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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.178 OF 2009
IN
NOTICE OF MOTION NO.1541 OF 2007
IN
SUIT NO.1327 OF 1997

Mrs.Rukhsana Suleman Chamadia,
Of Bombay, adult, Indian Inhabitant,
Residing at 10, Kanti Mahal, Telli Galli,
Andheri (E), Bombay – 400 069.

...Appellant
(Ori.Defendant)

Versus

Mr.Narendra Ramesh Sharma,
of Bombay, adult, Indian Inhabitant,
Residing at 4, Uday Darshan, 11th Road,
Santacruz (E), Bombay – 400 055.

...Respondent
(Ori.Plaintiff)

.....

Dr.A.K.Barthakur with Mr.R.Subramanium & Mr.J.A.Udaipuri i/b Ms
Mansi Bane for Appellant.

Mr.Shailesh Shah with Mr.Sanjay Jain & Ms.Sapna Rachure i/b
T.N.Tripathi & Co. for Respondent.

.....

**CORAM : SWATANTER KUMAR, C.J. AND
A.M.KHANWILKAR, J.**

**JUDGMENT RESERVED ON : 24TH AUGUST 2009.
JUDGMENT PRONOUNCED ON : 17TH SEPTEMBER 2009.**

JUDGMENT (PER KHANWILKAR, J.) :

1. This Appeal takes exception to the decision of the learned Single Judge of this Court dated 17th February 2009 in Notice of Motion No.1541 of 2007 in Suit No.1327 of 1997.

2. Briefly stated, the Respondent/Plaintiff filed Suit for declaration that the partnership in the name and style of M/s.Shubh Developers constituted under the Deed of Partnership dated 29th April 1989 and carrying on business from 5, Kanti Mahal, Teli Galli, Andheri (East), Mumbai – 69 be declared as dissolved from the date of filing of the Suit or from any other date, as the Court may deem fit and proper. The Respondent/Plaintiff also prayed for appointment of Commissioner for Taking Accounts, High Court, Mumbai or any other fit and proper person as Commissioner for the purposes of taking accounts and to order and decree the Defendant to pay the Plaintiff the monies that are found liable to be paid by the Defendant to the Plaintiff on taking such accounts.

3. This Suit was filed on 15th April 1997. During the pendency of the said Suit, Plaintiff took out Notice of Motion No.2823 of 1997 for

appointment of Court Receiver. That Motion was made absolute on 8th January 2001. Thereafter, the Plaintiff took out another Notice of Motion No.2221 of 1999 praying for following reliefs:

“a. THAT the Hon’ble Court be pleased to pass preliminary decree of dissolution of partnership of `M/s. Shubh Developers’ constituted under a Deed of Partnership dated 29th April, 1989 being Exhibit-`A’ to the Plaint from the date of filing of the suit;

b. THAT it be declared that the Plaintiff has 50% share in the suit Partnership firm of M/s.Shubh Developers:

c. THAT this Hon’ble Court be pleased to appoint Commissioner for taking accounts, High Court, Bombay as Commissioner for the purpose of taking accounts of the said Partnership Firm of M/s.Shubh Developers with direction to charges of assets of suit Partnership Firm and to sell the same and order and decree the Defendants to pay to the Plaintiff the monies that are found liable to be paid by the Defendants to the Plaintiff on taking such accounts;

d. FOR Ad-Interim and Interim Reliefs in terms of prayers (a), (b) and (c) above;

e. FOR costs of the Notice of Motion;

f. FOR such further and other Orders and directions as the nature and circumstances of the case may require.”

4. The learned Single Judge of this Court by speaking order dated 28th March 2001 made the said Notice of Motion absolute in terms of prayer clauses (b) and (c). The learned Single Judge proceeded to hold that the Defendant in the affidavit filed to oppose the earlier Notice of Motion positively admitted the fact that he was carrying on business in partnership



with the Plaintiff and the suit property belongs to the partnership firm. Further, both the partners had 50% share in the business and assets of the firm. The learned Single Judge proceeded to hold that in view of the said admission, the Plaintiff was entitled to certain relief from the Court on the basis of such admission and the Court need not wait for the Defendant to file written statement for evidence to be led, etc. The relevant extract of the said order which records the reasons and the operative order while disposing of the Motion reads thus:

“In so far as the present case is concerned, the Plaintiff has come to the Court seeking a decree of dissolution of the firm and for accounts and for division of the assets, alleging that there is a registered partnership between the Plaintiff and Defendant pursuant to the Partnership deed dated 29th April, 1989, which shows that both the partners had 50% share in the business and assets of the firm. According to the Plaintiff, according to the Partnership Deed, the partnership was at will, therefore, filing of the suits amounts to dissolution of the firm. It is clear from the affidavit of the Defendant filed in Notice of Motion No.2823 of 1987 dated 21st June, 1999 that not only the Defendant did not dispute the statement made in the plaint and in the affidavit filed in support of the notice of motion by the Plaintiff, but the Defendant made a positive statement that he is carrying on business in partnership with the Plaintiff and that the suit property belongs to the Partnership Firm. The statements made to the Defendant in paragraph 5(e) of his affidavit dated 21-6-1999 leaves one in no manner doubt that according to the defendant he was carrying on business in partnership with the Plaintiff. These clear statements have been made by the Defendant in his affidavit dated 21-6-1999, which clearly establish that the Plaintiff and the Defendant were carrying on business in partnership and each had 50% share. It is also clear from the statements of the Defendant that there is only one assets of the firm. In so far as the case put by the Defendant in his affidavit filed in support of this Notice of Motion is concerned, it is clearly an after thought. If according to the Defendant, a transaction between the Plaintiff and the Defendant was not a partnership transaction but a loan transaction, then no explanation is to be found in the affidavit of the Defendant as to why he makes a grievance that the Plaintiff did not make efforts and extend his co-operation to the Defendant for developing the



properties of the firm. There is no explanation to be found in the affidavit filed in reply to the present Notice of Motion by the Defendant, as to why and under what circumstances admissions were given in the affidavit dated 21-6-1999. Merely, relying on wrong would not be fatal. It is clear from the provision of Order 12 Rule 6 that if the Defendant has given clear admission, which entitles the Plaintiff to certain relief from the Court, then the Court is entitled to make appropriate orders on the basis of such admission. The Court need not wait for the defendants to file written statements, for evidence to be led etc.

In these circumstances, therefore, in my opinion, it would be appropriate as also it would be in the interest of justice to grant this Notice of Motion in terms of prayer clause (b) as also prayer clause (c) excluding the bracketed portion. It is directed that after the Commissioner's report is submitted, the proceedings or final decree shall be taken up.

Notice of Motion disposed of.”

(emphasis supplied)

5. Consequent thereto, Court Commissioner came to be appointed for taking accounts. Both the parties participated in proceedings before the Commissioner who in turn submitted his report to the Court on 6th May 2004. The Plaintiff thereafter filed Notice of Motion No.28 of 2005 on 27th January 2006 in which prayed for reliefs which are similar to one prayed in the present Motion. The said Motion, however, was withdrawn on 27th January 2006 with liberty to take out fresh Motion. Accordingly, the present Motion has been filed by the Plaintiff on the assertion that this Court had already passed a preliminary decree on 28th March 2001 and the Commissioner for Taking Accounts has also submitted his report on the basis of which a final decree could be passed. Accordingly, the Plaintiff has prayed for the following reliefs in this Motion:



- (a) That the High Court pleased to grant final decree of dissolution of Partnership firm of Messers. Shubh Developers constituted Under Deed of Partnership dated 29th April, 1989 from the date of filing of the Above suit i.e. 15th April, 1997 or from any Other date as the Hon'ble Court may deem fit and proper.
- (b) That the Commissioner for taking Accounts, High Court, Bombay or some Other fit and proper person be ordered and directed to sell and realize all the assets and properties of the suit partnership of Messers Shubh Developers, including those described in Exhibit – C to the plaint by Public auction and realization be paid over to the Plaintiff to the extent of his one half share as determined by the oder dated 28th March, 2001 passed in Notice of Motion No. 2221 of 1999.
- (c) That the Commissioner for taking Accounts, High Court, Bombay be ordered and directed to submit further report to the Hon'ble Court within four weeks whether the assets and properties of the suit partnership of Messers Shubh Developers, including those described in Exhibit-C to the Plaint can be divided by meat and bound or be sold.
- (d) For ad-interim and interim relief in terms of prayer (a), (b) and (c) above be granted;
- (e) For Costs;
- (f) For such further reliefs as the nature and circumstances of the case may require be granted.”

6. It appears that this Motion came up for hearing on 23rd October 2008 when the learned Single Judge passed the following order:

“This notice of motion is moved by the plaintiff praying that final decree of dissolution of the partnership firm be passed and the Commissioner of some other fit and proper person be ordered and directed to set the assets and properties of the partnership firm.

2. The partnership assets and properties include those enlisted at Exh.C. To the plaint.

3. Although the prayer in the motion is worded in manner suggesting public auction, parties desire to explore the possibility of inter se bidding. However, for that purpose, they agree at this stage to have valuation done of the assets and properties.
 4. Both sides do not disputes that the Court Receiver, High Court to have the property valued by appointing valuer from his panel and thereafter file his report seeking directions regarding bidding.
 5. According, the Court Receiver to valuation report of the assets and properties as expeditiously as possible and in any event before 24th November, 2008. Place this motion for further orders on 25th November, 2008. Court Receiver to act on an authenticated copy of this Order.”
7. The Motion was listed for hearing on 25th November 2008, on which date, the Court passed the following order:
- “The valuer who has been appointed by the Court Receiver from his panel has submitted his Report which is opened in the presence of parties. A copy of the same was handed over to Mr.Jain, appearing for plaintiff and Mr.Pande appearing for defendants for perusal. Having perusal this report and the basis of valuation of the said property, it is apparent that the valuer has failed to apply his mind to some vital aspects of this matter, including the location of the property, age of the building etc. The valuer seems to have been influenced by the Stamp Duty and Ready Reckoner calculations. In such circumstances, both sides pray that the valuation Report be discarded.
2. Mr.Jain states that the property be sold by public auction and reserves price be fixed at Rs.1 Crore for that purpose. Mr.Pande states that he will have to seek instructions and at his request, S.O.one week.”
8. From the record of the Court, it is noticed that the parties consented for taking steps to sell the suit property and also fixation of reserve price therefor. However, subsequent thereto, the Defendant changed Advocate.

The newly appointed Advocate appeared before the Court on 15th December 2008 and disputed the factum of consent of the Defendant who had appeared in-person on the earlier occasion regarding sale of suit property. Besides, the Advocate appointed by the Defendant argued before the Court on 12th January 2009 that no preliminary decree has been granted in the present matter. He argued that the affidavit filed on behalf of the Defendant could not be treated as admission of the Defendant, much less, to pass a decree on admission against the Defendant. It was argued that as a matter of fact, the Suit itself could not have proceeded for want of service of writ of summons on the Defendant. According to the Defendant, the fact that the Defendant had appeared to oppose the Notice of Motion or filed affidavit, does not absolve the Plaintiff from service of summons on the Defendant. No suit summons was ever served on the Defendant and the consequence whereof would be that the Suit itself deserves to be dismissed, keeping in mind the provisions of Rule 87 of the High Court (Original Side) Rules. The learned Single Judge considered all these objections and has negatived the same. The learned Single Judge, by the impugned decision dated 17th February 2009, in the first place, opined that the order dated 28th March 2001 was a preliminary decree and that was allowed to become final. As a consequence, it was not open to the Defendant to argue to the

contrary, much less, to raise issues regarding the validity and correctness of the said preliminary decree at this stage. Besides, the learned Single Judge opined that from the record of the case, it was more than clear that the Defendant not only participated in the proceedings to oppose grant of ad-interim relief in 1997 but also to oppose the Notice of Motion for interim relief and even subsequent thereto at the stage of Notice of Motion 2221 of 1989, however, allowed the order passed on the said Notice of Motion to become final. More so, the Defendant participated in proceedings before the Commissioner appointed by the Court for Taking Accounts and further had consented for sale of the suit property as is recorded in order dated 23rd October 2008 read with order dated 25th November 2008. The learned Single Judge was of the view that the Defendant is bound by the order dated 28th March 2001 which is a preliminary decree. He also found that the fact that the said order is a preliminary decree is reinforced from the circumstances that the Court appointed Commissioner for Taking Accounts and both parties participated in the said proceedings on the basis that a preliminary decree has already been passed, whereas, objection is being raised by the Defendants after lapse of over seven years therefrom which was clearly an afterthought. The learned Single Judge accordingly proceeded to order that a final decree be drawn up on the basis that the Suit

firm stands dissolved with effect from 15th April 1997, which is the date of filing of the Suit. At the same time, the learned Single Judge has directed the Court Receiver to take steps to dispose of the properties and assets of the firm including those described in Exhibit C to the Plaint by taking necessary steps in accordance with the Rules and conclude the same within twelve weeks from the date of the order, whereafter, retain the sale proceeds until further orders and directions of the Court. It is this decision which is subject matter of challenge before us in the present Appeal.

9. The Counsel appearing for the Defendant/Appellant has more or less reiterated the grounds urged before the learned Single Judge. According to the Appellant, the learned Single Judge has committed manifest error in not addressing the crucial issue that failure to serve writ of summons on the Defendant was fatal and that, orders passed in the proceedings in absence thereof were nullity. According to the Appellants, the Suit itself was not maintainable in view of the arbitration clause in the Deed of Partnership. Moreover, there was no question of passing preliminary decree till the Defendant had filed the written statement which could be done only after service of writ of summons. It was argued that in absence of service of writ of summons, the Court could not have assumed jurisdiction to pass

preliminary decree, much less, final decree of dissolution. Indeed, it was argued that the order passed by the learned Single Judge on 28th March 2001, by no standards, can be considered as a preliminary decree and especially when relief in terms of prayer clause (a) of the Notice of Motion No.2221 of 1999 was not granted. It was argued that the learned Single Judge was bound to consider the case of the Appellant that the alleged Partnership Deed was executed only for the purpose of security for the loan transaction and the same was not to be acted upon. In other words, the said Deed of Partnership did not constitute a legal partnership firm. Moreover, the partnership firm as constituted, was incapable of carrying on any business and did not carry any business for which reason, the Suit for dissolution of the suit partnership firm was not maintainable. It was argued that the fact that the Appellant did not challenge the question of validity and correctness of the order dated 28th March 2001 passed in Notice of Motion 2221 of 1999 will not preclude the Appellant from challenging the same in the present appeal, especially when the same can be demonstrated to be nullity. It was also argued that the learned Single Judge committed manifest error in ordering dissolution of the firm with effect from 15th April 1997, which is the date of filing of the Suit, in that, the firm could have been dissolved only after a valid notice was served and the date of institution of

the Suit cannot be the basis to assume that the firm stood dissolved by notice. On the other hand, Counsel appearing for the Respondent/Plaintiff has supported the view taken by the learned Single Judge in the impugned decision and prays for dismissal of the Appeal being devoid of merits.

10. After having considered the rival submissions, the first question that needs to be addressed is the purport of Order dated 28th March 2001 passed in Notice of Motion No.2221 of 1999. We have already adverted to the reliefs claimed in the said Notice of Motion. It is common ground that the said order disposes of the Motion in terms of prayer clause (b) and (c), except the bracketed portion thereof. In other words, the said order merely proceeds to declare that the Plaintiff has 50% share in the suit partnership firm of M/s.Subh Developers and further direct appointment of Commissioner for Taking Accounts of the said partnership firm. The question is: does this amount to a preliminary decree passed by the Court at the instance of the Plaintiff. That will have to be answered on the basis of the reasons which weighed with the learned Judge to pass the said order and dispose of the Notice of Motion in terms of prayer clause (b) as also prayer clause (c) excluding the bracketed portion. We have already adverted to the reasons that weighed with the learned Single Judge by reproducing the



relevant extract of the order. It is amply clear that the learned Single Judge proceeded to hold that the Defendant in the reply affidavit filed before the Court had made a positive statement that he is carrying on business in partnership with the Plaintiff and the suit property belonged to the partnership. The learned Judge has positively opined that there was no doubt whatsoever that according to the Defendant he was carrying on business with Plaintiff, which clear statement was found in his affidavit dated 21st June 1999 indicating that the Plaintiff and the Defendant were carrying on business in partnership and each had 50% share. The affidavit also concedes the fact that there is only one asset of the firm. The Court then proceeded to observe that this was a clear admission given by the Defendant and the point in issue can be answered on the basis of the said admission in terms of provisions of Order XII Rule 6 of the Code of Civil Procedure (hereinafter referred to as the 'C.P.C.')

and on that basis, the Court is entitled to make appropriate orders without waiting for the Defendant to file written statement or for evidence to be led etc. Even if the said order was to be literally read, it is clear that a preliminary decree is passed to the extent of declaration that Plaintiff has 50% share in the partnership firm of M/s.Subh Developers and further that Commissioner for Taking Accounts was appointed to take forward the said preliminary decree,

so that a final decree could be passed after the report of the Commissioner for Taking Accounts. The view so taken by the learned Single Judge in the impugned decision, on plain language of order dated 28th March 2001, in our opinion, is unexceptionable. Once it is held that a preliminary decree has already been passed by this Court, the grievance of the Appellant/Defendant that there was no admission in the affidavit or that the statement in the affidavit could not be considered as admission of the Defendant so as to pass a preliminary decree on that basis, could have been addressed only if the Defendant were to challenge the said order dated 28th March 2001, which was a preliminary decree. However, the Defendant allowed the said order to become final. Instead, the Defendant acted upon the said order by participating in proceedings before the Court Commissioner appointed for taking accounts. No grievance whatsoever was made by the Defendant with regard to the correctness or validity of the said order. On the other hand, the Defendant participated in the proceedings not only before the Commissioner but also later on before the Court. It is also noticed that he Defendant consented to taking steps to sell the suit property as is recorded in the order dated 23rd October 2008 and 25th November 2008 in the present Notice of Motion. However, it is for the first time after change of Advocates, the Defendant almost after eight years thought of

questioning the said order dated 28th March 2001 to contend that the same was not a preliminary decree nor a preliminary decree could be passed by the Court in absence of service of writ of summons on the Defendant. The fact that service of writ of summons has not been effected on the Defendant was alleged for the first time in October 2008. These aspects have been considered by the learned Single Judge. In our opinion, the learned Single Judge has rightly rejected the argument canvassed on behalf of the Defendant on well established principles.

11. To get over this position, it was argued that by no standards, the order dated 28th March 2001 can be considered as a preliminary decree. We are not impressed by this argument. We have already adverted to the scope of the order dated 28th March 2001 and in our opinion, it is a preliminary decree to the extent of declaring of a partnership firm in terms of Partnership Deed dated 29th April 1989 in which both partners had 50% shares in the business and assets of the firm. In other words, the Plaintiff had 50% share in the suit partnership firm of M/s.Shubh Developers. As a consequence of this preliminary decree, it is no more open to the Appellant/Defendant to contend that the Partnership Deed was executed only for the purpose of securing loan transaction and the same was not to be

acted upon or that the firm was incapable of carrying on any business and did not carry any business. If at all the Appellant/Defendant was aggrieved by the said preliminary decree, he ought to have questioned the validity and correctness thereof by way of appropriate proceedings. Those questions cannot be reopened in the present proceedings. Even the argument of the Appellant that the statements in the affidavit of the Defendant did not constitute any admission, much less, could be made the basis to pass a preliminary decree, cannot be reopened in the present proceedings. On account of order dated 28th March 2001 attaining finality, those aspects cannot be allowed to be reagitated by the Appellant in the present proceedings.

12. However, Counsel for the Appellant pressed into service decisions of the Apex Court that even if the Appellant had not challenged the said order dated 28th March 2001 is not precluded from questioning the same in the present proceedings. According to him, every interlocutory order, even if remedy of appeal against the same was available, need not be challenged by the party and the same can be done after the final order is passed. To buttress this proposition, reliance is placed on the decision of the Apex Court in the case of **Achal Misra vs. Rama Shanker Singh & Ors.**

reported in (2005) 5 SCC 531. This decision on the other hand answers the point in issue against the Appellant. In Paragraph 12 of the said reported decision, the Apex Court has expounded that a party is not bound to appeal from every interlocutory order, which is a step in the procedure that leads to a final decree and it is open on Appeal from such final decree to question the interlocutory order. The Court has further noted that this principle has at least two exceptions as provided by Section 97 of the Code. The same postulates that a preliminary decree passed in a Suit could not be challenged in an Appeal against the final decree based on that preliminary decree and similarly Section 105(2) of the Code precludes a challenge to an order of remand at a subsequent stage while filing an appeal against the decree passed subsequent to the order of remand. The former exception applies on all fours to the case on hand. Having found that the order dated 28th March 2001 is a preliminary decree, the correctness of the opinion recorded in the said order cannot be challenged later on after the final decree. The order impugned in this appeal is nothing but directing the Office to draw up a final decree in terms of the directions issued. The preliminary decree, is thus unassailable.

13. Counsel for the Appellant also relied on another decision of the Apex Court in the case of **Chittoori Subbanna v. Kudappa Subbanna & Ors.**

reported in AIR 1965 SC 1325 with special reference to exposition in Paragraphs 28 and 29 thereof to contend that the direction in the preliminary decree would operate as resjudicata. There can be no quarrel with this proposition but at the same time, keeping in mind, the mandate of Section 97 of the Code, it is not open to the Defendant to challenge the preliminary decree passed in a Suit at a later stage. Realising this difficulty, the Appellant would argue that the order dated 28th March 2001 passed in Notice of Motion No.2221/1999 was a nullity on account of the fact that the same was passed without service of writ of summons on the Defendant in the Suit. Without service of writ of summons, contends learned Counsel, the Court could not have assumed jurisdiction to pass a preliminary decree. Reliance is placed on Rule 87 of the High Court (Original Side) Rules to contend that the mandate is to dismiss the Suit if the writ of summons remains unserved for more than six months. The argument though attractive, is clearly an argument of desperation. In the first place, no grievance regarding non service of writ of summons was ever made by the Defendant as late till October 2008. Instead, the Defendant not only participated in opposing the Notice of Motion for interim relief but also Notice of Motion No.2221 of 1999 on which order dated 28th March 2001 came to be passed. All concerned understood the said order to have the

effect of a preliminary decree. The Defendant participated in the proceedings before the Court Commissioner which was naturally the outcome of the preliminary decree passed by the Court. Even during the hearing of the present Motion, the Defendant consented before the Court for taking steps to sell the suit property as is recorded in the orders dated 23rd October 2008 and 25th November 2008. The wisdom has dawn on the Defendant only after change of Advocates. Obviously, it is upon legal advise, the Defendant took up the plea of non service of writ of summons almost after eight years from passing of the preliminary decree. Much water had flown thereafter. Although the Counsel for the Appellant vehemently argued that on account of non-service of writ of summons, the Court had no jurisdiction to pass order dated 28th March 2001 and for which it was nullity, however, no legal provision has been brought to our notice which would support this contention. Since much reliance was placed on Rule 87 of the High Court (Original Side) Rules, it would be apposite to advert to the same at this stage, which reads thus:

“R.87.Suits to be placed on board for dismissal if summons not served within six months.- If the Writ of Summons is not served within six months from the date of the filing of the plaint, the Prothonotary and Senior Master shall, unless good cause is shown, place the suit on board for dismissal. The Prothonotary and Senior Master shall notify such suits on his notice board one week before they are placed on the board for dismissal.”

14. On plain language of this provision, to our mind, it is only an enabling provision which stipulates that if the writ of summons is not served within six months from the date of filing of the Plaint, the Prothonotary and Senior Master shall, unless good cause is shown, place the Suit on Board for dismissal. It obligates the Prothonotary and Senior Master to notify such Suits on its notice Board one week before they are placed on the Board for dismissal. In the event, Plaintiff were to show good cause, the question of dismissing the Suit would not arise at all. Thus understood, it is not a mandatory provision resulting in dismissal of Suit on account of non-service of writ of summons within specified time as such. However, the Appellants have relied on the unreported decision of Division Bench of our High Court in the case of **Tardeo Properties Pvt.Ltd. vs. Bank of Baroda decided on July 13, 2007 in Original Side Appeal No.713 of 1999 in Suit No.1567 of 1987**. Relying on the observations, in particular, in paragraphs 25 and 26 of this decision it was argued that the learned Single Judge could not have proceeded further until the writ of summons were to be served on the Defendant and in fact, the Plaintiff ought to be non-suited for having failed to serve the writ of summons on the Defendant. Reliance is also placed on another Division Bench decision of our High Court in the case of

Iridium India Telecom Ltd. vs. Motorola Inc. & Anr. reported in 2004

(1) Mah.L.J.532 (Bombay), which has taken the view that the Original Side Rules made by the High Court regulate procedure in exercise of its original jurisdiction having regard to Section 129 of the Code, which decision has been upheld by the Apex Court in the case of **Iridium India Telecom Ltd. vs. Motorola Inc. reported in AIR 2005 SC 514**. In our opinion, however, none of these decisions relied by the Appellant would take the matter any further. What has been glossed over by the Appellant is that the grievance that the Court could not have proceeded to pass the preliminary decree in absence of service of writ of summons, ought to have been raised at the first available opportunity when the order was passed on 28th March 2001. In any case, that was a ground to assail the preliminary decree passed by the Court. The observations made by the Division Bench of our High Court in the unreported decision will have to be understood as having been made in the fact situation of the case before it. In that case, the Court had purportedly in exercise of powers under Order VIII Rule 10 of the Code passed the impugned decision. It was a decree passed against the Defendant without service of writ of summons. The grievance regarding non-service of writ of summons was not only raised at the first opportunity but was pressed into service in the appeal filed against the decree. In the

present case, the Appellant has allowed the preliminary decree dated 28th March 2001 to become final. Besides, as observed by the learned Single Judge, the Appellant participated in proceedings before the Court Commissioner for taking accounts on the basis that a preliminary decree has already been passed. Not only that the Appellant consented before the Court on 23rd October 2008 and 25th November 2008 to take steps to sell the suit property so as to effectuate the decree to be passed by the Court. It was argued that the fact that the Appellant participated in proceedings before the Commissioner for Taking Accounts or consented, does not amount to waiver of right to challenge the adverse order passed by the Court. In support of this submission, reliance is placed on the decisions of the Apex Court reported in **(2006) 7 SCC 275 in the case of Rashtriya Ispat Nigam Ltd. & Anr. vs. Verma Transport Co. , (2003) 6 SCC 503 – Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums, (2000) 4 SCC 539 – P.Anand Gajapathi Raju & Ors. vs. P.V.G. Raju (Dead) & Ors. and 2003 (3) Mh.L.J. 487 – Jashu M.Patel v. Shivdatta R.Joshi.** The argument clearly overlooks that the Appellant has not bothered to challenge the validity of decision dated 28th March 2001. All concerned acted on the basis that the same was a preliminary decree. At no point of time, the said decision has been put in issue till recently. The

decisions pressed into service will be of no avail to the Appellant in the fact situation of the present case. The Appellant would be bound by the order dated 28th March 2001 and since that is held to be a preliminary decree, no fault can be found with the learned Single Judge which has proceeded to pass final decree in furtherance thereof.

15. Counsel for the Appellant relied on the decision of the Apex Court in the case of **Reliance Airport Developers (P) Ltd. v. Airports Authority of India & Ors. reported in (2006) 10 SCC 1** to contend that all errors of law are jurisdictional facts and the error of law committed by the Court will have to be set right by the Appeal Court. Once again, this argument does not commend to us, inasmuch as the Appellant has allowed the preliminary decree dated 28th March 2001 to become final which will bind the Appellant as well as us. If the said preliminary decree remains unchallenged, no fault can be found with the impugned decision whereby the learned Single Judge has passed impugned order directing drawing up of a final decree which is in furtherance of the preliminary decree.

16. Reliance was placed on the decision in the case of **Suraj Bahadur v. Mahadeo reported in AIR 1963 241**. In our opinion, this decision is of no

avail to the Appellants. In Paragraph 6 of the decision, the main contention has been reproduced. It was the case of the Defendant that the Deed of Partnership was not admissible in evidence and the District Court had fallen into serious error in holding that by virtue of reference contained thereto in the subsequent document, the former could be taken into consideration in finding out the terms and conditions of the partnership and that as that could not be done, the Plaintiff's suit should have been dismissed. In the context of that controversy, the Court proceeded to hold that the preliminary decree passed by the Court below was not satisfactory. In the facts of that case, it was found that the shares of the parties were not determined and further it did not fix the date of dissolution and did not give any direction as to who is to render accounts and how. In the present case, the order dated 28th March 2001 clearly determines the extent of share of the Plaintiff and also directs appointment of Commissioner for Taking Accounts. In the facts of the present case, therefore, the order dated 28th March 2001 would fulfill the elements of a preliminary decree.

17. Counsel appearing for the Appellant had also relied on the decisions reported in **AIR 1958 SC 886 – Razia Begum v. Sahebzadi Anwar Begum, 2009 Vol.III (3) Bom.L.R. 1388 – Shantez A Partnership Firm**

and Faheen Designs A Partnership Firm v. Applause Bhansali Films Pvt.Ltd., AIR 2007 Delhi 166-Mrs.Vijay Gupta v.Shri Ashok Gupta, AIR 1999 SC 3381 – Balraj Taneja v. Sunil Madan to contend that the Judgment on admission under Order XII Rule 6 of the Code was not warranted as the Defendant had denied having given any such admission. It is too late in the day for the Appellant to advance such argument. That argument was available to the Appellant when the Notice of Motion No. 2221 of 1999 was considered. As a matter of fact, the Defendant had made such grievance as is noted in Paragraph 4 of the order dated 28th March 2001. The Court has recorded the contention of the Defendant. It was argued on behalf of the Defendant that unless and until the Defendant files written statement, it cannot be said that he has admitted the facts and no preliminary decree can be passed against the Defendant. It was further argued that in the affidavit filed in the Notice of Motion, Defendant has claimed that there was no partnership between the Plaintiff and the Defendant and the transaction between the Plaintiff and Defendant was merely a loan transaction. The argument so advanced did not find favour with the learned Single Judge who decided Notice of Motion 2221 of 1999 vide order dated 28th March 2001.

18. If the Appellant was aggrieved by the said opinion, was obliged to challenge the same in appropriate proceedings. Instead, the Appellant allowed the said preliminary decree to become final. It is not open in the present proceedings to examine the grievance of the Appellant as to whether the Appellant had admitted certain facts on the basis of which the Court would proceed to pass Judgment on admission.

19. According to the Appellant, the order passed on 28th March 2001 in Notice of Motion No.2221 of 1999 cannot be termed as a preliminary decree because the date of dissolution of partnership has not been fixed as was required under Order XX Rule 15 of the Code. Reliance is placed on the dictum of the Apex Court in the case of **Banarsi Das v. Kanshi Ram reported in AIR 1963 SC 1165**. Emphasis was placed on observations in Paragraphs 12 to 14. The question considered in the said decision was in the context of issue of limitation in filing the Suit. The Apex Court has observed that the question of limitation was not one purely of law but was a mixed question of fact and law. The Court adverted to Section 43 of the Partnership Act and Order XX Rule 15 of the Code. It went on to observe that it was clear that the date from which the firm would stand dissolved

will have to be reckoned from the date of service of summons accompanied by the copy of the Plaint. What is relevant for our purpose is that Order XX Rule 15 provides that it is for the Court before passing a final decree to pass a preliminary decree declaring the proportionate share of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken, and other acts to be done, as it thinks fit. That does not mean that if the date of dissolution is not specified in the order dated 28th March 2001 passed in Notice of Motion No.2221 of 1999, it was not open to provide for the said date while passing a final decree which was invited by the Plaintiff by way of present Notice of Motion No.1541 of 2007. The learned Single Judge while considering this Motion, has rightly observed that in the light of the fact that Suit has been instituted on 15th April 1997 and parties having due notice of its institution and have proceeded on the basis that the suit firm stands dissolved with effect from that date, the Suit firm was ordered to be dissolved with effect from 15th April 1997. There is no infirmity in the view so taken by the learned Single Judge. No provision has been brought to our notice that the date of dissolution cannot be provided in the final decree, if the same is not specifically provided in the preliminary decree. The reported decisions pressed into service will therefore be of no avail to the Appellant.

20. That takes us to the ground urged by the Appellant that the Suit was not maintainable in view of arbitration clause in the Deed of Partnership. This argument need not detain us. It is seen that the Appellant appeared in the Notice of Motion for interim relief and participated therein by filing reply on merits. Having stepped in the proceedings, the question of Suit being barred on account of arbitration clause will have to be stated to be rejected.

21. Taking overall view of the matter in our opinion the Appeal is devoid of merits. The same is dismissed with costs.

CHIEF JUSTICE

A.M.KHANWILKAR, J.