

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.28 OF 2016

1. Rameshwar s/o Shivling Dhumal,
Age 51 years, Occupation Agricultural,
R/o Hasegaon (Kaij) Tq. Kallam,
Dist. Osmanabad.
2. Angad s/o Shivling Dhumal,
Age 45 years, Occupation Agricultural,
R/o As above. **....Appellants.**

VERSUS

1. Bibhishan s/o Baburao Kale (Died).
2. Gururaj s/o maruti Mogale,
Age 82 years, Occupation Agricultural &
Private Service, R/o Hasegaon (Kaij)
Tq. Kallam Dist. Osmanabad. **....Respondents.**

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Mr. S. V. Chandole, Advocate holding for Mr. D. R. Dhumal,
Advocate for Appellants.

Mr. D. D. Sarvade, Advocate for respondent No.2.

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**WITH
SECOND APPEAL NO.33 OF 2016**

1. Rameshwar s/o Shivling Dhumal,
Age 51 years, Occupation Agricultural,
R/o Hasegaon (Kaij) Tq. Kallam,
Dist. Osmanabad.
2. Angad s/o Shivling Dhumal,
Age 45 years, Occupation Agricultural,
R/o As above. **....Appellants.**

VERSUS

1. Mahadev s/o Rambhau Jadhav (Died),
Through L.Rs.
- 1A. Jaishri w/o Mahadev Jadhav,
Age 44 years, Occupation Household,
R/o Hasegaon (Kaij) Tq.Kallam
Dist. Osmanabad. At Present
Karanjkar Wada, Dattanagar, Behind
New Police Station Kallam, Tq.Kallam
Dist. Osmanabad.
- 1B. Ku. Akash s/o Mahadev Jadhav,
Age 19 years, Occupation Education,
R/o As above.
2. C. B. Bikkad,
Age 50 years, Occupation Advocate,
R/o Kallam Tq. Kallam Dist.Osmanabad.
3. Bibhishan s/o Baburao Kale (Died).
4. Gururaj s/o Maruti Mogale,
Age 82 years, Occupation Agricultural &
Private Service, R/o Hasegaon (Kaij)
Tq. Kallam Dist. Osmanabad. **...Respondents.**

.....

Mr. S. V. Chandole, Advocate holding for Mr.D. R.Dhumal,
Advocate for Appellants.

Mr. D. D. Sarvade, Advocate for respondent No.4.

Mr. S. S. Thombre, Advocate for respondent No.2.

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Judgment :
26-02-2019**

**Date of Pronouncing The Judgment :
29-04-2019**

ORDER :

1. Both the appeals are arising out of a common Judgment and decree passed by the first appellate Court, hence they are taken up for consideration together. Second Appeal No.28 of 2016 is arising out of Judgment and decree passed in Regular Civil Appeal No.158 of 2010 and Second Appeal No.33 of 2016 arises out of Judgment and decree passed in Regular Civil Appeal No.159 of 2010. Both the appeals were heard by learned District Judge - 2, Osmanabad and allowed on 13-08-2015. Regular Civil Appeal No.158 of 2010 was arising out of Judgment and decree passed in Regular Civil Suit No.536 of 1999 by Civil Judge, Junior Division, Kallamb dated 29-03-2010, whereas Regular Civil Appeal No.159 of 2010 was arising out of Judgment and decree passed in Regular Civil Suit No.531 of 2000 (Old Special Civil Suit No.275 of 1998) passed by learned Civil Judge, Junior Division Kallamb, dated 29-03-2010. Parties are almost same, subject matter is also almost same, and therefore, the parties are referred by their nomenclature before trial Court.

2. Present respondent No.2 was the original plaintiff in both the civil suits, whereas the appellants are the respective defendants. In Regular Civil Suit No.531 of 2000 plaintiff had come with a case that,

he is the owner of agricultural land Block No.283 admeasuring 80 R out of 2 Hectare 93 R situated at village Hasegaon (Old Tq.Kaij) Tq. Kallamb Dist. Osmanabad. He had purchased the said property along with right to half share in the water from the well situated in Block No.104 from one Mandubai w/o Vyankat Sontakke by sale deed dated 18-01-1993. He possesses and cultivates the said land since the date of sale deed. He obtained the 7/12 extract of his land on 22-09-1998 and saw that the name of defendant No.1 was entered by virtue of Mutation Entry No.568 as owner. He therefore, obtained copy of mutation entry and came to know that the said mutation has been sanctioned on the basis of compromise decree passed in Regular Civil Suit No.174 of 1995. He thereafter collected all the necessary documents and came to know that Mahadev Rambhau Jadhav had filed Regular Civil Suit No.174 of 1995 in July 1995 contending that, plaintiff had executed gift deed dated 19-07-1995 in favour of defendant Mahadev. It was also contended that, the possession of the gifted property was handed over to him. According to the plaintiff, he had never executed any document under the name and style as gift deed in favour of defendant Mahadev nor he had appeared or compromised the suit by engaging any advocate. It is stated that, the said deed is false and fabricated.

The suit was filed on 24-07-1995. Defendants therein (i.e. the plaintiffs in this suit) was shown to have appeared on 25-07-1995 *suo motu* by filing pursis. It is stated that, defendant No.2 was shown as his advocate in that suit and by playing fraud on the Court and impersonating plaintiff consent decree has been obtained by fraud. It is stated by the plaintiff that, he had no reason to gift away the property to defendant No.1. In fact the concerned Court without looking at the documents passed the decree on the basis of a unregistered gift deed. The title over the suit land has not been transferred by the said document in favour of defendant No.1. Therefore it is stated that, the revenue entry is not binding on the plaintiff. By way of amendment it was contended that defendant No.1 has executed a sale deed in favour of defendant No.3 on 15-05-1999 in respect of the suit land, therefore it is *void ab-initio*. Further defendant No.3 executed sale deed on 05-01-2000 in favour of defendants No.4 and 5. On the basis of sale deeds those defendants are obstructing the possession of the plaintiff over the suit land. Therefore, he prayed for a declaration that the gift deed dated 19-07-1995 is *void ab initio* and cancellation of decree in Regular Civil Suit No.174 of 1995, consequential prayer of injunction was also prayed.

3. As regards Regular Civil Suit No.531 of 2000 initially the original defendant No.1 had filed written statement and contested the suit, however during the pendency of the suit, he died and his representatives were brought on record, however the legal representatives of defendant No.1 have failed to file written statement or appeared in the matter, and therefore, the suit proceeded either without written statement or *ex-parte* against them.

4. As regards Regular Civil Suit No.536 of 1999 is concerned, the plaintiff had contended that, during the pendency of the earlier suit, the defendant No.1 has executed sale deed in favour of defendants No.3 to 5, and therefore the suit for permanent injunction as well as for declaration of his title was filed.

5. Defendant No.1 in that suit expired. Defendants No.2 and 3 filed written statement. They denied the title as well as possession of plaintiff over the suit property. It is stated that, Mahadev became owner of the suit property by virtue of gift deed dated 19-07-1995. He sold the said land to defendant Bibhishan and they have purchased the suit land from Bibhishan by executing sale deed dated

05-01-2001. They have stated that, they are the bonafide purchasers for value without notice, and therefore they prayed for dismissal of the suit by grant of compensation. It appears that, they have filed counter claim to declare their ownership.

6. Plaintiff filed written statement to the counter claim and reiterated the same facts which he had pleaded in his suit.

7. In both the matters issues came to be framed and the parties have led oral as well as documentary evidence. Taking into consideration the evidence as well as documents, the learned trial Court though Judgment was passed on the same day, but there were two separate Judgments, dismissed both the suits. Hence, the original plaintiff filed Second Appeal No.158 and 159 of 2010. After hearing both the sides, the learned first appellate Court has allowed the appeal with costs. It was declared that, plaintiff is the owner of the suit property. The Judgment and decree passed in Regular Civil Suit No.174 of 1995 was cancelled. Consequential prayer of injunction was granted as against the defendants, their servants, agents or anybody claiming through them, were permanently restrained from obstructing the possession of plaintiffs over the suit land. Hence the defendants in both the suits have filed these second

appeals.

8. Heard Mr. S. V. Chandole, learned Advocate holding for Mr. D. R. Dhumal, learned Advocate for Appellants, Mr. D. D. Sarvade, learned Advocate for respondent No.2 in Second Appeal No.28 of 2016 and Advocate for Respondent No.4 in Second Appeal No.33 of 2016, and also heard Mr. S. S. Thombre, learned Advocate for respondent no.2 in Second Appeal No.33 of 2016.

9. It will not be out of place to mention here that, with consent of both the parties, the matter has been decided finally at the stage of admission itself. It is now required to be seen as to whether the appellants were successful in showing substantial question of law and/ or such facts that this Court can interfere in the decree and Judgment drawn by the first appellate Court. Learned advocate appearing for the appellant submitted that, plaintiff contends that he had purchased the land from one Mandubai on 18-01-1993. Name of Mahadev Jadhav came to be mutated to the revenue record of the suit land vide Mutation Entry No.568. Plaintiff has come with a case that, decree obtained in Regular Civil Suit No.174 of 1995 is illegal. Plaintiff has specifically come with a case that, he had never contested or given consent for any decree. Plaintiff has also

contended that, the decree was obtained by fraud. However, when *Order XXIII Rule 3* of Code of Civil Procedure provides that,

“Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith.”

This procedure was followed before the trial Court who was dealing with Regular Civil Suit No.174 of 1995. *Sub-rule (4) of Rule 1 of Order XXIII* of Code of Civil Procedure provides,

“Where the plaintiff---

(a) abandons any sit or part of claim under sub-rule (1),
or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

Therefore, the institution of the fresh suit was barred in this case. In fact an application could have been filed by the plaintiff to contest the matter but he could not have instituted a separate suit. In fact

in that case, the plaintiff had filed written statement along with the Vakalatnama and then accepted the claim of the plaintiff therein. Therefore, it was the Judgment on admission as contemplated under Order XII Rule 6 of Code of Civil Procedure.

10. The learned advocate Mr. S. V. Chandole appearing in Second Appeal No.28 of 2016 made submission in addition to the submissions on behalf of appellants in Second Appeal No.33 of 2016 that the subsequent suit was barred under Order II Rule 2 of Code of Civil Procedure. In fact in the suit that was filed in 1999 i.e. Regular Civil Suit No.536 of 1999, he could have made all the prayers which he has then subsequently made in Regular Civil Suit No.531 of 2000. Therefore, Regular Civil Suit No.531 of 2000 was barred under Order II Rule 2 of Code of Civil Procedure. Learned advocate appearing for the appellants have relied on the decision in, *Pushpa Devi Bhagat (Dead) Through LR. Sadhna Rai (Smt) Versus Rajinder Singh And Others*, reported in (2006) 5 Supreme Court Cases 566, wherein it has been held that,

" Order 23 Rule 3 consists of two parts. The first part provides that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in

part by any lawful agreement or compromise in writing and signed by the parties, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith. The second part provides that where a defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such satisfaction to be recorded and shall pass a decree in accordance therein."

" The difference between the two parts of Order 23 Rule 3 CPC is this : where the matters falls under the second part, what is reported is a completed action or settlement out of court putting an end to the dispute, and the resultant decree recording the satisfaction, is not capable of begin enforced by levying execution. Where the matter falls under the first part, there is a promise or promises agreed to be performed or executed, and that can be enforced by levying execution. While agreements or compromises falling under the first part can only be by an instrument or other form of writing signed by the parties, there is no such requirement in regard to settlements or satisfaction falling under the second part. Where the matter falls under the second part, it is sufficient if the plaintiff or the plaintiff's counsel appears before the court and informs the court that the subject-matter of the suit has already been settled or satisfied."

It was also held in this case that,

“ When no evidence having been led to refuse plaintiffs claim, necessary conclusion is that, defendants admitted plaintiffs claim. Then such decree can also be construed as a Judgment on admission under Order XII Rule 6 of (6) Code of Civil Procedure. ”

11. Further reliance has been placed on the decision in, *Karam Kapahi and Others Versus Lal Chand Public Charitable Trust and Another*, reported in (2010) 4 Supreme Court Cases 753, wherein the principles behind Order XII Rule 6 of Code of Civil Procedure were elaborated ;

"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". 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. 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 justitiae". 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. 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 inasmuch 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". In the present case where the controversy is between the parties on an admission of non-payment of rent, judgment can be rendered on admission by the court. The provision under Order 12 Rule 6 of the Code is enabling, discretionary and permissive and is neither mandatory nor is it peremptory since the word "may" has been used. Thus in a given situation, as in the instant case, the said provision can be applied in rendering the judgment."

12. Further reliance has been placed on the decision in, *Vishankumari Udaysingh Varma and Another (Smt.) Versus Vijaysingh Rajasingh Varma and Others*, reported in 2016 (4) Bom. C. R. 481, wherein it has been held by the Division Bench of this Court that,

"Conjoint reading of provisions of Rule 3 and 3-A of Order 23 of Code of Civil Procedure necessarily implies that a party to an earlier suit cannot bring fresh suit to

assail a decree passed under compromise.”

13. Per contra, the learned advocate for the respondent supported the reasons given by the first appellate Court and contended that, defendants have failed to prove that the property was validly gifted by plaintiff. In fact the defendants in Regular Civil Suit No.531 of 2000 had failed to contest the matter. They had not even filed the written statement. Under such circumstance they cannot claim anything on merits. It was properly considered by the learned first appellate Court as to how the decree in Regular Civil Suit No.174 of 1995 is illegal, improper and not binding on the plaintiff. It was held that the plaintiff has possession over the suit land. There was no question of gifting away the property to defendant No.1. The fraud that was played on the Court was very much obvious from the record, and therefore, the suit was maintainable when it was contended that, the decree has been obtained by fraud. The learned Court who had recorded the compromise in Regular Civil Suit No.174 of 1995 failed to consider that the alleged gift deed is an unregistered document. He has placed reliance on the decision in, *Ganpatrao s/o Ramji Nagul & Anr. Versus Dattatraya Guru Daulatgiri Maharaj & Anr.*, reported in 2010 (1) ALL MR 802,

wherein it has been held that,

"In the instant case, defendant has claimed his title over suit property on the strength of an unregistered gift deed executed by plaintiff community court observed the following :-

By virtue of S.17 of Registration Act, unregistered instrument executed in favour of defendant by the plaintiff community will not vest any title in him and, furthermore, the document being not in consonance with S.123 of Transfer of Property Act, cannot be construed as evidence entitling defendant to claim the property. Unregistered instrument of gift shall have no effect of transfer of title. Thus it can be concluded that no title has been passed in favour of defendant by virtue of unregistered instrument of gift which is in conflict with the provisions of S.17 of Registration Act and S.123 of Transfer of Property Act."

He also relied on the case in, *Bhoop Singh Versus Ram Singh Major and Others*, reported in *AIR 1996 Supreme Court 196 (1)*, wherein it is held that,

"The legal position qua Clause (vi) of Section 17 (2) can be summarized as below :

"(1) Compromise decree of bona fide, in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration

would not require registration. In a converse situation, it would require registration.

(2) If the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs.100/- or upwards in favour of any party to the suit, the decree or order would require registration.

(3) If the decree were not to attract any of the clauses of sub-section (1) of Section 17, it is apparent that the decree would not require registration.

(4) If the decree were not to embody the terms of compromise, benefit from the terms of compromise cannot be derived, even if a suit were to be disposed of because of the compromise in question.

(5) If the property dealt with by the decree be not the "subject matter of the suit or proceeding" Clause (vi) of sub-section (2) would not operate."

And it was submitted that, since it was a compromise decree in which a declaration was sought regarding title to the suit property and the gift deed was unregistered but then the plaintiff therein was getting the property transferred to him, then he ought to have registered the compromise decree. It was a compulsorily registrable

document. He further submitted that, there was no question of bar under Order II Rule 2 of Code of Civil Procedure for institution of the second suit i.e. Regular Civil Suit No.531 of 2000 because the cause of action was different as against the other defendants therein. They obstructed the possession of the plaintiff at a subsequent point of time.

14. In order to buttress the said submission he placed reliance on, *Rikabdas A. Oswal Versus Deepak Jewellers And Others*, reported in (1999) 6 Supreme Court Cases 40, wherein it has been held that,

“If the cause of action is different then there is no application of Order II Rule 2 of Code of Civil Procedure.”

Thereupon it was submitted that, the First Appellate Court has taken a correct view and no substantial question of law can arise requiring the admission of the second appeal.

15. It is not in dispute that, initially plaintiff was owner the of Gut No.283 admeasuring 80 R along with half share in the well situated in village Hasegaon. He had purchased said property by registered sale deed dated 18-01-1993 from Mandubai Sontakke. It is but natural that after the said sale deed, he would have been put in possession of the suit property and therefore he was cultivating the

said land. According to him he noted the mutation entry in the name of original defendant No.1 Mahadev Jadhav in the year 1998 and traced out that, it was by virtue of a compromise decree that was passed in Regular Civil Suit No.174 of 1995. Plaintiff has deposed to support his contention that, he never appeared in the matter, he had not engaged defendant No.2 advocate to defend himself or place written statement of admission in that suit. Record of that suit shows that suit was filed by Mahadev against the present plaintiff and in the written statement the contention raised by Mahadev in the plaint was admitted totally. Mahadev had contended that, present plaintiff has gifted him the property by document dated 15-05-1999. According to the plaintiff he has never signed that document.

16. It is also not in dispute that, the said document is insufficiently stamped and unregistered document. Under such circumstance the plaintiff in the present case has sought declaration that the said compromise is not binding on him, it has been arrived at and the decree has been obtained by fraud and even the gift deed is *void ab initio*. It will not be out of place to mention here that, original defendant No.1 had resisted the claim by filing written

statement but after his death before evidence was led his legal representatives were brought on record but they did not file written statement. The other defendants have also not filed their written statement. So whatever evidence was led by the plaintiff had gone unchallenged on record. In spite of this fact it appears that the learned Trial Court dismissed the suit. Much burden was cast on the plaintiff to show that, the signature on the gift deed, written statement in Regular Civil Suit No.174 of 1995 were not send to handwriting expert, and therefore, the burden is stated to have not been discharged by the plaintiff. It appears that, the learned trial Court expected unnatural things when the defendants had not challenged the said part. Further the learned trial Court did not consider as to whether the 'decree' passed in Regular Civil Suit No.174 of 1995 was illegal or not, that was the main contention. The said fact has been considered by the First Appellate Court. It is required to be seen as to whether in Regular Civil Suit No.174 of 1995 when it was presented before the concerned Court that the defendants therein had admitted the claim of the plaintiff therein, then whether that Court was bound to pass any decree or not. In *Himani Alloys Limited Versus Tata Steel Ltd.*, reported in, [2011] 7 SCR 60, it has been observed that,

“Order 12 Rule 6 of Code of Civil Procedure being an enabling provision, it is neither mandatory nor prepatory but discretionary. The Court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a Judgment on admission is a Judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore, the unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is a clear admission which can be acted upon.”

Similar view was also taken in, *Uttam Singh Duggal & Co. Ltd. Versus United Bank of India*, reported in 2000 (7) Supreme Court Cases 120, *Karam Kapahi And Others Versus Lal Chand Public Charitable Trust*, reported in (2010) 4 Supreme Court Cases 754, and *Jeevan Diesels and Electricals Ltd. Versus Jasbir Singh Chadha*, reported in 2010 (6) Supreme Court Cases 601. This legal position has been reiterated by Apex Court recently in *Hari Steel and General Industries Ltd. & Anr. v/s. Daljit Singh & Ors [CIVIL APPEAL NO. 4265 OF 2019 [Arising out of S.L.P.(C)No.31176 of 2018] decided on 24-04-2019]*. It has been held that, “In any event, even

in a given case, the admissions are categorical and unconditional, whether any inference can be drawn on admissions having regard to documents placed on record, is a matter to be considered having regard to facts of each case. There cannot be any straight jacket formula to extend the benefit of Order XII Rule 6 of CPC". Therefore, the circumstances before the Court in Regular Civil Suit No. 174 of 1995 were such that provisions of Order XII Rule 6 of Code of Civil Procedure ought not to have been invoked.

17. In *Razia Begum Versus Sahebzadi Anwar Begum & Ors.*, reported in *AIR 1958 SC 886 = 1959 SCR 1111*, it was held that,

"Order 12 Rule 6 has to be read along with Proviso to Rule 5 of Order 8. That is to say, notwithstanding the admission made by the defendant in his pleading, the Court may still require the plaintiff to prove the facts pleaded by him in the plaint."

Thus, in spite of admission of a fact having been made by a party to the suit, the Court may still require the plaintiffs to prove the fact which has been admitted by the defendants. This is also in consonance with the provisions of Section 58 of the Evidence Act which provides as under :

"58. Facts admitted need not be proved – No fact need

be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings :

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions” (stress supplied)

The proviso to this Section specifically gives a discretion to the Court to require the facts admitted to be proved otherwise than by such admission. The Proviso corresponds to the Proviso to Rule 5 (1) Order VIII of Code of Civil Procedure.

18. In view of the above, it is clear that the Court, at no stage, can act blindly or mechanically. While enabling the Court to pronounce judgment in a situation where no Written Statement is filed by the defendants, the Court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under Order VIII Rule 10 of Code of Civil Procedure where the Court can either pronounce judgment against the defendants or pass such order as it may think fit.

19. Having regard to the provisions of Order XII Rule 6; Order V Rule 8, specially Proviso thereto; as also Section 58 of the Evidence Act, this Court in Razia Begum's case (Supra) observed as under :

“In this connection, our attention was called to the provisions of R.6 of O.12 of the Code of Civil procedure, which lays down that, upon such admissions as have been made by the Prince in this case, the Court would give judgment for the plaintiff. These provisions have got to be read along with R.5 of O.8 of the Code with particular reference to the proviso which is in these terms:”

“Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.”

The proviso quoted above, is identical with the proviso to Section 58 of the Evidence Act, which lays down that facts admitted need not be proved. Reading all these provisions together, it is manifest that the Court is not bound to grant the reliefs prayed for, even though the facts alleged in the plaint, may have been admitted.

20. As pointed out earlier, the Courts are not to act blindly upon the admission of a fact made by the defendants in their Written Statement nor the Court should proceed to pass judgment blindly

merely because a Written Statement has not been filed by the defendants traversing the facts set out by the plaintiffs in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendants, the Court should be a little cautious in proceeding under Order VIII Rule 10 of Code of Civil Procedure. Before passing the judgment against the defendants, it must be seen that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiffs without requiring them to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which needs to be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendants who have not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiffs to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order VIII, or the expression "may make such order in relation to

the suit as it thinks fit" used in Rule 10 of Order VIII.

21. Thus from the pronouncements of the Apex Court above, it can be seen that, merely because a certain fact is admitted by the defendant in written statement, Court is not bound to accept it blindly. The Court is bound to consider as to whether all the legal requirements are complied with and what would be the consequences of accepting the admission and passing a decree on the basis of that admission. Here in this case the certified copy of the plaint, written statement and the Judgment in Regular Civil Suit No.174 of 1995 has been filed at Exhibits 7, 15 and 9 respectively. The gift deed which was produced before the concerned Court, certified copy of the same also has been filed but it has not been exhibited. The perusal of all these documents would clearly show that, Mahadev was claiming ownership by virtue of gift deed on the basis of said 'unregistered document'. It is to be noted that, when the plaintiff had purchased the said property from Mandubai, the consideration amount was Rs.41,000/-. Therefore, definitely the value of the property under alleged gift deed was more than Rs.100/-, therefore the said document was a compulsorily registrable document. It could not have given title to Mahadev, as it

amounted to "transfer", unless it would have been duly registered. It appears that, the concerned Court i.e. Jt. Civil Judge, Junior Division, Kallam, who passed the decree in Regular Civil Suit No.175 of 1995 failed to consider that though in the written statement execution of the gift deed was admitted yet it was not a legal document, and therefore, the declaration of ownership could not have been given. The ratio laid down in *AIR 1996 Supreme Court 196 (1)* and *2010 (1) ALL MR 802* are applicable here. When declaration of ownership could not have been granted to Mahadev in that suit as the document was not registered and duly stamped and without adopting the procedure of impounding the document, the said defect could not have been cured, Mahadev had one more chance to get the said decree registered as per the ratio laid down in *AIR 1996 Supreme Court 196 (1)*. That has also not been followed in this case. Under such circumstance the said decree that was passed in Regular Civil Suit No.174 of 1995 was illegal. The concerned Court ought not to have resorted to order XII Rule 6 of Code of Civil Procedure. In fact that option was never available to the concerned Court. Thus, when the title did not pass to Mahadev by virtue of either the gift deed or the decree that was obtained, present suit i.e. Regular Civil Suit No.531 of 2000 was definitely

maintainable. It is to be noted that, after getting the decree Mahadev has sold the said property to defendant No.3, that too during the pendency of the suit, and thereafter defendant No.3 has sold the said property to defendants No.4 and 5. Therefore, the sale deeds in favour of defendants No.3 and 5 are *void ab initio* and they are hit by principle of *lis pendens*.

22. Another fact is also required to be considered that, in Regular Civil Suit No.174 of 1995 as the certified copies of the said record has been produced, the defendant therein (present plaintiff) is shown to have appeared *suo motu*. The suit was filed on 24-07-1995. Order of issuance of summons was passed by the concerned Court on 25-07-1995 and on the same day the pursis Exhibit 8 was filed stating that the defendant is appearing *suo motu* and it is not necessary that he should be served with a notice or summons. It appears that, he had come with the written statement. In the written statement initially date was written as 24-07-1995 and after scoring it out, date 25-07-1995 has been written by hand. That means, even before the filing of the suit it appears that the written statement was ready and taking into consideration the said written statement even the Judgment has been pronounced by the learned

trial Court on 31-08-1995. The gift deed bears date 19-07-1995. The said chronology ought to have been considered by the concerned Court and it ought to have been predicted that there is something fishy in the case and under such circumstance the concerned Court ought not to have resorted to Order XII Rule 6 of Code of Civil Procedure. On this ground also when the mechanical Judgment and decree has been passed, it deserves to be set aside.

23. Now the appellant has also contended that, a separate suit ought not to have been filed and only an application before the same Court ought to have been filed, and therefore, the reliance was placed on *Pushpa Devi Bhagat (Supra)* and other pronouncements. The ratio laid down in those cases cannot be denied. However, it is to be noted that, the said pronouncements was under Order XXIII Rule 3 of Code of Civil Procedure whereas in this case the Court which dealt with Regular Civil Suit No.174 of 1995 had proceeded under Order XII Rule 6 of Code of Civil Procedure. As per Para 26 of *Pushpa Devi Bhagat (Supra)* in that case the plaintiff had examined two witnesses. The first defendant therein was ex-parte. Defendants No.2 to 5 did not lead evidence in spite of opportunities and under those circumstance it was observed that the defendants

have admitted the claim of the plaintiff. Here the facts are slightly different. It appears from the Judgment pronounced in Regular Civil suit No.174 of 1995 that the stage of leading evidence by any of the parties was not taken up at all. Even in *Vishankumari Udaysingh Varma and Another (Supra)* what was held by Division Bench of this Court was that, when there is compromise decree under Order XXIII Rule 3 and 3-A of Code of Civil Procedure, then a separate suit is barred. But here in this case, the plaintiff is coming with a case that the decree has been obtained by fraud and there appears to be substance in the say of the plaintiff taking into consideration the chronology of the events which have been narrated earlier.

24. In *S. P. Chengalvaraya Naidu Versus Jagannath*, reported in 1994 (1) SCC 1, Apex Court has stated that,

“fraud avoids all judicial acts, ecclesiastical or temporal.”

It was further observed that,

“An act of fraud on Court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. The principles of “finality of litigation” cannot be passed to the extent of such an absurdity that

it becomes an engine of fraud in the hands of dishonest litigants. The Court of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

Thus, it can be seen that even the Apex Court had expressed concern for the frauds committed on Courts, then decrees are obtained and the present case is the best example of that. In spite of the fact that the document on which the plaintiff in Regular Civil

Suit No.174 of 1995 was claiming his rights, has not adhered to the legal process. The document on which his claim has rested was an unregistered and insufficiently stamped document which could not have given him any right, title or interest over the suit property. Unfortunately the concerned Court had not considered the said fact and inappropriately proceeded under Order XII Rule 6 of Code of Civil Procedure. In the present case, the defendants cannot resist the plaintiff on the basis of the said decree that was obtained by fraud. Under such circumstance the separate suit was definitely maintainable.

25. It cannot be also said that there is a bar of *res judicata* in any manner for Regular Civil Suit No.531 of 2000 as well as Regular Civil Suit No.536 of 1999 for the simple reason that basically the decree in Regular Civil Suit No.174 of 1995 was obtained by fraud and secondly when Regular Civil Suit No.536 of 1999 was pending, Regular Civil Suit No.531 of 2000 was filed. Though both the Judgments were pronounced on different dates yet the appeals were simultaneously heard in respect of both the decrees. Therefore, when the appeals were decided, there was no finality achieved in respect of any of the findings in both the decrees. Further in

Ramchandra Sen Versus Savitri Devi and Others, reported in 2003 (8) SCC 319, it has been observed that,

“Once it is held that a Judgment and decree obtained by practicing fraud on the Court, it is trite that the principles of res judicata shall not apply. The High Court, therefore, in our opinion committed a serious error in referring to the earlier orders passed by it so as to shut the doors of justice, on the face of the appellant, for all time to come. We, therefore, are of the opinion that the impugned Judgment dated 10-12-1998 cannot sustained.”

26. Present suit was also not barred under Order 2 Rule 2 of Code of Civil Procedure as the cause of action for both the suits are different. The plaintiff in this case had proved that, decree in Regular Civil Suit No.174 of 1995 was obtained by Mahadev by practicing fraud on Court. The document on the basis of which he was claiming ownership was cannot be said to be a document of title. The said gift deed had not transferred title in Mahadev nor the decree that was passed in Regular Civil Suit No.174 of 1995 had given him title. Under such circumstance, he had no authority to sell out the land to defendants No.3 to 5, and therefore, the learned First Appellate Court has rightly allowed the appeals and the declaration in respect of suit property has been rightly granted to the plaintiff.

The Judgment and decree passed in Regular Civil Suit No.174 of 1995 has been rightly cancelled and the defendants have been rightly permanently enjoined from disturbing the plaintiffs possession over the suit land. Therefore, no substantial question of law is arising in this case in order to admit the second appeals. It has to be dismissed at the threshold for the above said reasons. Hence, both the second appeals are disposed of as "**not admitted**".

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.