



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO.1757 OF 2013**

Seal International Limited,  
incorporated under the laws of U.K.,  
having its registered office at  
Ladywell Mills, Hall Lane, Bradford,  
West Yorkshire BD47DF, England,  
U.K.

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... Appellant  
(Orig. plaintiff)

***Versus***

The Board of Trustees of the Port of  
Bombay, a statutory Corporation  
constituted under the provisions of  
the Major Port Trust Act, 1963 (38 of  
1963) as amended by Act 29 of 1974,  
having its principal place of business  
at Vijay Deep, Shoorji  
Vallabhdas Marg, Bombay 400038.

...Respondent  
(Orig. defendant)

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Mr. Cyrus Bharucha, Solicitor Krunal Gadhia, Mr. Jainuddin Khan, Mr. Hisham Abdus Salam, Ms. Maitreyi Kulkarni, Ms. Neha Dhuru i/b Gagrats, Advocates for the Appellant.

Mr. Dhruva Gandhi a/w Ms. Kajal Gupta a/w Ms. Shweta Singh i/b M. V. Kini & Co., Advocates for the Respondent.

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**CORAM : JITENDRA JAIN, J.**

**DATED : 9<sup>th</sup> FEBRUARY 2026**

**JUDGMENT:-**

1. This appeal challenges an order dated 26<sup>th</sup> July, 2013 passed by the Bombay City Civil Court whereby suit filed for money claim by the original plaintiff / appellant came to be dismissed on the ground that the original plaintiff has not proved its ownership of the goods which

were sold by auction by the original defendant. The parties are addressed in the present judgment as per their original status in the suit.

### **BRIEF FACTS:**

2. It is the case of the original plaintiff, U.K. based company, that in late 1993 / early 1994 goods were sold by them to M/s. Kansale Hosiery Exports, Ludhiana under the trade name “M/s. Blackwell Enterprises”. Since Kansale Hosiery Exports gave up its claim to the goods, the goods were sought to be re-shipped back to U.K. However the goods were lying with the original defendant and various charges were demanded by the original defendant. The original defendant on 8<sup>th</sup> August, 1994 sold these goods for a consideration of Rs.18,30,070/- though all the charges were paid by the local agent.

3. The original plaintiff, therefore, filed a suit in November 1994 i.e. within three months from date of sale claiming the sale proceeds on the ground that they were the owners of the goods and “M/s. Blackwell Enterprises” was a trade name used by them for the purpose of trading. Issues were framed on 24 February, 2003. Notice for admission of document was issued by the defendant on 26 July 2006 and while recording evidence on 4 August 2006 documents were marked in which some of the documents were admitted by the plaintiff alongwith its contents. In July 2003, impugned order and judgment came to be passed.

### **FINDINGS OF THE TRIAL COURT:**

4. The Trial Court framed various issues primarily being whether the sale by the original defendant was contrary to the provisions of the Major Port Trusts Act, 1963 and whether the original plaintiff is the owner of the consignment which was sold. The Trial Court after

considering the evidence held that the auction sale conducted by the original defendant was contrary to the provisions of the Major Port Trusts Act, 1963. There is no challenge to this part of the order by the original defendant. The Trial Court insofar as the ownership of the original plaintiff of the suit consignment is concerned held that the original plaintiff has not proved that they are the owners of the goods which were sold and therefore they are not entitled to the sale proceeds. It is *inter alia* this finding which is challenged by the original plaintiff in the present Appeal.

**SUBMISSIONS OF THE PLAINTIFF / APPELLANT :**

5. Mr. Barucha, learned counsel for the plaintiff states that there is no dispute that M/s. Kansale Hosiery Exports had given up its claim to the goods. It is his submission that “M/s. Blackwell Enterprises” was a trade name of the original plaintiff which was used for transacting the business and same was proved by the evidence led by the original plaintiff’s witness. He further submits that the Advocate’s for the original defendant issued notice calling upon the original plaintiff to admit various documents which *inter alia* included the document dated 5<sup>th</sup> September, 1994 addressed by the original plaintiff’s advocate to the original defendant. This document records that the original plaintiff was the owner of the goods. This document and its contents were admitted by the original plaintiff without any objection being raised by the defendant and came to be exhibited, as recorded in the minutes of 4<sup>th</sup> August, 2006. He, therefore, submits that since the document and in its contents were admitted the question of proving the said document does not arise and consequently the ownership was admitted by the defendant. He further submits that the Trial Court was in error interpreting the provisions of Order XII Rule 2-A of the Code of the Civil Procedure. He further stated that in civil proceedings based on

preponderance of probability and the fact that no one has claimed ownership till today except the plaintiff, the ownership can be said to have been proved.

6. Mr. Bharucha, relied upon the following two decisions.

(a) *Canara Bank, Bombay Vs. Eastern Mechanical Works, Bombay*<sup>1</sup>

(b) *Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane*<sup>2</sup>

**SUBMISSIONS OF THE DEFENDANT / RESPONDENT:**

7. Mr. Gandhi, learned counsel for the defendant submits that in the written statement they have taken a plea denying the ownership of the plaintiff. He further submitted that all the documents and evidence are in the name of “M/s. Blackwell Enterprises” and the plaintiff has failed to prove it’s claim that “M/s. Blackwell Enterprises” was plaintiff’s trade name. He submits that even the address of the plaintiff and the address of “M/s. Blackwell Enterprises” is different. He relied upon the evidence of the witnesses of the plaintiff and discredited this evidence on the issue of “M/s. Blackwell Enterprises” being trade name of the original plaintiff. He submitted that under Section 63 of the Major Port Trusts Act, 1963, the sale proceeds, if not claimed within six months, could be applied by the Board for the purposes of the said Act. He relied upon the decision of this Court in the case of *Hiren P. Doshi Vs. State of Maharashtra & Anr.*<sup>3</sup> and contended that even if the document is admitted, the original plaintiff should prove the same and, therefore, pleaded that no fault can be found in the impugned order. He further submitted that the issue of admission of document dated 5<sup>th</sup> September, 1994 has been considered by the learned Trial Court in paragraph nos.24 to 26. He, therefore, submitted that the Appeal is devoid of

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1 2008(5) Mh.L.J.

2 1975 S.C.R.

3 2015 SCC OnLine Bom 6090

merits and should be dismissed. He, however, fairly states that sale proceeds are to be refunded to the owners but till today no one has claimed except the present original plaintiff.

### **ANALYSIS & CONCLUSIONS:**

8. I have heard learned counsel for the original plaintiff and the defendant. The only issue which arises for my consideration is whether the Trial Court was justified in holding that the plaintiff has not proved its ownership of the goods auctioned by the defendant ?

9. At the outset, the Trial Court has held that the auction sale conducted by the defendant is contrary to the provisions of the Major Port Trusts Act, 1963. This finding has not been challenged by the defendant. Therefore, insofar as the issue of claim to the sale proceeds from auction sale is concerned, the defendant cannot retain the same because admittedly the sale proceeds do not belong to the defendant. The reliance placed by Mr. Gandhi on Section 63 of the Major Port Trusts Act, 1963 to justify the retention cannot be accepted because provisions of Section 63 would be applicable only if the sale is legal and valid as per Sections 61 and 62 of the said Act. In the instant case, on this issue the Trial Court has held that the auction was contrary to the provisions of Sections 61 / 62 of the Major Port Trusts Act. Mr. Gandhi, learned counsel for defendant fairly states that the sale proceeds have to be refunded to the owner and till today no one has claimed ownership except the present suit filed by the plaintiff. Even otherwise, since the suit was filed within 6 months of auction, the defendant by virtue of Section 63 of the Major Part Trust Act cannot use it for the purpose of the said Act. Therefore, in my view, retention of the sale proceeds of the auction sale by the defendant is illegal and amounts to unjust enrichment. Since the sale itself is held to be illegal the

defendant is liable to refund sale proceeds to the owner. Whether plaintiff is the owner or not is discussed in subsequent paragraphs.

10. Now, I propose to analyse the issue of whether the original plaintiff has proved its ownership to the goods which were auctioned by the defendant and whether the plaintiff is required to prove the documents and its contents when both are admitted by the plaintiff on a notice by the defendant.

11. The relevant provisions of Order XII Rule 2 and Order XII Rule 2-A of the Code of Civil Procedure, 1908 are as follows:-

**Order XII Rule 2**

*Notice to admit documents.* —Either party may call upon the other party to admit, within seven days from the date of service of the notice any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

**Order XII Rule 2-A**

*Document to be deemed to be admitted if not denied after service of notice to admit documents.*—(1) Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in his reply to the notice to admit documents, shall be deemed to be admitted except as against a person under a disability:

*Provided that the Court may, in its discretion and for reasons to be recorded, require any document so admitted to be proved otherwise than by such admission.*

(2) Where a party unreasonably neglects or refuses to admit a document after the service on him of the notice to admit documents, the Court may direct him to pay costs to the other party by way of compensation.

12. The original defendant called upon the original plaintiff to admit various documents by issuing notice under Order XII Rule 2 of the Code of Civil Procedure, 1908 (CPC). One of the document which was called

upon by the original defendant to admit by the original plaintiff was the document dated 5 September 1994 addressed by the original plaintiff's advocate to the original defendant. This letter states that the original plaintiff having its office at UK has sold goods to M/s. Kansal Hosiery Exports, Ludhiana and the same were shipped through Ceylon Shipping Corporation Limited by their vessel M.V. LANKA RUWAN to Bombay. However, M/s. Kansal Hosiery Exports did not take the delivery and therefore, the goods were proposed to be re-exported to UK. The said letter further states that the auction of the goods by the original defendant was contrary to the provisions of the Major Port Trusts Act, 1963. The said letter called upon the original defendant to return the sale proceeds.

**13.** The original plaintiff, on 4 August 2006 during the course of recording the evidence admitted the said document including the contents thereof. Insofar as some other documents are concerned, same were admitted by the plaintiff but subject to proving the contents thereof. The letter dated 5 September 1994 which was at serial no.23 of the compilation of the documents of the defendant was admitted including its contents. No objection to the said admission of the document and its contents was taken by the original defendant in the meeting of 4 August 2006 before the Commissioner. The document was thereafter exhibited and marked.

**14.** There is no denial to the contents of this document by the original defendant in the written statement except stating in paragraph 10 of the written statement that the original plaintiff is not the owner of the consignment. This written statement was filed in 1996 whereas the meeting in which the contents of the document were admitted took place on 4 August 2006, which is much after the written statement was filed and to which no objection was taken by the original defendant.

15. Order XII of the CPC deals with Admissions. Rule 2 provides for notice to admit documents by either party calling upon the other party to admit the document, save all just exceptions. In my view, on a reading of Order XII Rule 2, it would mean that a party who is called upon to admit a document can admit it subject to raising just exceptions. The exceptions cannot be raised by the party who calls upon the other party to admit but it is the other party who is called upon to admit the document who has to raise exceptions. In this case, the original plaintiff who was called upon to admit the documents has not raised any objections or exceptions while admitting the document at serial no.23, which is the document dated 5 September 1994 addressed by the original plaintiff's advocate to the original defendant. It is important to note that in the meeting of 4 August 2006, this document was not only admitted with respect to its execution, but also with respect to its contents and to which no objection was raised by the original defendant in the said meeting. Therefore, in my view, the phrase "saving all just exceptions" in Order XII Rule 2 would be applicable to the exceptions/objections to be raised by the party who is called upon to admit the document and if no such objection is raised, then the Court on its own cannot invoke this saving. In this case no objections/exceptions were raised by the plaintiff.

16. Order XII Rule 2-A of the CPC is a deeming provision which provides that every document which a party is called upon to admit, if not denied specifically or by necessary implication, or by pleading of that party or in his reply to the notice to admit documents, shall be deemed to be admitted except as against a person under a disability. In the instant case, the exception in Order XII Rule 2A(1) on account of disability is not applicable.



17. The document of 5 September 1994 was called upon to be admitted by the original defendant to the original plaintiff and the original plaintiff expressly admitted the said document not only with respect to its execution but also with respect to its contents and as observed above, no objection was taken to the said admission of the execution and its contents by the original defendant.

18. The proviso to Order XII Rule 2-A(1) provides that the Court may in its discretion and for reasons to be recorded require any document so admitted to be proved otherwise than by such admission.

19. In my view, on a reading of the above said proviso, the Court of first instance has to exercise its discretion by recording the reasons and calling upon the party to prove the document though admitted under sub-rule (1) of Rule 2 of Order XII of the CPC. In the instant case, on a reading of the impugned judgment, I do not find that the Trial Court has exercised its discretion by recording the reasons and called upon the original plaintiff to prove the said document though its admission and contents were admitted on 4 August 2006. The proviso contemplates an express finding and reasons to be recorded by the Court as to why even if the document is admitted, the Court is calling upon the party to prove the same. In this case no such discretion seems to have been exercised by the Court.

20. First proviso to Order XII Rule 2-A(1) gives a clue that unless the Court calls upon the party admitting the document to prove, the document and its contents are deemed to have been proved in a case where the contents are also admitted alongwith the document and no further proof is necessary. In the instant case, the Court having not exercised its discretion, the document of 5<sup>th</sup> September, 1994 is to be taken as proved and the party cannot be called upon to prove again a

proved and admitted document. If the Court does not exercise its discretion then the admitted documents of which the contents are also admitted is deemed to have been proved and therefore the contention of the defendant that they only called upon the plaintiff to admit execution and not contents and therefore contents need to be proved is required to be rejected and accepting such a contention would be contrary to the proviso to Order XII Rule 2-A(1) of the Code of Civil Procedure in the facts of the present case.

**21.** It is important to note that Section 58 of the Indian Evidence Act, 1872 (as it existed at relevant time) provides that no fact need to be proved in any proceedings which the parties have agreed to admit at the hearing, or which, before the hearing, they agree to admit by any writing, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

**22.** In the instant case, at the time of recording the evidence, the defendant called upon the plaintiff to admit various documents including the letter dated 5 September 1994. The plaintiff admitted the documents and its contents and the same was not objected to by the defendant in the said hearing. Furthermore, in the said document, it is stated that the transaction was executed by the plaintiff. Also there is no reply to the said letter dated 5 September 1994. Therefore, considering all these facts, in my view, there is no further requirement on the plaintiff to prove the contents of the document since the ownership of the goods has been admitted by both the parties.

**23.** The defendant having called upon the plaintiff to admit the document and the plaintiff having admitted not only the document but its contents and no objection having been raised at that point in time, today the defendant is estopped from contending that the plaintiff has

not proved ownership of the goods since by the above chain of events, both the parties admitted the plaintiff being the owner of the goods.

**24.** The object of obtaining admission is to do away with the necessity of proving facts that are admitted. In the instant case, there is not only admission by the plaintiff of the execution of the document called upon by the defendant to admit but there is also an admission of the contents of the document and therefore, no further necessity of proving the admitted facts is required.

**25.** The object of the amendment by which Rule 2-A was inserted clearly shows that the rule is to enable the parties to obtain speedy judgment atleast to the extent of relief to which, according to the admission of one of the party, the other party is entitled to. In the instant case and after considering the above chain of events, in my view, admission of document dated 5 September 1994 by the plaintiff and its contents thereof would not require any further proof of contents to be proved by the plaintiff.

**26.** In the instant case, framing of an issue on the point of ownership by the Trial Court will not amount to the Court having exercised its discretion under the proviso to Order XII Rule 2-A(1). The framing of issue to prove ownership is different from calling upon the party to prove the document, though admitted. The discretion under the proviso has to be exercised prior to framing of the issue. Therefore, the Court having not exercised its discretion under the proviso to Order XII Rule 2-A(1), the challenge to the document cannot be assailed by the original defendant in the trial of the present proceedings.

**27.** In this case, issues were framed by this Court (prior to its transfer to the City Civil Court) on 24<sup>th</sup> February, 2003. The notice for admission and its admission of document alongwith contents happened on

26<sup>th</sup> July, 2006 and 4<sup>th</sup> August 2006 respectively. Therefore to say that the Court had exercised its direction under the proviso while framing issue would be incorrect because when the issues were framed admissions had not taken place. Therefore subsequent event of admission can, therefore, be relied upon by the plaintiff to prove ownership.

28. In the instant case, the plaintiff has admitted contents alongwith document of 5<sup>th</sup> September, 1994 and it is this fact which played an important role in coming to the conclusion that contents stands proved. The learned counsel for both the parties have not shown me any precedent which requires or does not require contents of documents to be proved or not to be proved in a situation where on notice by defendant on plaintiff to admit the document, the plaintiff not only admits the document but also its contents. The decision relied upon by the learned counsel for the plaintiff in the case of *Canara Bank (supra)* deals with where the document was proved by the witness and read with Bankers Books Evidence Act, the Court held that the document stands proved. In the instant case before me, this stage did not arise because the document and its contents were admitted much before the witnesses were cross-examined.

29. The challenge to the auction sale from inception was raised by none other than the plaintiff itself. The Trial Court based on such challenge by the plaintiff held the auction to be contrary to the Major Port Trusts Act. This fact cannot be brushed aside for considering the ownership issue. Why would any stranger challenge the auction sale unless a such person has interest. When challenge by such a person is recognised and upheld, same can certainly be considered by the Court when it comes to assessing the claim of ownership by this very plaintiff.

30. It is also important to note that the defendant themselves relied upon the admission of other documents of which contents were also admitted on 4<sup>th</sup> August 2006 to justify the legality of auction process (which the Trial Court held as illegal) and no proof of its contents was ever sought by the defendant or the Trial Court. Therefore to contend that the document of 5<sup>th</sup> September 1994 which formed part of the same batch of admitted documents alongwith its contents, plaintiff is required to prove ownership is unjustified. It amounts to blowing hot and cold at the same time.

31. It is important to note that the original defendant did not reply to the letter dated 5 September 1994 by denying that the original plaintiff was not the owner of the auctioned goods. The denial of ownership comes in the written statement. Post filing of the written statement on a notice to admit by the original defendant, the original plaintiff not only admitted the execution of the said document but also the contents thereof. Therefore, in my view, the Trial Court was not justified in coming to the conclusion that the document dated 5 September 1994 was not proved.

32. In view of above, the document dated 5 September 1994 clearly states that the original plaintiff is the owner of the auctioned goods and the original plaintiff having admitted the execution and contents thereof and the Court having not exercised its discretion under the proviso to Order XII Rule 2-A(1), the original defendant is now estopped from submitting that the original plaintiff is not the owner of the auctioned goods.

33. The learned counsel for the original defendant has relied upon the decision in the case of *Hiren P. Doshi (supra)* in support of his submission that even if a document is admitted under Order XII Rule 2,

still it needs to be proved. I have perused the said decision. The facts of the said decision were materially different than the facts before me. In the said decision, the original defendant did not respond to the notice issued by the original plaintiff for admitting the documents and therefore, the original plaintiff filed chamber summons calling upon the original defendant to admit the document. There was no admission of the contents of the document in the facts of the said judgment. In the case before me, the contents and execution have both been admitted and no objection was raised at the time of such admission of its execution and contents. Furthermore, in paragraph 12 of the said decision, it is made clear that it is the party who has admitted the documents who can challenge the correctness of the contents of the document and in such a case, the burden would lie on such party who relies on the documents to prove the correctness of such document. In the instant case, the original plaintiff, who has admitted the document, is not challenging the correctness of the contents of the document but on the contrary has accepted the contents of the document and therefore, the decision in the case of ***Hiren Doshi (supra)*** does not assist the original defendant but on the contrary supports the case of the original plaintiff.

34. The observations of this Court in the case of ***Hiren P. Doshi (supra)*** that the document has to be proved is in the context of the proviso to Order XII Rule 2-A(1) of the CPC. The relevant observations are reproduced :-

*“In terms of Rule 2-A of Order XII of the Code of Civil Procedure, 1908, only those documents which were not denied specifically or by necessary implication or stated to be not admitted in the pleading of that party or in his reply to admit documents shall be deemed to have been admitted except as against a person under a disability. In this case, defendants have not expressed any disability. Therefore, only*

*such documents which defendants have not denied specifically or by necessary implication or stated to be not admitted in the written statement can be considered to have been admitted under this Rule. At the same time, Court also has discretion and for reasons to be recorded, to require plaintiff to prove the documents otherwise than by way of admission under Rule 2-A. This, means that the Court should generally admit that if it feels that the plaintiff despite the defendants not denying specifically or by necessary implication or the defendants not stating in the pleading that the document is not admitted or has failed to reply to the notice to admit documents, has to prove the documents, the Court has to give reasons for that and write other way round. The intention behind Rule 2-A of Order XII is to speed up the trial.”*

35. On a reading of the judgment in the case of **Hiren Doshi (supra)**, the said decision does not state that when the contents of the document and the document both are admitted and the Court has not exercised its discretion under the proviso then even in that scenario, the party has to prove the contents of the document. There is a difference between admission of document which may or may not amount to admission of contents in which case contents have to be proved for its truth but when the document and contents both are admitted necessity of proving the contents for its truth would not arise.

36. The issue of “M/s Blackwell Enterprises” being a trade name arose only after the defendant took this objection post filing the suit and, therefore, there was no occasion for the plaintiff to plead the same specifically in the plaint, since the plaint proceeded on a footing that there is no dispute with respect to ownership of the plaintiff to the goods which were auctioned. This has to be read alongwith the notice issued by the advocate for the plaintiff, wherein the plaintiff was described as the owner of the goods. Therefore, the reasoning given by the Trial Court that in the plaint there is no mention of the trade name and, therefore, the claim of ownership is not proved is erroneous.

37. The plaintiff led the evidence of its managing director Mr. Andrew David (PW-2). In the examination-in-chief, the managing director stated on oath that the plaintiff uses the name “M/s. Blackwell Enterprises” to trade in Greasy Texas, Mohair from Texas USA to India and under the said trade name continues to do business with India. In the cross-examination of PW-2, the plaintiff explained that the document which contains the name “M/s. Blackwell Enterprises” is signed by Mr. Simpson, who is employed with the plaintiff. It is also important to note that a managing director will not be aware of each and every transaction and who carries out the instructions and, therefore, no adverse inference can be drawn from the answers which requires a managing director to answer on each consignment of the plaintiff. The PW-2 in his cross-examination has stated that Mr. Simpson instructed a UK based company called Cory Brothers, who in turn availed the services of M/s. Seahorse Shipping Agencies and M/s. Ocean Waves. It is important to note that M/s. Seahorse Shipping Agency and M/s. Ocean Waves were in constant touch with the defendant in its capacity as representative. There is a correspondence between Cory Brothers and M/s. Seahorse Shipping Agency with respect to this transaction. PW-2 in answer to question nos.72 and 73 stated “M/s Blackwell Enterprises” is a trading name used by the plaintiff when exporting Greasy Taxes, Mohair to India and also explained that Bill Blackwell is the name of the person who has signed the document on which the address is shown as Texas, USA and Bill Blackwell works for the plaintiff. The ownership of the goods was admitted by PW-2 in the cross-examination in answer to question no.76. In my view, the documents containing the name of “M/s. Blackwell Enterprises” have been sufficiently explained by PW-2 in his examination- in-chief and in his cross-examination and, therefore, it cannot be said that the plaintiff



has not proved the ownership.

**38.** The evidence of PW-1 has been heavily relied upon by the learned counsel for the defendant to dislodge the claim of the original plaintiff. In my view PW-1 was a clearing agent who would certainly not have any knowledge about the constitution of his client. However, PW-1 has admitted that they were appointed by Cory Brothers and PW-2 has in his evidence stated that Cory Brothers was appointed by the original plaintiff. This chain is relevant for appreciating the evidence. PW-1 in his cross-examination has also admitted that the statement in his evidence to the effect that “M/s. Blackwell Enterprises” is the original plaintiff’s trading partner was made by mistake and he has fairly stated that this mistake was realized after the discussion with the original plaintiff and their advocate’s by which time the correct status of “M/s. Blackwell Enterprises” came to his knowledge. Even otherwise if the evidence of PW-1 is ignored then also, in my view the evidence of PW-2 read with my analysis of Order XII Rule 2-A and the other reasons given above and after appreciating the evidence in totality, it cannot be said that the original plaintiff has failed to prove the ownership.

**39.** It is important to note that evidence has to be appreciated by taking into account all the relevant factors. The fact that the plaintiff was pursuing its claim from 1994 with the defendant with respect to the auctioned goods is not disputed. It is also not disputed that till today other than the plaintiff, no one else has staked its claim to the sale proceeds of the auctioned goods, though almost three decades have passed. The plaintiff has also undertaken to file an indemnity before the Trial Court to secure any future claim against the defendant. This proves the bona fides of the original plaintiff. Even today the original plaintiff has offered to furnish indemnity. Admittedly, the defendant

cannot retain this money and no one else other than the plaintiff is pursuing its claim for the last three decades and based on the document dated 5 September 1994 which is admitted not only qua its execution, but also qua its contents and the fact that PW-2 in his evidence has explained the documents which bears the name of “M/s. Blackwell Enterprises” goes on to show that the claim of ownership has been proved by the plaintiff.

40. The learned counsel for the appellant is justified in relying on the decision of the *Hon’ble Supreme Court in the case of Naranyan Ganesh Dastane (supra)* on applicability of preponderance of probabilities in civil cases. In my view and looking at the facts which are stated above, certainly the preponderance of probabilities based on the above reasons leans in favour of the plaintiff with regard to the issue of proving ownership of the goods which are auctioned.

41. For all the above reasons, appeal deserves to be allowed and the order of the Trial Court to the extent challenged herein by the original plaintiff is quashed and set-aside. It is made clear that interpretation of Order XII is restricted to the facts of the present case only and same should not be read *dehors* peculiar facts of the present case. This precedent should not be read to mean that if only documents are admitted there is no need for its proof since facts before me are different.

42. The decree be directed to be drawn in terms of prayer clause (a) of the plaint with modification with respect to the amount and the rate of interest of 18% p.a. claimed. The High Court on 28<sup>th</sup> July 1999 in a motion by the plaintiff directed the defendant to deposit Rs.11,60,729/- with the Registry. Therefore no interest is payable from the date of deposit on this sum of Rs.11,60,729/- since the defendants’ have

complied with the said order as stated in the affidavit of DW-1. However, defendant would be liable to pay interest on Rs.11,60,729/- from the date of filing of the suit till the above order passed in motion at the rate of 6% p.a. since plaintiff has not led any evidence with regard to the interest at the rate of 18% p.a.

**43.** Insofar as balance amount of Rs.6,24,659 (Rs. 17,85,388/- minus Rs. 11,60,729/-) is concerned, DW-1 in his examination-in-chief in paragraph 29 has said that defendant had incurred expenses as per the work sheet. The said work sheet is at page 371 of the Appeal book which shows Rs.6,62,201/- having been incurred. Plaintiff has not cross-examined the said witness on this issue. Rs.6,62,201 consists of Rs.1,83,007/- sales expenses, customs duty-Rs.3,66,014/- and BPT charges-Rs.1,13,180/- Since sale has been held to be contrary to the Major Part Trusts Act and there is a finding by the Trial Court that all the charges are paid while dealing with legality of the auction, Rs.1,83,007/- and Rs.1,13,180/- is due to the plaintiff. On customs duty since plaintiff did not cross examine Rs.3,66,014/- same cannot be directed to be paid by the defendant to the plaintiff. Therefore the plaintiff is entitle to Rs.2,96,187/- (Rs.1,13,180 plus Rs.1,83,007/-) and interest thereon at 6% p.a. from the date of filing the suit till the date of payment.

**44.** Plaintiff is entitled to the amount deposited Rs.11,60,729/- under order of this Court alongwith interest accrued thereon till today after complying with the procedure in accordance with law.

**45.** In view of above, I pass the following order.

### **ORDER**

- (i) Impugned order dated 26<sup>th</sup> July 2013 is quashed to the extent challenged herein;

- (ii) Appeal is partly allowed. Decree be drawn up accordingly and as more particularly set out in paragraphs 42 and 43 of this judgment;
- (iii) If in future any person raises any claim on the auction transaction for recovery then defendant would not be liable.
- (iv) No order as to cost.

( JITENDRA JAIN, J. )