for hearing on 24.07.2000 and a learned Judge of the Delhi High Court inter alia held since the Club admitted that it was inducted as a tenant in the suit premises under the lease deed, it cannot withhold the payment of rent/damages inter alia on the ground that the suit premises belong to MCD who had never demanded any rent. The I.A. was thus dismissed and the Club was directed to pay the arrears of rent from July 1996 till the date of the said order within a month from the date of the order. The operative portion of High Court's order dated 24.7.2000 is set out below:-

". . .It is pertinent to note that under Section 116 of the Indian Evidence Act, a tenant is estopped from denying the title of the lessor to the tenanted premises during the continuance of lease.

The Defendant having admitted that it was inducted as a tenant in the Suit premises by the Plaintiff under aforesaid two registered lease deeds, can not now withhold the payment of rent/damages on the ground of premises allegedly belonging to MCD who has not demanded any rent. I.A. 1724/2000

is, therefore, liable to be dismissed and in I.A. 2281/99 an Order under Rule 10 of Order 39 CPC deserves to be passed against the Defendant directing it to pay the arrears of rent/damages since July 1996 and future rent/damages at the last paid rate which the Defendant's counsel had also undertaken to pay as is manifest from the Order dated 15th December, 1999.

Accordingly, I.A. 1724/2000 is dismissed. In I.A. 2281/99 the Defendant is directed to pay arrears of rent/damages since July 1996 till date at the last paid rate within one month from today and it will also continue to make payment thereof for the subsequent period, month by month at the same rate to the Plaintiff Trust."

21. Prior to that order dated 24.7.2000 in the suit filed by the Trust (Suit No. 518 of 1999) an order was passed on 15.12.1999 wherein it was recorded by the High Court that the counsel for the Club undertook to pay rent and clear all damages on or before the next date of hearing. The exact order passed by the High Court is set out below:-

"Ld. Counsel for defendant submit that defendants would make the payment of the rent/damages at the "last paid rate" and clear all arrears on or before the next date of hearing. It is made clear that payments made towards rent/damages would be without prejudice to the rights and contentions raised by the defendants assailing the right of the plaintiff to receive payment of rent/damages."

22. Challenging the Single Bench order dated 24.7.2000, the Club filed an appeal being FAO (OS) No. 272 of 2000 before the Division Bench and one of the contentions of the Club was that the learned Single Judge was in error in holding that under Section 116 of the Indian Evidence Act, a tenant is estopped from denying the title of the lessor to the tenanted premises during the continuance of the lease. However, the said appeal with all those contentions of the Club was dismissed in-limine by a Division Bench of the Delhi High Court by an order dated 19.9.2000 which reads as under:

"A copy of the order dated 15th December, 1999 passed in this very suit has been brought to our notice In view of the said order, in our view it is not even open to the appellant to raise this issue of payment of rent/damages to the respondents again. The said order has been passed protecting the rights and contentions of the respective parties. In view of the said order, this appeal is dismissed in limine."

23. It appears that the said order of the High Court dated 19.9.2000 was never challenged by the Club and it became final. However the direction which was given by the learned Single Judge in its order dated 24.7.2000 referred to hereinabove was not complied with by the Club.

24. Then on 8.5.2001, the Club filed an application under Section 115 of the Transfer of Property Act in the suit filed by the Trust (Suit No. 518 of 1999).

25. In the said application the stand of the Club is that the controversy between the parties, namely, the Trust and the Club has been resolved and the Club has no objection to pay the rent reserved under the said sub-lease dated 23.9.1992. In paragraphs (7) and (8), the Club made this categorical statement:

"7. That with the disclosure of the said documents the controversy between the parties stands resolved and the Defendant can have no objection to paying the rent reserved under the said sub-lease Deed dated 23.9.1992.

8. That the Defendant has paid a portion of the arrears of rent and undertakes to pay al future rent in accordance with the terms of the said sub-lease Deed dated 23.9.1992."

26. In that application a prayer was made for relieving the Club against forfeiture resulting from the non-payment of rent and to declare that the Club holds the suit property as if the forfeiture has not occurred on the Club's undertaking to honour all its obligations under the sub-lease dated 23.9.1992.

27. Sometime in May 2000, the Trust, in its Suit, filed an application under Order 12 Rule 6 of the Code of Civil Procedure for passing a judgment on admission. In the said application in paragraph 4, the Trust asserted that on a perusal of the written statement filed by the Club following things are admitted; (i) relationship of Lessor and Lessee (ii) Rent being above Rs. 3500/- p.m. and (iii) a notice of termination of lease of the Club has been duly served on the Club and (iv) non-payment of rent by the Club.

28. To that application a reply was filed by the Club. While replying the averments made in paragraph 4 of that application, the Club only referred to the suit filed by the Club stating that the lease in question is fraudulent and is under challenge, but specific averments made in paragraph 4 of Trust's application were not denied. In answer to the averment made in paragraph 6 of the Trust's application about the monthly rent of the suit premises, no specific denial was given by the Club except urging that the lease deed is void ab-initio.

29. The suit filed by the Trust then came up for hearing and by a judgment and order dated 22.10.2002 the learned Trial Judge refused to grant relief under Section 114 of the Transfer of Property Act. The Court also held that since there is clear admission by the club about non-payment of rent the plaintiff is entitled to a decree for possession in respect of the entire suit property.

30. Then an appeal was filed by the Club impugning the said judgment which was dismissed by a Division Bench of the Delhi High Court by judgment and order dated 9.1.2009.

31. The Division Bench also held that the conduct of the Club disentitles it from the equitable relief under Section 114.

32. The Division Bench after dismissing the appeal directed the Club to hand over vacant possession in respect of the suit property to the Trust by 31.3.2009.

33. It is interesting to note that even though in its petition under Section 114 of the Transfer of Property Act, the Club took a stand that it has no objection of paying the rent reserved under the sub-lease dated 23.9.1992, in the appeal which was filed by the Club being RFA (OS) No. 34 of 2002 against the order of Single Judge dated 22.10.2002, the Club took a totally contrary stand that the Trust has no right or title over the suit premises and it cannot demand the rent.

34. It appears that in the course of the appeal, the Club took various contrary stands and adopted various dilatory tactics. From the order passed by the Division Bench of the High Court, it appears that it has been noted that the appellant took various adjournments before concluding its arguments and sought adjournments on 21.7.2003, 11.12.2003. 12.4.2004, 13.10.2004, 23.11.2004, 11.1.2005, 7.2.2005, 2.8.2005, 16.9.2005 and as a result of which the appeal was dismissed for non-prosecution on 18.10.2005 by the Division Bench.

35. Thereafter, the Club again filed an application for restoration of the appeal and the appeal was restored by the Division Bench on 16.1.2006 wherein the Court commented upon the dilatory tactics resorted to by the Club and restored the appeal by imposing a cost of Rs. 10,000/- on the Club.

36. As the Division Bench refused to grant any stay of the order dated 30.11.2005 in respect of the execution proceeding, the Club filed a special leave petition being SLP (C) No. 25261 before this Court. The said Special Leave Petition was disposed of by this Court by an order dated 6.7.2006. While disposing of the said petition, this Court was pleased to observe that the appeal filed by the Club should be disposed of within a reasonable time and all dilatory tactics adopted by the tenant-Club should be defeated. After observing that this Court ordered that the High Court should dispose of the appeal with utmost expedition preferably within six months and made it clear that in case the tenant-Club adopts dilatory tactics in the disposal of the appeal within the time schedule, the High Court shall record an order to that effect that the interim order passed by this Court shall stand vacated and the decree may be executed, if necessary, by deputation of armed forces.

37. Even though this Court by its order dated 6.7.2006 directed the disposal of the appeal within six months, it was disposed of, as stated above, only in the month of January, 2009.

38. Even after the disposal of the appeal, several steps were taken delaying the execution of the decree. Some Members of the Club filed a petition praying for extension of time for handing over possession beyond 31st March, 2009 as that was the deadline to hand over possession by the Club to the trust. The Members prayed for extension of time of eight weeks from 31.3.2009. The application by the members was dismissed by the Division Bench of the High Court by an order dated 24.3.2009.

39. Thereafter, another set of Members filed a suit being CS(OS) No. 509/2009 before the Delhi High Court with a prayer to set aside the judgment of the learned Single Judge dated 22.10.2002 which was affirmed by the Division Bench by its judgment dated 9.1.2009.

40. I.A. No. 3583/2009 was also filed in the said suit for staying the operation of the order dated 22.10.2002 passed by the Single Judge. The said application was also dismissed by a detailed order of the Delhi High Court on 30.3.2009. While doing so the Court observed that the Club and its members were fully aware about the pendency of the suit, the passing of the judgment and decree as well as of the appeal filed against the judgment otherwise resolution could not have been passed on 23.10.2002 in favour of Mr. Bhandari to file the appeal against the judgment and decree of the High Court.

41. The said judgment dated 30.3.2009 passed in the I.A. was not challenged.

42. In the earlier part of this judgment, this Court noted that the first special leave petition against the Division Bench Judgment was filed by some members of the Club, inter alia, on the ground that they are affected by the judgment and decree of the High Court to which they were not made parties and on such representation, this Court issued notice and stayed the operation of the High Court's judgment dated 9.1.2009. About a fortnight thereafter the Club filed its special leave petition and took advantage of the previous order of stay which was passed by this Court and got its special leave petition tagged with the petition filed by the Club members. Now this Court is hearing both the petitions together.

43. In the background of these facts, Mr. Ravi Shankar Prasad, learned Senior Counsel for the appellant-Club highlighted the following points in support of his submission that the appeal should be allowed:

(a) The High Court erred by applying the principles of Order 12 Rule 6 of Civil Procedure Code in the facts and circumstances of this case as there was no clear admission by the Club of case of the Trust in its plaint.

(b) The principles of Section 114 of the Transfer of Property Act are independent of the provision of Order 12 Rule 6. Section 114 of the Transfer of Property Act is an equitable remedy for a lessee in a given case and the stand taken in a proceeding under Section 114 cannot be taken into consideration to reach a finding under Order 12 Rule 6 of the Code.

(c) Assuming there is failure to deny case in the plaint that does not necessarily amount to proof and the Court before granting decree ought to have considered the proviso to Order 8 Rule 5 of the Code.

(d) The overall conduct of a litigant in pursuing the case at various stages cannot be considered for the purpose of disentitling it from getting an equitable relief in a proceeding under Section 114 of the Transfer of property Act.

(e) In the facts of this case, bar of estoppel under Section 116 of the Evidence Act does not operate on the Club from questioning the title of the Trust.

44. On the other hand, Mr. Soli J. Sorabjee, learned Senior Counsel appearing on behalf of the Trust advanced the following submissions:—

(a) The object of Order 12 Rule 6 is to enable a party to obtain speedy judgment and the application of the Rule cannot be narrowed down. According to the learned counsel, certain relevant and vital facts in the plaint of the Trust have been admitted by the Club.

(b) The learned Counsel further submitted that in the instant case, the Club cannot question the title of the landlord i.e. the Trust, and the suit (Suit No. 1605 of 1997) which it filed questioning the title of the Trust was dismissed and there is nothing on record to show that it has been restored.

(c) The contentions which the Club raised in its petition for relief under Section 114 of the Transfer of Property Act were not taken without prejudice to its stand in the written statement. Club's admissions in the written statement and in its petition under Section 114 of the Transfer of Property Act are clear and the Court can take both into consideration.

(d) The stand of the Club in its suit and in its application filed in the Trust's suit for restraining the Trust from receiving the rent is inconsistent with the Club's stand in its application under Section 114 of the Transfer of Property Act. The Club thus approbates and reprobates which it legally cannot do.

(e) The Club did not accept the order dated 24.7.2000 passed by the learned Single Judge directing it to pay arrears from July 1996 but it was challenged by the Club by way of appeal, which was

dismissed. Assuming subsequent payments were made pursuant to the said order dated 24.7.2000 that does not efface the consequences of non-payment in the past.

(f) Reliance on the first proviso to Order 8 Rule 5 of the Code is misconceived and in the instant case both the learned Single Judge and the Division Bench on appreciation of the pleading held that there were clear admissions.

(g) In the facts and circumstances of the case and on its overall conduct, the Club is not entitled to obtain the discretionary relief from this Court under Article 136 of the Constitution of India.

45. Considering the aforesaid rival contentions of the parties, this Court is unable to accept the stand of the appellant and is inclined to dismiss both the appeals for the reasons discussed hereinbelow.

46. The principles behind Order 12 Rule 6 are to give the plaintiff a right to speedy judgment. Under this Rule either party may get rid of so much of the rival claims about 'which there is no controversy' [See the dictum of Lord Jessel, the Master of Rolls, in Thorp versus Holdsworth in (1876) 3 Chancery Division 637 at 640]. In this connection, it may be noted that order 12 Rule 6 was amendment by the Amendment Act of 1976.

47. Prior to amendment the Rule read thus:–

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

48. In the 54th Law Commission Report, an amendment was suggested to enable the Court to give a judgment not only on the application of a party but on its own motion. It is thus clear that the amendment was brought about to further the ends of justice and give these provisions a wider sweep by empowering judges to use it 'ex debito justitial, a Latin term, meaning a debt of justice. In our opinion the thrust of the amendment is that in an appropriate case, a party, on the admission of the other party, can press for judgment, as a matter of legal right. However, the Court always retains its discretion in the matter of pronouncing judgment.

49. If the provision of order 12 Rule 1 is compared with Order 12 Rule 6, it becomes clear that the provision of Order 12 Rule 6 is wider in as much as the provision of order 12 Rule 1 is limited to

admission by 'pleading or otherwise in writing' but in Order 12 Rule 6 the expression 'or otherwise' is much wider in view of the words used therein namely: 'admission of fact.....either in the pleading or otherwise, whether orally or in writing'.

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

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

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

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

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

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

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

54. In Uttam Singh (supra) this Court made a distinction between a suit just between the parties and a suit relating to Specific Relief Act where a declaration of status is given which not only binds the parties but also binds generations. The Court held such a declaration may be given merely on admission (para 16, page 128 of the report).

55. But in a situation like the present one where the controversy is between the parties on an admission of non-payment of rent, judgment can be rendered on admission by Court.

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

" . . . I will only add a few words of my own. Rule 6 of Order 12 of the Code of civil Procedure corresponds to Rule 5 of Order 32 of the Supreme Court Rules (English), now rule 3 of Order 27, and is almost identically worded (see Annual Practice 1965 edition Part I. p. 569). The Supreme Court Rule came up for consideration in Ellis v. Allen (1914) Ch 904. In that case a suit was filed for ejectment, mesne profits and damages on the ground of breach of covenant against sub-letting. Lessee's solicitors wrote to the plaintiff's solicitors in which fact of breach of covenant was admitted and a case was sought to be made out for relief against forfeiture. This letter was used as an admission under rule 5 and as there was no substance in the plea relief against forfeiture, the suit was decreed for ejectment under that rule. Sargant, J. rejected the argument that the rule is confirmed to admissions made in pleadings or under rules 1 to 4 in the same order (same as ours) and said:

"The rule applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed."

Rule 6 of Order 12, in my opinion, must bear of the same construction as was put upon the corresponding English rule by Sargent, J. The words "either on the pleadings or otherwise" in rule 6 enable us not only to see the admissions made in pleadings or under Rules 1 to 4 of the same order but also admissions made elsewhere during the trial."

(Emphasis added)

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

58. Therefore, in the instant case even though statement made by the Club in its petition under Section 114 of the Transfer of Property Act does not come within the definition of the word 'pleading' under Order 6 Rule 1 of the Code, but in Order 12 Rule 6 of the Code, the word 'pleading' has been suffixed by the expression 'or otherwise'. Therefore, a wider interpretation of the word 'pleading' is warranted in understanding the implication of this rule. Thus the stand of the Club in its petition under Section 114 of the Transfer of Property Act can be considered by the Court in pronouncing judgment on admission under Order 12 Rule 6 in view of clear words 'pleading or otherwise' used therein especially when that petition was in the suit filed by the Trust.

59. However, the provision under Order 12 Rule 6 of the Code is enabling, discretionary and permissive and is neither mandatory nor it is peremptory since the word "may" has been used.

60. But in the given situation, as in the instant case, the said provision can be applied in rendering the judgment.

61. The contentions of the Club cannot be accepted on another legal ground also. It is clear that the Club has taken inconsistent pleas. On the one hand the Club alleged that the Trust is not its Lessor and has no right to receive the lease rent and it questions the title of the Trust. On the other hand the Club is seeking the equitable remedy against forfeiture under Section 114 of the Transfer of Property Act where it has proceeded on the basis that the Trust is its Lessor and the Club is the Lessee and as a Lessee it has to pay the lease rent to the Trust. Therefore, the Club seeks to approbate and reprobate.

62. The phrase 'approbate and reprobate' is borrowed from Scots Law where it is used to express the Common law principles of Election, namely, that no party can accept and reject the same instrument.

63. In the instant case while filing it Suit and questioning the title of the Trust, the Club seeks to reject the lease deed. At the same time while seeking the equitable remedy under Section 114 of the Transfer of Property Act, the Club is relying on the same instrument of lease. Legally this is not permissible. [See the observation of Scrutton, L.J., in Verschures Creameries Ltd. Vs. Hull and Netherlands Steamship Co. Ltd., – 1921-2 KB 608, which has been approved by a Constitution Bench of this Court in Bhau Ram Vs. Baij Nath Singh and Ors. – AIR 1961 SC 1327]

64. The principle of Election has been very felicitously expressed in the treatise 'Equity – A course of lectures' by F.W. Maitland, Cambridge University, 1947. The learned author has explained the principle thus:

"The doctrine of Election may be thus stated: That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it....."

65. In the old equity case of Streatfield Vs. Streatfield (White and Tudor's Leading Cases in Equity, 9th Edition, Volume I, 1928) this principle has been discussed in words which are so apt and elegant that I better quote them:

"Election is the obligation imposed upon a party by Court of equity to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person

from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both Story (3rd ed.), p. 452; Dillon v. Parker, 1 Swans. 394, note (b); Thellusson v. Woodford, 13 V. 220. The principle is stated thus in Jarman on Wills (6th ed.), 532; and see Farwell on Powers (3rd ed.), p. 429.: "That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it" See Walpole v. Conway, Barn. C. 159; Kirkham v. Smith, 1 Ves. Sen. 258; Macnamara v. Jones, 1 Bro. Ch. 481; Blake v. Bunbury, 4 Bro. Ch. 21; Wintour v. Clifton, 21 B. 447; 8 De G.M. & G. 641; Codrington v. C., L.R. 7 H.L. 854; 861; Pitman v. Crum Ewing, [1911] A.C., at pp. 228, 233; Brown v. Gregson, [1920] A.C. 860, 868. The principle of the doctrine of election is now well settled."

66. This principle has also been explained by this Court in Nagubai Ammal and Ors. Vs. B. Shama Rao and Ors. – AIR 1956 SC 593. Speaking for a three-Judge Bench of this Court, Justice Venkatarama Ayyar stated in para 23 at page 602 of the report:

"The doctrine of election is not however confined to instruments. A person cannot say at time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election."

67. On the doctrine of election the learned Judge has also referred to Halsbury's Laws of England, (Volume XIII page 454 para 512} in which this principle of 'approbate and reprobate' has been described as a species of estoppel which seems to be 'intermediate between estoppel by record and estoppel in pais' (Page 602 of the report).

68. The said principle has also been accepted by this Court in C. Beepathuma and Ors. Vs. Velasari Shankaranarayana Kadambolithaya and Ors. – AIR 1965 SC 241, paragraphs 17-18.

69. Therefore, the common law doctrine of Election is a part of our jurisprudence and squarely applies in this case inasmuch as the Club has advanced inconsistent pleas as noted hereinabove.

70. In so far as non-payment of lease rent is concerned, the Club has admitted it in its written statement in paragraphs (8) and (10). The Club has also admitted it in its reply to the Trust's petition under Order 12 Rule 6 referred to hereinabove. The Club has also admitted non-payment of rent in

its petition under Section 114 of the Transfer of Property Act where it sought the equitable remedy of forfeiture and which has been denied to it by the High Court for valid reasons.

71. From the pleadings between the parties in this case the following things are admitted:

(a) the Club has admitted in its written statement that the Trust is its Lessor;

(b) the Club has also admitted that it has not paid the lease rent;

(c) the Club has also admitted that the lease rent is more than Rs. 3500/- per month in its reply to the Trust's petition under Order 12 Rule 6;

(d) the Club has also admitted the receipt of notice of termination of lease issued by the Trust on the ground of non-payment of lease rent.

72. The Suit filed by the Club questioning the title of the Trust as its Lessor has been dismissed and nothing has been shown to this Court that it has been restored as on date. Such a plea is prima facie not acceptable in view of the provisions under Section 116 of the Evidence Act. However, in support of its case that the Club is not estopped under Section 116 of the Evidence Act to challenge the title of the lessor, learned Counsel for the Club relied on a judgment of this Court in D. Satyanarayana Vs. P. Jagadish – (1987) 4 SCC 424. The principle laid down in that decision is not attracted in the facts of this case.

73. In D. Satyanarayana (supra) the tenant was a sub-tenant of the tenant-respondent. The sub-tenant was threatened with eviction by the superior landlord. Being threatened with such eviction, the sub-tenant started paying monthly rent directly to the superior landlord. In such a situation the Court held that an exception to the rule of estoppel under Section 116 of the Evidence Act can be made since title of the landlord came to an end as he was evicted by the title paramount. The Court held even if there is a threat of eviction by the title paramount, the tenant can attorn to the title paramount and a new jural relationship of landlord and tenant may come into existence. In such a situation, a sub-tenant can question the title of the tenant and the bar under Section 116 of the Evidence Act cannot apply. Here the fact situation is totally different. Here the Club was not facing threat of eviction from anybody excepting the Trust and there is no question of a superior landlord. In the instant case Section 116 prima facie applies and the Club is prima facie stopped from challenging the title of the Trust.

74. Apart from the reasons discussed above, in our opinion the Club is not entitled to any equitable relief under Articles 136 of the Constitution having regard to its conduct. From the facts discussed above it is clear that the Club was very negligent in pursuing its case. Its case was dismissed on

several occasions. The Club also adopted dilatory tactics in prolonging the litigation. Even after losing the appeal before the High Court, the Club, through its members initiated several proceedings to stall the execution of the decree and in those proceedings the High Court held that with knowledge of the Club those proceedings by the members were initiated. Even while filing the Special Leave Petition before this Court, initially the members of Club came with the usual plea of not being aware of the eviction proceeding against the Club as they were not parties to the same. On that plea the members initially obtained a stay of the execution proceedings. Thereafter, the Club taking advantage of the existing stay order, filed its SLP.

75. In the backdrop of these facts one thing is clear that the conduct of the Club is such as to disentitle it to any discretionary remedy.

76. The jurisdiction of this Court under Article 136 of the Constitution is basically one of conscience. The jurisdiction is plenary and residuary in nature. It is unfettered and not confined within definite bounds. Discretion to be exercised here is subject to only one limitation and that is the wisdom and sense of justice of the judges (See Kunhayammed and others vs. State of Kerala and another – (2000) 6SCC 359 at 371). This jurisdiction has to be exercised only in suitable cases and vary sparingly as opined by the Constitution Bench of this Court in the case of Preetam Singh vs. The State reported in AIR 1950 SC 169, at paragraph 9.

77. Over the years this view has been repeated in several cases and some of which are noticed hereunder.

78. In Municipal Board, Pratabgarh and another vs. Mahendra Singh Chawla and others reported in (1982) 3 SCC 331, a two Judge Bench of this Court held that in exercising the discretionary jurisdiction under Article 136 law is to be tempered with equity and if the equitable situation so demands the Supreme Court should mould the final order (See paragraph 6).

79. Subsequently in Transmission Corpn. of A.P. Ltd. Vs. Lanco Kondapalli Power (P) Ltd. reported in (2006) 1 SCC 540 this Court held that while exercising jurisdiction under Article 136 the conduct of the party is a relevant factor and in a given situation this Court may refuse its discretionary jurisdiction under Article 136 (See paragraphs 54, 55 and 56). Similar views have been expressed in the case of Jagraj Singh vs. Birpal Kaur reported in (2007) 2 SCC 564 wherein this Court held that the conduct of the parties is relevant when the Court is exercising its jurisdiction under Article 136 (See paragraph 30). In Tanna & Modi vs. CIT, Mumbai XXV and others reported in (2007) 7 SCC 434 this Court held it does not exercise its discretionary jurisdiction under Article 136 just because it is lawful to do so (See paragraph 23). In the case of Prestige Lights Ltd. vs. State Bank of India reported in (2007) 8 SCC 449 the Court refused to exercise jurisdiction under Article 136 of the Constitution having regard to the conduct of the parties.

80. For the reasons aforesaid this Court is not inclined to interfere in exercise of its jurisdiction under Article 136. Both the appeals, the one filed by Karam Kapahi & Others and the next one filed by the M/s. South Delhi Club Ltd. are dismissed with costs assessed at Rs. 25,000/- (Rupees Twenty-five thousand) to be paid by M/s South Delhi Club to M/s. Lal Chand Public Charitable Trust within four weeks from date. The Judgment of the High Court is affirmed.

Karam Kapahi v. M/S Lal Chand Public Charitabl Trus.&Anr