# THE HIGH COURT OF SIKKIM AT GANGTOK

(Civil Appellate Jurisdiction)

DATED : 06.08.2013

**CORAM**

**HON'BLE THE CHIEF JUSTICE**
**MR. JUSTICE PIUS C. KURIAKOSE**

R.S.A. No. 1 of 2012

1. Shri Umesh Agarwal,
   S/o Late Bhaskaranand Agarwal,

2. Shri Mudit Agarwal,
   S/o Umesh Agarwal,

3. Shri Sohil Agarwal,
   S/o Umesh Agarwal,

All residents of M.G. Marg, Gangtok,
East Sikkim.

..... **Appellants/Plaintiffs.**

- versus -

1. Shri Mahesh Agarwal,
   S/o Bhaskaranand Agarwal,

2. Shri Mihir Agarwal,
   S/o Shri Mahesh Agarwal,

3. Smt. Mridula Agarwal,
   W/o Shri Mahesh Agarwal,

All residents of M.G. Marg, Gangtok,
East Sikkim.

..... **Respondents/Defendants.**

For Appellants/Plaintiffs : M/s. Bhaskar Raj Pradhan, Sr. Advocate with Tashi R. Barfungpa, Yangchen Doma Gyatso, Yadev Sharma and Karma Tshering Bhutia, Advocates.

For Respondents/Defendants : M/s. N. Rai, Sr. Advocates with Najier Ahmed and Sushant Subba, Advocates.

# J U D G M E N T

***Pius, CJ***

Surviving plaintiffs in Title Suit No. 01/2009 on the files of learned Civil Judge, East Sikkim, who were appellants in Title Appeal Case No. 08/2011, have filed this Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC') impugning that the decision concurrently taken by the lower Appellate Court and the Trial Court on an application filed under Order XII Rule 6 of CPC by the defendants to non-suit them on the basis that the title suit filed by them was liable to be dismissed straightway on the basis of admission already made by them in a previous litigation. The facts will have to be adverted to briefly.

**2.** The appellants will hereinafter be referred to as the surviving plaintiffs and the respondents will hereinafter be referred to as the defendants or by their names. The suit was instituted originally as Civil Suit No. 10/1994 by the surviving plaintiffs and also by one Bhaskaranand Agarwal, father of appellant No. 1 and respondent No. 1 in respect of 9 items of immovable properties described in Schedule - A to the plaint and another immovable property described in Schedule – B, which is in fact the first item described in Schedule – A itself. The suit was amended and the following are the reliefs sought for in the amended plaint:

(a) For declaration that the suit properties mentioned in the Schedule 'A' hereunder are joint family properties and/or the coparcenary properties of the Plaintiffs and the Defendants.

(b) For declaration that the deed of gift executed and registered on 31.1.1989 by the Defendant No. 1 in favour of Defendant No. 3 in respect of the properties mentioned in Schedule 'B' hereunder is void and inoperative in law and is not binding upon the Plaintiffs and/or in coparceners of the Hindu undivided family or upon any members of

the joint family of the Plaintiffs and the Defendants.

(c) For permanent injunction restraining the Defendants and each one of them from transferring alienating, encumbering, dealing with and/or from disposing of any of the joint properties of the parties mentioned in Schedule 'A' hereunder and also from interfering with the peaceful possession of the Plaintiffs and their family members in all the joint properties as aforesaid including in Schedule 'B' hereunder and also from interfering with running of the joint family business in any manner whatsoever.

(d) For Receiver.

(e) For Costs.

(f) For such other relief or reliefs to which the Plaintiffs are entitled in law and equity.

As per the amendment, three more items of properties are incorporated in Schedule – A, and these three items are not immovable properties as such, but they are three different business concerns.

**3.** The first defendant Mahesh Agarwal as already indicated is the direct brother, being the elder brother of appellant- surviving plaintiff No. 1 Umesh Agarwal. The second defendant is the son of first defendant and the 3rd defendant Smt. Mridula Agarwal is the wife of first defendant and in her favour Annexure – B Gift Deed dated 31.03.1989 is executed by her husband, Mahesh Agarwal, jointly with 'M/s Shree Mulchand and Sons' a proprietary concern belonging to him.

**4.** The case of the plaintiff is that all the properties including the Schedule – B property, which appears to be the most valuable amongst the immovable properties described in Schedule – A belong to a Hindu Undivided Joint Family in which the members presently are the three appellants and defendant Nos. 1 and 2. According to them, in the above Hindu Undivided Joint Family, no partition has so far taken place in respect of the immovable properties scheduled to the plaint. In this context they claim that all these properties were allotted to a registered partnership firm by name 'M/s Shree Mulchand and Sons' by the Government of Sikkim by an order of allotment dated

14.09.1944 which is produced in the case as Exhibit P-1. It is, therefore, further case that pursuant to a family arrangement entered into at Calcutta on 06.06.1968 between the then members of the Hindu Undivided Joint Family including late Bhaskaranand Agarwal, 11 items of immovable properties including the immovable properties which are scheduled to the plaint to the branch consisting of Bhaskaranand Agarwal and his two sons namely, the first defendant and the first plaintiff. Exhibit P-2 is copy of the above family arrangement. Thus, though both parties seem to be tracing their title to Exhibits P-1 and P-2, they are at issue as to whether the property continued to be joint property between them while the plaintiffs contend that the immovable properties continued to be their joint property of themselves and defendant No. 1 and 2, the contention of defendants is that pursuant to a process of partition which started in 1973 at the time when Bhaskaranand Agarwal was alive the entirety of their right, title and interest of the original partnership firm by name M/s Shree Mulchand and Sons, his business and properties at Mangan Bazar, at Dikchu and at Gangtok Bazaar

including the properties described in Schedule – B were allotted exclusively and separately to the first defendant and, accordingly, a new firm was registered on 16.06.1979 under the same name Shree Mulchand and Sons under the sole proprietorship of the first defendant. It is contended by them that as the above registration was done after undergoing all formalities and public notice by virtue of the above registration the first defendant became the absolute owner in respect of the business of Shree Mulchand and Sons and the immovable properties described as items No. 1, 4, 5 and 6 in Schedule – A stood vested absolutely in defendant No. 1. It is also contended that the first defendant who thus became the absolute owner of the properties would convey his ownership over item No. 1 in Schedule – A (Schedule – B property) in favour of his wife, the third defendant Mridula by a Gift Deed dated 31.03.1989. It is contended that upon such acquisition of ownership by virtue of Gift Deed the 3rd defendant made an application for mutation of the properties covered by the Gift Deed, the properties now stand mutated in favour of the third defendant. It is also contended that under the

above partition which commenced in 1973 properties described in some other items 2, 3 and 7 in Schedule-A were allotted to plaintiff No. 2 and that he is carrying on a separate business.

**5.** Answering the plaintiffs' case that they together with defendant Nos. 1 and 2 continued to be a mitakshara coparcenary, it is contended that the Hindu Undivided Joint Family has no application in Sikkim. Pristine Hindu Law does not apply to Hindus in Sikkim at all, it is so contended. On the pleadings raised by the parties at the trial Court formulated the following 8 issues for trial:

1. Whether the plaintiffs have any cause of action to bring the instant suit?

2. Whether the suit is barred by limitation?

3. Whether the suit is properly valued?

4. Whether the properties as described in Schedule 'A' to the plaint are coparcenery property/joint family property of the plaintiffs and the defendants?

5. Whether the transfer of the property under Schedule 'B' to the plaint as effected by the

defendant No. 1 in favour of defendant No. 3 by way of gift is void, inoperative and not binding upon the plaintiffs?

6. Whether the suit is bad for mis-joinder and non- joinder of necessary parties?

7. To what relief or reliefs, if any, are the plaintiffs entitled?

8. Had the defendant No. 1 any right and authority to transfer the joint property as described in schedule 'B' to the plaint by executing the alleged Deed of gift?

**6.** Pursuant to the order passed by the Court for production of documents, the plaintiffs produced as many as 36 documents marking them as Exhibit P-1 to Exhibit P-36. On their sides, the defendants produced as many as 58 documents. They also sought for summoning of 5 documents from proper custody. For various reasons the trial of the suit got adjourned. At that juncture, the defendants would file an application under Order XII Rule 6 CPC praying that the Court may pass a judgment in the suit dismissing the suit on the basis of admissions made by the

plaintiffs in a Civil Suit No. 76/1986 on the files of Civil Judge, East Sikkim through the depositions of the deceased original first plaintiff Bhaskaranand Agarwal and the surviving 1st plaintiff Umesh Agarwal, that the immovable properties in question are not coparcenery properties and that the parties are not joint owners of the properties. Reliance was placed by the defendants on the depositions given by appellant No. 1 as PW-2 and also on their father Bhaskaranand Agarwal as PW-1 in that suit. To this application counter was filed by appellant No. 1 and appellant Nos. 2 and 3 separately and it was contended by the appellants that it is not correct to say that in Civil Suit No. 76/1986 plaintiff No. 1 and late Bhaskaranand Agarwal had admitted that Schedule – B property belongs absolutely to the 3rd defendant. It was also contended that it was not admitted that partition of the property scheduled to the plaint had taken place during the life time of Bhaskaranand Agarwal. It was also contended that the deposition in Civil Suit No. 76/1986 was given in the context of that civil suit and for the purpose of that suit only. It was contended that the subject matter of that civil suit and the present

suit were entirely different. It was also contended that during trial it will be possible for the appellants-plaintiffs to convince the Court that the depositions in Civil Suit No. 76/1986 was given on the basis of an understanding between the members of the undivided family namely Bhaskaranand Agarwal, Mahesh Agarwal and Umesh Agarwal for accomplishment of their common end which was to evict a recalcitrant tenant who was not paying rent due in respect of the premises under his possession. It was contended that at any rate the so called admission is not liable to be acted upon as it is already retracted in the present suit.

**7.** The learned trial Judge would consider the application and the contentions raised and after hearing the parties would come to the conclusion that the appellant No.1 had made “clear, unequivocal and unambiguous” admission regarding the ownership of the business and properties of M/s Shree Mulchand and Sons. According to the learned Judge it was admitted by the appellant No. 1 that the first defendant is the absolute owner and proprietor of the business and properties of M/s Shree

Mulchand and Sons and this admission of appellant No. 1 clearly proves the case of the defendants.

**8.** The learned trial Judge would conclude that Order XII Rule 6 CPC would squarely apply to the present case and the very purpose of that Rule being to render a speedy justice, the Court should not narrow down the above purpose by not acting upon the admissions of PW-1/ appellant No.1 which he had given in the earlier civil suit. For coming to such conclusion the learned Judge relied on the judgment of the Hon'ble Supreme Court in the case of ***Uttam Singh Duggal & Co. Ltd. vs. United Bank of India : AIR 2000 SC 2740*** and in ***Karan Kapahi and others vs. Lalchand Public Charitable Trust and another : AIR 2010 SC 2077***. On the basis of above conclusion the learned Judge would dismiss the suit, passing decree in nature of a declaration that the plaintiffs and defendants are not the joint owners of Schedule – 'A' and 'B' properties.

**9.** Before the lower Appellate Court the appellant-plaintiffs would highlight two documents, Annexure - 1 and

Annexure – 2. Even though before the trial Court the appellants-plaintiffs would produce those two documents, Annexure - 1 and Annexure – 2, that Court did not place any reliance on those two documents. Annexure – 1 purported to be a note of understanding executed on 19.08.1987 by the first defendant and Annexure – 2 purported to be a declaration given by the very same defendant on 23.07.1988. What is seen recorded in Annexure – 1 to which the signatures of plaintiff No. 1 and defendant No. 1 (the two brothers) are seen subscribed on the top is that whatever appellant No. 1 had deposed in Civil Suit No. 76/1986 regarding the ownership over the building at M.G. Marg, Gangtok was only for the sake of their joint interest in the property and without prejudice to the interest and claims of other members of the joint family. It is also stated therein that the above depositions shall not to be used by the first defendant or any other person claiming under him for any purpose whatsoever, prejudicial and contrary to the interest and claim of any of the members of the joint family over the ancestral property including their family business. Annexure – 2 purports to

be a declaration by the first defendant that the depositions by his father, late Bhaskaranand Agarwal and his brother Umesh Agarwal, the first plaintiff was made “under compelling circumstances” and that the above depositions and the registration of the property and business under the same name of ‘M/s Shree Mulchand and Sons’ will not have any effect or force in law or upon the interest which the appellant No. 1 and other members of the joint family have over the common properties.

**10.** The lower appellate Court (District Court) on considering the appeal, which was preferred by the present appellants, against the judgment and decree of the trial Court would focus on Annexures 1 and 2 unlike the trial Court. That Court would highlight certain suspicious circumstances in which those two documents are shrouded and would come to the conclusion that Annexures - 1 and 2 “apparently appears to have been manufactured for the purpose of this suit”. Coming to the important issue of applicability of Order XII Rule 6 CPC to the present case, the learned District Judge would virtually endorse the reasoning of the trial Judge. It was found that in the

depositions given by the appellant No. 1 late Bhaskaranand Agarwal in Civil Suit No. 76/1986 there were admissions which cut at the root of the case pleaded by the plaintiffs and that such admissions “though it is not conclusive, it is decisive of the matter unless it is successfully withdrawn or proved to be erroneous”. According to the learned District Judge, those admissions have not been withdrawn in this case as per the procedure nor they have been proved to be erroneous. In that view of the matter, the learned District Judge would hold that there was no warrant to interfere with the judgment and decree passed by the trial Court and accordingly, dismissed the appeal.

**11.** In this second appeal filed under Section 100 CPC, as many as 26 grounds have been raised and at paragraph 33 of the Memorandum of Appeal this Court is called upon to formulate as many as 19 questions of law (Questions A to S). There is a further statement that the appellants also seek leave of the Court to urge additional grounds. The second appeal would come up for consideration before this Court on 13.06.2012 and on behalf of the defendant who had lodged a caveat in

anticipation of the second appeal. Senior Advocate Mr. N. Rai entered appearance and on a verbal request made on behalf of the appellant the matter was adjourned to 09.07.2012. However, the case was taken up on 29.06.2012. On that day with the consent of learned counsel for both the sides, the second appeal was rescheduled for hearing on 17.07.2012. On 17.07.2012, Mr. B. R. Pradhan, learned Sr. Counsel would appear on behalf of appellants and this Court would order notice and Mr. N. Rai, learned Sr. Counsel accepted notice on behalf of defendants-respondents. Lower Court records were called for and the Court ordered that on the date of next hearing which was scheduled for 27.08.2012, the Court will frame substantial questions of law as may arise in the case. On 27.08.2012, though there was appearance of both sides, nothing transpired and the case was ordered to be listed on 05.09.2012 for framing the substantial questions of law. On 05.09.2012, this Court after hearing the learned counsel for the parties and after perusing the judgment of the learned Courts below and the records would formulate the

following six substantial questions of law, as questions involved in the second appeal: -

1. Whether the purported deposition dated 18.08.1987 made as a witness in an earlier trial, Civil Suit No. 76 of 1987 filed by the defendant No. 1 for recovery of rent against a tenant and retracted in the present suit can be held to be conclusive admission against the appellants in the subsequent litigation, i.e. present suit, claiming right in the joint family properties in absence of any finding recorded by the Court on such statement in earlier suit?
2. Whether document dated 19.08.1987 and the declaration dated 23.07.1988 referred to in question No. 1 allegedly executed amongst the appellant No. 1 and respondent No. 1 subsequent to the alleged admission in Civil Suit No. 76 of 1987 declaring the statement/admission as *nonest* with regard to the rights of the appellant No. 1 in the properties, subject matter of present suit, could have been ignored as forged and fabricated by the Courts below without providing opportunity to the appellants (plaintiffs) to prove the same in trial?

3. Whether the appellants No. 2 and 3 (plaintiffs), who are sons of appellant No. 1 and claimed right/share in the joint family properties are bound by the purported admission made by the appellant No. 1 in a trial concluded in the year 1987 when the appellants No. 2 and 3 had not even been born and their rights as co-personas could be defeated?
4. Whether the evidentiary admission purportedly made by the Appellant No. 1 regarding Schedule B properties only has the effect of binding the Appellants as admission with regard to the 13 other properties mentioned in Schedule A?
5. Whether the purported admission made by the Appellant No. 1 can confer title of the joint family properties mentioned in Schedule A and B on the respondents when admittedly the Respondents do not have any legal title evidenced by any deed or document?
6. Whether the 8 issues framed by the trial court vide order dated 21.06.2005 could be said to be disposed off and decided on the bare finding with regard to the purported admission made with regard to the Schedule B property only?

The appeal was formally admitted and this Court passed an interim order directing both the sides to maintain status quo with regard to the properties as existed on that day. It is after several posting dates that the appeal came up before me for final hearing.

**12.** I have heard the submissions of Mr. B.R. Pradhan, learned senior counsel for the plaintiffs-appellants and Mr. N. Rai, learned senior counsel for the defendants-respondents. Mr. B.R. Pradhan, would submit that the substantial questions of law formulated by this Court were so framed after hearing both the sides and all those questions are actually involved in this appeal. According to Mr. Pradhan all those questions are only to be answered in favour of the appellant. Mr. Pradhan would draw my attention to the judgment of the trial Court and that of the lower appellate Court. He would submit that both those judgments are *per se* erroneous and illegal being the result of a total non-application of mind by the two Courts below to the facts which obtained in the case and to the law which is applicable to this case.

**13.** Drawing my attention to the documents which is produced as Exhibit P-1 (the order issued by the Government of Sikkim through its Forest Department on 14.09.1944) allotting the site in the New Extension Bazaar area at Gangtok, Mr. Pradhan would submit that the above allotment is in favour of a registered partnership firm by name of 'M/s Shree Mulchand & Sons'. Drawing my attention to the document which is produced and exhibited as Exhibit P-3 to the plaint, Mr. Pradhan submitted that the above firm was one registered with the Registrar of Firms at Calcutta and the partners in that firm were the then members of Hindu Undivided Joint Family of which present members are appellants and defendants No. 1 and 2. Drawing my attention to the document produced as Exhibit P-2 before the Court below which is captioned as terms and conditions for Gangtok allotment, Mr. Pradhan submitted that the same was the junction of all the 5 members of the then Hindu Mitakshara Coparcenery including Late Bhaskaranand Agarwal, the father of appellant No. 1 and defendant No. 1. Mr. Pradhan submitted on the clear terms of Exhibit P-2 that the 11 properties at Gangtok including

the various items of immovable properties scheduled in the present plaint were allotted to the branch consisting members of late Bhaskaranand Agarwal and his two sons, Mahesh Agarwal, 1st defendant and Umesh Agarwal, 1st plaintiff. It was pointed out that the 1st defendant and 1st appellant were minors at that point of time and it was their father who accepted the allotment on their behalf also. Mr. Pradhan submitted that Exhibit P-1 and Exhibit P-2 are documents admitted by both sides. According to him, that the plaint schedule of immovable properties was the subject matter of Annexures P-1 and P-2 is also a matter not in dispute. He argued that Exhibit P-2 shows that the plaint schedule of immovable properties are allotted jointly to late Bhaskaranand Agarwal, Mahesh Agarwal and Umesh Agarwal, who undoubtedly constituted a Mitakshara Coparcenery. If any one of them is to claim absolute and exclusive title over any portion of the properties covered and allotted under Annexure P-2 then the same is possible only through a partition which has the junction of all the members of the coparcenery.

**14.** Drawing my attention to the application for registration of firm dated 16.06.1979 submitted in respect of the firm by name 'M/s Shree Mulchand & Sons' Mr. Pradhan would submit that the firm by name of 'M/s Shree Mulchand & Sons' since registered with the office of the Registrar, North Sikkim, Mangan could never be the partnership firm in whose favour the allotment was made by the Government of Sikkim in the year 1944. This firm (hereinafter referred to as 'Mangan Firm') is only a proprietary concern of which the first defendant is the sole proprietor. According to Mr. Pradhan, there is nothing in the documents pertaining to registration of Mangan Firm even to indicate that the first defendant has become the owner of the immovable properties which is the subject matter of the present suit. At the best that document will show that the first defendant started a proprietary business in the name of 'M/s Shree Mulchand & Sons' at Mangan Bazaar and was proposing to open branches of that proprietary firm at Dikchu and Gangtok Bazaar.

**15.** The learned senior counsel submitted that though there is some pleadings in the written statement filed by

the defendants to the effect that during the period after 1973, while Bhaskaranand Agarwal was alive, Bhaskaranand Agarwal would divide the immovable properties allotted to him and his sons in 1968 between his sons and that the first defendant was allotted all the immovable properties at M.G. Marg, there is absolutely no documentary evidence produced for substantiating the above pleadings. Drawing my attention to the Gift Deed dated 31.03.1989 executed by 'M/s Shree Mulchand & Sons' and the first defendant, as Donors, in favour of Smt. Mridula Agarwal, the 3rd defendant, as Donee, Mr. Pradhan submitted that the above Gift Deed is *per se* void in as much as it is not attested as required by Section 123 of Transfer of Properties Act, 1882. The learned senior counsel also submitted that even if the above fatal defect was not there in the Gift Deed then also the Donee would not have derived anything out of the Gift Deed as the donor did not have any title to convey to the Donee. The defence put forth by the defendants to the case of the appellants that the properties continued to be joint it is thus inherently

impossible and unreasonable if the suit goes for trial so submitted Mr. Pradhan.

**16.** The learned senior counsel submitted that the law relating in the admission has been clearly misconceived and misunderstood by the trial Court as well as the lower appellate Court. The learned senior counsel drew my attention to Sections 17, 21, 58 and 145 of the Indian Evidence Act. The learned senior counsel submitted that the while Section 17 defines admission, Section 21 insists proof to be given by persons who want to utilize the admission against the maker of the admission. Referring to Section 145 of the Indian Evidence Act, Mr. Pradhan submitted that the above section speaks about the manner in which the admissions are to be proved against their makers. Referring to Section 58, Mr. Pradhan submitted that the law contemplates two kinds of admissions, judicial admissions and evidentiary admissions. It is judicial admission which is contemplated under Section 58 of the Indian Evidence Act. In order that an admission is treated as judicial admission, the same has to be an admission by one of the parties to the given litigation through their

pleadings or by something in writing produced in that very same litigation. All other admissions are evidentiary admissions. It is judicial admissions under Section 58 of the Indian Evidence Act, which stand on a higher pedestal than evidentiary admissions. Evidentiary admissions will have to be proved against their makers like any other relevant facts. It is trite law that an admission (even judicial admission) can be retracted and can be explained away. In the instant case, the so called admission sought to be relied on by the defendants against the appellants is at best evidentiary admission only.

**17.** The learned senior counsel would read over to me the full text of the deposition given by late Bhaskaranand Agarwal and by the 1st plaintiff in Title Suit No. 76/1986. He pointed out that even that on a cursory reading of the depositions given by late Bhaskaranand Agarwal, father of 1st defendant and 1st plaintiff, it become clear that he has not given any admission to the effect that the properties which are the subject matter of that litigation belonging absolutely to the plaintiff in that suit namely Mahesh Agarwal, the first defendant herein. Mr.

Pradhan would highlight in this context the expression ‘we’, ‘our’, ‘us’ etc. repeatedly by late Bhaskaranand Agarwal in his testimony. Coming to the depositions of appellant No. 1 in this second appeal, Mr. Pradhan submitted that the above deposition was given at a time when the relationship between the plaintiff No. 1, defendant No. 1 and late their father Bhaskaranand Agarwal was utmost cordial. The Lease Deed on the basis of which the building in question in that case had been let out to the defendant in that suit was taken in the name of first defendant, who was the elder of late Bhaskaranand Agarwal’s two sons. The intimacy of the relationship between the parties is obvious from the circumstance that it is the first plaintiff herein who gave evidence as the principal witness on behalf of his brother, the first defendant herein, though he was the plaintiff. The defendant in that suit was a constant trouble giver for the family. Being a chronic defaulter in the matter of payment of rent, it was the need of the family that he should be evicted at any cost. Thus, scope of that suit and that of the present suit is entirely different. The present suit is a property suit in the sense that properties are scheduled and

reliefs are sought in respect of the properties. The Civil Suit No. 76/1986 was a simple money suit for being recovery of rent only. Question of title as such was not at all relevant in that suit. The only issue was regarding the rate of rent and also regarding the plea of discharge of rent by the defendant. Even it is assumed for the sake of argument that the subject matter of that suit is involved in the present suit then clearly it is only a minute fraction of the subject matter of the present suit which was subject matter of that suit.

**18.** The learned senior counsel submitted that when the suits goes for trial, it will be possible for the plaintiffs-appellants to establish that the statement which was given by the first plaintiff regarding their ownership of the building occupied by M/s New India Transport Company was clearly erroneous. The title to immovable property cannot be conferred on anybody by oral admissions of a person. The title over immovable property will be acquired only through the modes known to law. In the absence of documents to show that the plaint schedule properties, particularly 'Schedule – B' property came under the

absolute title of the first defendant, even if the first plaintiff or his father had made "clear, unequivocal and unambiguous admissions" regarding the first defendant's title over the entire plaint schedule property, the same would not have any consequence.

**19.** Mr. Pradhan submitted that the appellants No. 2 and 3, the two sons of appellant No. 1 are also members of the coparcenery. The view taken by the Courts below that admission by appellant No. 1 is binding on his children is per verse as appellants No. 2 and 3 are not claiming under their father, they are claiming membership in coparcenery by virtue of their birth in the family.

**20.** Mr. B.R. Pradhan, learned senior counsel would cite a catena of decisions to fortify the submissions he made before me. In fact the very first decision which was cited before me is the judgment of the Supreme Court in **Karam Kapahi & others vs. Lal Chand Public Charitable Trust and another : (2010) 4 SCC 753**, a decision which was relied upon very much by the Courts below. My attention was specifically drawn by Mr. Pradhan

to paragraphs 18, 22, 24, 26, 37, 38, 39, 44, 45 and 48 of the above judgment. He would submit that even in cases where clear, unambiguous and unequivocal admissions which are fatal to the case of a given party have been made it is not obligatory that the Court invoking Order XII Rule 6 should act straightway on those admissions and give a verdict against that person. The provision is only enabling, discretionary and permissive. The instant one is not a case where there is justification for non-suiting the plaintiff at the threshold particularly as the admissions are evidentiary admissions and the statements are not specific. To drive home his point that law sees a distinction between evidentiary admissions and the judicial admissions, Mr. Pradhan pointed out that in the case of Karan Kapahi the admission was made in that very suit unlike the present case. Mr. Pradhan would rely on the judgment of the Supreme Court in **Basant Singh vs. Janki Singh and others : AIR 1967 SC 341** and submitted that it is the judicial admission i.e. an admission made by a party in his pleadings which may be used against him as evidence in the same suit. But as far as the other suits are concerned,

these admissions can never be received as substantive evidence. It is open to a person to see that the admission made by him is not proved. Reliance was placed for the proposition that judicial admission has much more productive value than evidentiary admissions. Mr. Pradhan also relied upon the judgment of the Supreme Court in **Nagindas Ramdas vs. Dalpatram Ichharam alias Brijram and others : (1974) 1 SCC 242**. Referring to paragraphs 27 and 28 of the above judgment, Mr. Pradhan submitted that while judicial admission is fully binding on the party who makes them and may constitute a waiver of proof, evidentiary admissions are receivable only at the time of trial as evidence and can always be shown as wrong.

**21.** Citing a judgment of the Supreme Court in **Nagubhai Ammal and others vs. B. Shama Rao and others : AIR 1956 SC 593**, Mr. B.R. Pradhan would draw my attention to paragraph 18 of the judgment and submit that an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the

circumstances under which it is made. Mr. Pradhan submitted referring to judgment in **Ambika Prasad Thakur vs. Ram Ekbal Rai : AIR 1966 SC 605**, that once it is shown that appellants No. 2 and 3 are all members of the coparcenary then the partition claimed by the defendants even if true cannot be binding upon them and it is without their junction that the partition was effected. For these propositions, Mr. Pradhan also relied on paragraph 7 of the judgment of the Supreme Court in **Smt. Sukhrani (dead) by L.R's and others vs. Hari Shankar and others : AIR 1979 SC 1436**.

**22.** In order to drive home the point that admission can be explained for showing that it was erroneous, Mr. Pradhan relied on paragraph 25 of the judgment of the Supreme Court in **Geo Group Communications inc. vs. IOL Broadband Ltd. : (2010) 1 SCC 562**. Referring to the decision of the Supreme Court in **Jeevan Diesels and Electricals Ltd. vs. Jasbir Singh Chadha (HUF) and another : (2010) 6 SCC 601** Mr. Pradhan would at the very outset point out that the above judgment was delivered by the very same Bench which delivered the

judgment in **Karam Kapahi's** case (supra.). Mr. Pradhan submitted that in this later decision the very same Bench has explained that whether or not there is a clear, unambiguous admission is a matter not to be decided on the basis of judicial proceedings. That is a matter to be decided on the basis of the fact situation which obtained in a given case, the learned senior counsel submitted that their Lordships had clearly laid down that the applicability of principles of **Karam Kapahi's** case will depend on the fact situation in a given case. According to him there is no comparison between **Karam Kapahi's** case and the present case. Learned senior counsel submitted that the above view has been approved by another two judges Bench in Supreme Court in a later decision and in this context the learned senior counsel relied on paragraph 8 of the judgment in **Payal Vision Limited vs. Radhika Choudhary : (2012) 11 SCC 405**.

**23.** Mr. Pradhan would refer to the judgment of the Supreme Court in **Sita Ram Bhanu Patil vs. Ramchandra Nago Patil & Anr. : (1977) 2 SCC 49** and

submit that before an admission is used against any person, the admission will have to be proved and the party against whom it is being proved should be confronted with this proof at the time of cross-examination with previous admission.

**24.** Anticipating argument from the opposite side regarding narrow contours of Section 100 CPC, Mr. Pradhan would rely on the judgment of the Supreme Court in **Kashmir Singh vs. Harnam Singh & Anr. : AIR 2008 SC 1749** and submit that a substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. It was also submitted that the general rule that the High Court will not interfere with concurrent findings of the court below is not an absolute rule. The learned Senior Counsel relied on **Ramlal & Anr. vs. Phagua & Ors. : AIR 2006 SC 623** to argue that when it is clear that the two lower Courts concurrently erred in not appreciating oral and documentary evidence properly, the High Court is at liberty even to re-appreciate evidence and record its own conclusion for the purpose of reversing of the order passed

by the Courts below. For the same proposition, Mr. Pradhan relied on the judgment of the Supreme Court in **Jagdish Singh vs. Natthu Singh : AIR 1992 SC 1604** and it was argued that there is every justification for interference in this case. Learned Senior Counsel concluded by submitting that impugned orders/judgments be set aside immediately and the trial Court be directed to try and dispose of after affording the opportunity to both sides whatever evidence they want to.

**25.** It was Mr. N. Rai, learned Senior Counsel, who addressed before me on behalf of the respondents. Mr. Rai would make extensive submissions endeavouring to meet all the arguments of Mr. B. R. Pradhan. Mr. Rai submitted at the very outset referring to paragraph 33 of the memorandum of Second Appeal that the appellants pleaded that the Second Appeal only involves questions of law. Involvement of questions of law as distinguished from substantial questions of law will not sustain the second appeal under Section 100 CPC. Mr. Rai submitted that it is trite position of law where new pleas cannot be taken in

second appeal. The appellants had not formulated any substantial question of law in the memorandum of second appeal. Most of the questions actually formulated by the appellants were questions of fact only. As regards the question formulated by this Court in second appeal, Mr. Rai Submitted that even those questions are questions of fact and almost all of them have already reached finality. According to him, the main issue involved in this case is whether admission can be considered under Order XII Rule 6 of the CPC has already been decided by the Hon'ble Supreme Court in **Karam Kapahi's case (supra)** a judgment of the Apex Court, which is binding on this Court.

**26.** Expatiating the argument that the concurrent findings of fact cannot be challenged in second appeal, Mr. N. Rai would rely on various passages contained in paragraphs 53, 54, 55, 57, 60, 70, 81 of the judgment of the Supreme Court in **Gurdev Kaur and others vs. Kaki and others : (2007) 1 SCC 546**. It was strongly submitted by him that this Court does not have jurisdiction sitting in second appeal to interfere with the findings of facts entered by the Court below. Those findings are

concurrent. Arguing that there is a marked distinction between question of law and substantial question of law, Mr. Rai submitted that under Section 100 CPC what the High Court is called upon to decide the only substantial questions of law and not questions of law. In this context, Mr. Rai relied on a judgment of Supreme Court in **Kshitish Chandra Purkait vs. Santosh Kumar Purkait and others : (1997) 5 SCC 438**. If a question of law had been finally settled by the Hon'ble Supreme Court, such question of law even if it is a substantial question of law, will not arise in the second appeal under section 100 CPC and for this proposition of law, Mr. Rai relied on the judgment of the Supreme Court in **Pankaj Bhargava and another vs. Mahinder Nath and another: (1991) 1 SCC 556**. Placing reliance on observation of Supreme Court in paragraph 1 of the judgment in **Bholaram vs. Ameerchand : (1981) 2 SCC 414**, the learned senior counsel submitted that even when the High Court is convinced that the findings of the fact entered by the Court below are wrong or grossly inexcusable it would not entitle the High Court to interfere in the absence of a clear error of

law under Section 100 CPC. Mr. Rai submitted that Section 100 CPC is very, very narrow and he relied on the judgment of the Hon'ble Supreme Court in **Dnyanoba Bhaurao Schemade vs. Maroti Bhaurao Marnor : (1999) 2 SCC 471**.

**27.** Mr. N. Rai would further analysed Annexures - I and II, which were produced by the appellants at a later stage and was found by the lower appellate Court to be documents manufactured and fabricated for the purpose of the suit. Mr. Rai submitted that all the reasons stated by the lower appellate Court for coming to the conclusion that Annexures - I and II are manufactured and fabricated for the purpose of the suit by using blank stamped paper and plain paper respectively are sound reasons. Those papers had been signed by the first defendant for the using in the court proceedings by Bhaskaranand Agarwal representing the first defendant as his power of attorney holder. Referring to sub-rule 3, Rule 14, Order VII of CPC, Mr. Rai submitted that documents cannot be produced after the stage of issues are framed without the leave of the Court. Annexures I and II which were produced along with the

reply to the rejoinder filed by the first defendant cannot be considered. Those documents have to be treated as *non-est*. There are so many glaring infirmities *prima facie* appearing in Annexures - I and II. According to Mr. N. Rai, it is crystal clear that those documents are manufactured for the purpose of creating confusion in the mind of the Court. Mr. Rai in this context would highlight the following infirmities on Annexures - I and II: -

(i) On a close scrutiny of the document, it would be evident that the document has been prepared on a pre-signed blank paper to adjust and fit in to the existing signatures, when after execution of documents, they are signed at the end after the contents are typed out, which most curiously has not been done in the present cased.

(ii) The documents have been manufactured in the recent past even after filing the evidence on affidavit by Plaintiff No. 1.

In the Evidence on Affidavit filed by the Plaintiff No. 1 Umesh Agarwal on July 22, 2008, at page 5, paragraph 21 sub-paragraph 2 he says:

"I say that, being told about such registration and on misapprehension of law and in good faith, I believed that the defendant No. 1 owned the properties standing in the name of Shri Mulchand and Sons and even deposed in one civil suit No. 76 of 1986, which now stands disposed of, that the defendant No. 1 is the owner of the schedule 'B' property, out of such belief."

(iii) The words used in the documents like 'without prejudice' in 2nd last line in document dated 19.8.1987 and 'propriety in law' in the document dated 23.7.1988 indicate that the said documents were manufactured and fabricated with the help of a lawyer.

(iv) These two documents being such important documents are not registered. The Note of Understanding which has been prepared on a .25 p stamp paper pre-signed by Mahesh Agarwal, has not been registered since it is of recent origin and manufactured for the present application and its registration would have required Mahesh Agarwal's signature and presence. While great pain was taken to include Shree Mulchand and Sons and Agarwal Trading Company in the document dated 23 July, 1988 strangely it does not find mention of the business of M/s Agarwal Brothers and specially that of M/s Laxmi Stores which at that point of time were also under the proprietorship of Mahesh Agarwal. The proprietorship of Laxmi Stores having since been transferred in the name of Sheela Agarwal wife of Umesh Agarwal it obviously has escaped his notice while getting the document recently prepared as a means to wriggle out of the admissions made in the earlier civil suit No. 76 of 1986.

(v) The signatures subscribed on the right hand top corner of the note is indicative of the fact that the signature were subscribed on the sheet for use for Court purpose as per practice followed in Court in signing petitions.

(vi) The spacing between the head note – notes of understanding and the rest of the contents are not uniform. This suggests that the blank documents bearing the signature at the right

hand top given for use for Court purpose in earlier proceedings to Bhaskaranand as constituted attorney since he was appearing as a witness in the said Suit No. 76 of 1986, has been used for manufacturing the purported documents by use of a type machine in a manner to fill up the entire sheet.

(vii) The note of understanding neither bears the signature of Mahesh Agarwal nor of Umesh Agarwal at the bottom of it which ought to have been the case if the document was genuine.

(viii) The note of understanding contains corrections without any endorsements of the persons whose signatures appear on the note and, also the typing mistakes in the spelling of the word (i) whether (typed as “wheather”). There are also no endorsements against (i) of the error in the Head Note and (ii) the error in the 4th line of the first paragraph of the Note of Understanding. These obviously have has not been corrected as it would now be impossible to get the executants of this document to sign on the corrections.

(ix) Falsity is also proved by the difference in suit numbers in the two documents. In Annexure ‘I’ the suit no. is 76 of 1987 while in the second document it is 76 of 1986. Obviously the 2nd document-Annexure ‘II’ must have been made after the 1st documents-Annexure ‘I’ as is clear from the dates mentioned therein and keeping in view the 1st document which is also mentioned therein and also from the mention of the first document. The suit number in the 1st document could not be corrected as these documents have just been manufactured and the signature of Mahesh Agarwal cannot be procured now.

(x) Document Annexure-I is not related to Civil Suit No. 76 of 1986. It is in respect of Civil Suit No. 76 of 1987. If it is not for Civil Suit No. 76 of 1987, then the document becomes ambiguous and neither the deposition can be given to neither rectify the ambiguity nor can verbal submissions be made. Section 93 of Indian Evidence Act, bars from explaining or amending such ambiguity.

(xi) This note of understanding (Annexure 'I') does not speak of the deposition of Bhaskaranand Agarwal (the original plaintiff No. 1, since deceased) whose deposition is on record in the defendants' documents filed in the Court on April 5, 2003 where Bhaskaranand Agarwal appears in Court to depose as the constituted attorney of Mahesh Agarwal and not as the 'karta' (as claimed by the plaintiffs) strangely, the deceased Bhaskaranand Agarwal (original plaintiff No. 1, since deceased) is not a party to the purported note of understanding.

(xii) This 'Karta' word has been coined only after the instant suit was filed in the year 1994. Bhaskaranand Agarwal never functioned at any point of time as so called 'Karta' of the family of Defendants.

(xiii) That on 18.08.1987 when Umesh Agarwal plaintiff no. 1 testified upon oath before the Court in Civil Suit No. 76 of 1986 there was no understanding and that the statements made upon oath were voluntary, true and correct.

(xiv) On 18.08.1987 in his deposition in Civil Suit No. 76 of 1986, Umesh Agarwal the present plaintiff No. 1 has stated that Mahesh Agarwal was away for 10 days but surprisingly on the very next day Mahesh Agarwal seems magically to have

appeared and signed the note of understanding. It has not been stated as to where and how did Umesh Agarwal the plaintiff No. 1 herein and Mahesh Agarwal had signed the purported note of understanding on 19.08.1987. There is no explanation in the reply filed by the plaintiff No. 1 with regard to manner, mode and place of preparation of the purported note of understanding and execution.

(xv) In paragraph 2 of the Note of Understanding it is stated that the deposition of Umesh Agarwal was only for the sake of joint interest in the property. Joint interest in the property is a very vague term and has not been explained. Vague statements prove falsity.

(xvi) The expressions in the purported note of understanding though mentions that Bhaskaranand Agarwal had also testified upon oath in the said Civil Suit No. 76 of 1986 on the basis of the said alleged understanding, there is, however, no signature of Bhaskaranand Agarwal in the said notes of understanding, despite the fact that he was very much alive in the years 1987 and 1988 being the years on which the said notes of understanding were alleged to have been executed by the defendant No. 1 and plaintiff no. 1. As already stated above he is not even a party to the purported understanding when he ought to have been if he was the ‘Karta’ of the alleged Coparcenary property.

(xvii) Strangely, the purported Note of Understanding only mentions about the complaints that may arise in future due to the deposition of Umesh Agarwal but nothing has been mentioned about the deposition given by Bhaskaranand Agarwal who appeared as the Constituted Attorney of Mahesh Agarwal and proved a number of exhibits

in favour of Mahesh Agarwal which was instrumental in the suit being Decreed in favour of Mahesh Agarwal. The fact that the vital deposition of Bhaskaranand Agarwal was overlooked conclusively proves that this document has just been manufactured for the present application under Order 12 Rule 6 of CPC.

(xviii) There is no explanation as to why Bhaskaranand Agarwal's signature is not appearing in the said notes of understanding, even though they mention that the document will lie in the custody of our father Shri Bhaskaranand Agarwal.

(xix) The said notes of understanding has not been relied upon and/or referred to either in the plaint or any of the petitions filed in the suit proceedings despite the knowledge of such deposition and documentary evidence thereof clearly mentioned in the list of documents filed on behalf of the Defendants prior to filing of the petition under Order 12 Rule 6 of CPC.

(xx) The said note of understanding and declaration purported to have been made between the defendant no. 1 and the plaintiff no. 1 is not attested by any independent witness.

(xxi) The language/expression of the note of understanding and declaration prima facie suggest that the said notes of understanding and declaration have been prepared as tailor made defence as a counter to and to escape from the admission upon oath on record of the Court and from suffering order of dismissal of the Suit by judgment upon admission applied for by the defendants.

(xxii) There is no statement of Bhaskaranand Agarwal or of Plaintiff no. 1 that the deposition made by them upon oath in the earlier suit proceeding relied upon by the defendants for the purpose of the application under Order 12 Rule 6 of CPC are false.

(xxiii) The Plaintiff No. 1 has admitted having given the depositions by him and his father late Bhaskaranand Agarwal in Civil Suit No. 76 of 1986. He only desperately tries to explain the circumstances under which such depositions were made. But such a lame explanation is not tenable in the eye of law.

(xxiv) As per Order 12 Rule 6, a person who makes the admission in the suit need not be a party in the previous suit. Even if Mr. Umesh is not a party in Civil Suit No. 76 of 1986, he has admitted the separating of the Defendant No. 1 and himself in unequivocal terms as a witness under the oath. He cannot approbate and reprobate and he should be stopped from resiling from his previous statements and also playing fraud with the Court. We rely on the ruling passed by the Hon'ble Supreme Court in Karam Kapil's Case **AIR 2010 Supreme Court 2077** paragraph 54.

(xxv) The alleged agreement/note of understanding, assuming but not admitting, is entered into in the year 1987, it is void *ab initio*, *non est* and a nugatory in the eye of law having entered into for an illegal object of making false statements before a Court of Law. In such circumstances the effect would be that these agreements/notes of understanding cannot be looked into with the result that the averments/deposition made on OATH would survive as a valid piece of evidence.

(xxvi) No proceeding has filed for enforcement of the said note of understanding till date. No steps have been taken for rectification of records by Bhaskaranand Agarwal prior to filing of the suit in 1994 on the basis of the said note of understanding when admittedly the plaintiff no. 2 and 3 who rely upon the said note of understanding specially state that the note of understanding was in possession and custody of Bhaskaranand Agarwal.

(xxvii) In case the allegation that Mahesh Agarwal was not the owner but it was coparcenary property was correct then there was no impediment in Mahesh Agarwal coming and stating that the property, although, stands in my name is coparcenary property and since it stands in my name and my father the Karta of the Hindu Undivided Family has authorized me to file this suit in my name which would have been corroborated by the father and Umesh. This having not been done, these documents are false on this count also. But this fact cannot be ignored that Umesh Agarwal Plaintiff No. 1 supports his father's statement and says Mahesh is the owner of all the properties standing in the name of Shree Mulchand and Sons.

(xxviii) These documents have not been filed by Umesh Agrwal but it has been filed through his sons as a strategy to cover up the lapse of time in filing this document on a plea by his son that it was discovered in the Calcutta Office of his grandfather which strategy could not be discovered by the father Umesh who was one of the executants of the document. As stated above, such an important document even Bhaskaranand Agarwal the original Plaintiff also chose not to produce or file before this Hon'ble Court.

(xxix) These two documenting being such vital documents, since they are the only documents which states that the property is joint, were never filed though they were allegedly claimed have been in possession of the original plaintiff no. 1. (since deceased). These documents were prepared fraudulently and were filed after the defendants filed the application under O 12 R 6 as a desperate means to wriggle out of the admissions made by them in the previous Civil Suit No. 76 of 1986 pertaining to the very suit properties.

**28.** Meeting the argument of Mr. B.R. Pradhan, made in the context of Hindu Undivided Family, Mr. N. Rai submitted the present suit is not the only suit filed between the present parties. There are other suits filed by Umesh Agarwal and Mahesh Agarwal as sole owners of their individual properties / businesses. It was submitted that in all the suits the father late Bhaskaranand Agarwal appeared as the constituted attorney for both Mahesh Agarwal and Umesh Agarwal and not as the Karta of the Hindu Undivided Family and records of these cases will reveal the truth of this submission. It was submitted that as far as New India Transport Company case is concerned, the father late Bhaskaranand Agarwal started his deposition

by saying that he is the constituted attorney of the plaintiff Mahesh Agarwal who is his son. According to Mr. Rai if as a matter of fact the property was the property of Hindu Undivided Family the family would have been impleaded or at least it would have been most simple and natural for late Bhaskaranand Agarwal to show himself as the 'Karta' of the family. In this context Mr. Rai referred extensively to the pleadings in New India Transport Company's case. It was submitted that when the counsel for the defendant in that suit made a suggestion to Umesh Agarwal who was in the witness box that the building which was occupied by New India Transport Company was a building jointly occupied by the family. Mr. Umesh Agarwal categorically stated as follows:-

> "It is not correct that in reality the Bank building is the joint property of myself, my father and the plaintiff. It is not a fact that I am deposing falsely."

**29.** Mr. Rai submitted that not even a single document was produced by the plaintiff to show that late Bhaskaranand Agarwal was managing the properties or

businesses in his capacity as 'Karta' of the Hindu Undivided Joint Family. Mr. Rai highlighted that Mr. Umesh Agarwal has not denied testimonies were given in the Civil Suit No.76/1986. Mr. Rai submitted that since the document as stated in the agreement dated 19.08.1987 (the very next date of given deposition in Civil Suit No.76/1986) was said to have been in the custody of late Bhaskaranand Agarwal, the father of plaintiff No. 1 and defendant No. 1, who was alive when the suit was filed in 1994. The document as claimed should have been produced during that time. In fact, if this document was in existence at that time, there was no necessity to file a suit at all. The production of these two documents by the two sons of the present plaintiff No.1 (Umesh Agarwal) upon their attaining of majority itself is a suspicious circumstance, according to Mr. Rai.

**30.** Mr. Rai submitted that the decree passed in Civil Suit No.76/1986 had become final and New India Transport Company's judgment/order of eviction and delivery of the building was taken by Mahesh Agarwal alone as decree-holder. Mr. Rai submitted that there was no substance in

the argument that defendant has held back any vital documents. It is the plaintiff who has withheld vital documents. The plaintiff should win on the merit of his case rather than on the demerits of defendant's case. Mr. Rai's argument in the context of Order XII Rule 6 of CPC, is that the above rule can be invoked at any stage of the trial of a suit. Learned counsel submitted that having regard to the very object underlying the provision it is absolutely necessary to file an application under Order XII Rule 6 before the suit is tried. Mr. Rai would highlight the contradiction in the deposition given by Umesh Agarwal in different affidavits and would reiterate his submission that Annexures - I and II are false and fabricated documents. According to Mr. Rai, Mr. Pradhan's exposition of the law of evidence is not correct. He referred to the Section 80 of the Indian Evidence Act and submitted that the above section provides that there is a presumption as to documents produced as record of evidence. According to him, the depositions given by late Bhaskaranand Agarwal and Umesh Agarwal in Civil Suit No.76/1986 are to be presumed to be genuine and true.

**31.** Mr. Rai referred to Section 56 of the Indian Evidence Act and submitted that the Court can take judicial notice of certain facts. Reference was made to Section 57(6) of the Evidence Act that the Court can take judicial notice in respect of seals of the Court. Mr. Rai referred to Section 77 of the Evidence Act and it was submitted that certified copies issued by Courts can be relied on as proof of depositions. He referred to Section 90 of the Evidence Act and it was submitted that this section protects the genuineness of 30 years old documents. According to Mr. Rai, as Umesh Agarwal has not, till this moment, denied the deposition he has given in civil Suit No.76/1986, he should not be permitted to project false and fabricated circumstances so that effect of what he stated in that deposition is taken away.

**32.** Mr. Rai referred to Sections 23 and 24 of the Contract Act and submitted that even if Annexures - I and II are assumed to be genuine then also those documents are void as the very purpose of those documents is to by-pass the order dated 03.03.2010 passed by the trial Court in the Suit. Mr. Rai would expatiate the principles of

Section 23 of the Contract Act. Mr. Rai submitted that the relief of declaration sought for in the present case is clearly barred by the law of limitation as prescribed under Article 59 of the Limitation Act and, therefore, that relief which is the principal relief is liable to be rejected. Once that principal relief is rejected, the trial Court is duty-bound to dismiss such suits *suo motu* under Section 3 of the Limitation Act. The dismissal of the suit or rejection of the suit is inevitable, even otherwise.

**33.** By way of conclusion, Mr. Rai would submit that there is no infirmity justifying interference with decisions which are concurrently taken by the trial Court and the lower Appellate Court under Order XII Rule 6 CPC. Mr. Rai would fortify his submissions before me by the authorities of a catena of judicial precedents. The judgment of the Supreme Court in Karam Kapahi's case (supra) was first of the decisions relied on by him and the learned Senior Counsel referred the paragraphs 27, 28, 29, 30, 34, 35, 36, 39, 40, 43, 44, 45, 47, 48, 49, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68 and 80 of the above judgment. Learned Senior Counsel referred to the

judgment of the **Madhya Pradesh High Court in Shikharchand & ors. vs. Bari Bai & ors. : AIR 1974 MP 75**; the judgment of the Bombay High Court in **Dattatraya Shripati Mohite vs. Shankar Ishwara Mohite & Anr. : AIR 1960 Bombay 153**; the judgments of the Supreme Court in (i) **Uttam Singh Dugal & Co. Ltd. Vs. Union Bank of India & ors. : AIR 2000 SC 2740**, (ii) **Mudigowda Gowdappa Sankh & ors. vs. Pamchandra Revgowda Sankh (Dead) by his Legal representatives & anr. : AIR 1969 SC 1076**, (iii) **Charanjit Lal Mehra & ors. vs. Smt. Kamal Saroj Mahajan & anr, : AIR 2005 SC 2765**; the judgments of the **Punjab & Haryana High Court in (i) Dasa Singh vs. Jasmer Singh : 2003 (2) R.C.R. (Civil) 361**, (ii) **Smt. Surjit Kaur vs. Gurcharan Singh : Air 1973 P&H 18**; the judgments of the Rajasthan High Court in (i) **Chinnilal vs. Kalu & ors. : AIR 1966 Rajasthan 208**; (ii) **Chhelaram vs. Manak : 1997 Rajasthan 284**; the judgment of the Andhra Pradesh High Court in **Taste Hotels Pvt. Vs. Medisetty Jayasri & anr. : AIR 2012 AP 4**.

**34.** In support of the arguments regarding the contours of the jurisdiction under Section 100 CPC and what amounts to substantial question of law, Mr. Rai relied on the judgments of the Supreme Court in (i) **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar & ors. : AIR 1999 SC 2213**, (ii) **Jangbir vs. Mahavir Prasad Gupta : AIR 1977 SC 27**, (iii) **Hamida & ors. vs. Md. Kahlil : AIR 2001 SC 2282**, (iv) **Manorama Thampuratti vs. C. K. Sujatha Thampuratti & ors. : AIR 2000 SC 3400** and in concurrent findings of fact, Mr. Rai relied on the judgments of the Supreme Court in (i) **Pankaj Bhargava & anr. Vs. Mohinder Nath & anr. : (1991) 1 SCC 556**, (ii) **Tallam Gangadharan (Dead) by LRs. Vs. U. Ismail Sabeb : (2009) 17 SCC 389**, (iii) **S.B. Minerals vs. MSPL Ltd. : (2010) 12 SCC 24** and (iv) **Babu Ram alias Durga Prasad vs. Indra Pal Singh (Dead) by LRs. : AIR 1998 SC 3021**. Learned Senior Counsel submitted that impugned judgment be approved and the second appeal be dismissed.

**35.** I have given my anxious consideration to the rival submissions addressed at the Bar. Even though

perusal of pleadings and the materials produced by the parties in the context of Order XII Rule 6 is not very much warranted, in order to appreciate the submissions addressed before me correctly, I have made a survey of the pleadings and the materials placed on records by the parties. I have gone through the ratio of the various decisions cited before me by the learned counsel at the Bar, particularly, the decisions of the Hon'ble Supreme Court in the context of Order XII Rule 6 CPC.

**36.** I must mention at the very outset that this is an unfortunate case where despite persuasion by the trial Court and by this Court, the main contesting parties to this litigation who are direct siblings did not become inclined to resolve the disputes amicably.

**37.** A careful reading of Section 100 of the CPC and a survey of decisions cited at the Bar on either sides pertaining to the contours of the High Court's jurisdiction under Section 100 will reveal that once the High Court is satisfied that the case involved substantial questions of law, the second appeal will certainly be maintainable before the High Court against appellate decree passed by any Court subordinate to the High

Court. Even though sub-section (3) of Section 100 provides that in every second appeal under Section 100, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal, it is not necessary that the appellant or his counsel, who submits the memorandum of appeal on behalf of the appellant, formulates the substantial question of law. What is cardinal is whether the High Court is satisfied that the case involves a substantial question of law and, if yes, it is the duty of the High Court to formulate that question for the purpose of hearing of the second appeal.

**38.** In fact, the proviso to Section 100 CPC provides that even in cases where the High Court has formulated the substantial questions of law for the purpose of hearing of the second appeal, the High Court will continue to have power to hear on either substantial questions of law which is actually involved in the case though not formulated, the only rider being that when the High Court permits hearing on a substantial question of law not formulated for hearing, the Court shall record reasons. In the present case, as many as 6 (six) substantial questions of law were formulated by this Court on 05.09.2012 after hearing the counsel for the parties and after perusing the impugned judgment. It is absolutely

clear to my mind that there is no scope at all of any legitimate quarrel that the following questions among those questions are substantial question of law:-

1. Whether the purported deposition dated 18.08.1987 made as a witness in an earlier trial, Civil Suit No. 76 of 1987 filed by the defendant No. 1 for recovery of rent against a tenant and retracted in the present suit can be held to be conclusive admission against the appellants in the subsequent litigation, i.e. present suit, claiming right in the joint family properties in absence of any finding recorded by the Court on such statement in earlier suit?

2. Whether the appellants No. 2 and 3 (plaintiffs), who are sons of appellant No. 1 and claimed right/share in the joint family properties are bound by the purported admission made by the appellant No. 1 in a trial concluded in the year 1987 when the appellants No. 2 and 3 had not even been born and their rights as co-personas could be defeated?

3. Whether the evidentiary admission purportedly made by the Appellant No. 1 regarding Schedule B properties only has

the effect of binding the Appellants as admission with regard to the 13 other properties mentioned in Schedule A?

4. Whether the purported admission made by the Appellant No. 1 can confer title of the joint family properties mentioned in Schedule A and B on the respondents when admittedly the Respondents do not have any legal title evidenced by any deed or document?

**39.** Order XII, Rule 6 of the CPC, as it stands now, certainly empowers the Court to act on admission of fact made either in the pleadings or otherwise (meaning thereby in evidence either in the instant suit or in earlier proceedings) to make such orders or such judgment in the suit as the Court may think fit. Having regard to the admission, the power is given to the court. It has to be said that this power can be exercised by the Court at any stage of the suit either on *suo motu* or on application filed by the party without waiting for determination of all the questions between the parties. Sub-rule (2) of Rule 6 of Order XII makes it clear that under Order XII, Rule 6, it is open to the Court to dispose of the matter finally and it is

provided that a decree will have to be drawn up when a judgment is pronounced under sub-rule (1) of Rule 6 of Order XII. This means that even when the Court is acting under Rule 6 of Order XII, the rights of the parties to the suit can be conclusively determined.

**40.** The legislative objective underlying Rule 6 of Order XII is certainly that in a situation where a suit or the principal issue or any of the issues in a suit can be decided without wasting time for trial, such a decision should be taken so that Court's valuable time need not be unnecessarily wasted.

**41.** Section 17 of the Indian Evidence Act defines admission as a statement oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, mentioned in Section 18 and the following sections of the Evidence Act. Section 21 of the Evidence Act insists that proof is to be given by or on behalf of the persons against the maker of the admission. Section 145 of the Evidence Act provides

for the manner in which makers of previous statements containing admissions are to be confronted with and the admissions proved against them.

**42.** A survey of the various decisions cited before me at the Bar, particularly, the judgment of the Supreme Court in Karam Kapahi (supra.), Basant Singh (supra), Nagindas Ramdas (supra.) shows that the law contemplates two kinds of admissions - judicial admissions and evidentiary admissions. It is judicial admissions which are contemplated under Section 58 of the Indian Evidence Act. In order to that an admission is a judicial admission, the same has to be an admission through his pleadings or by other materials in writing produced in the very same litigation. All other admissions are evidentiary admissions. Judicial admissions stand on a higher pedestal than evidentiary admissions. Evidentiary admissions will have to be proved against the makers like any other relevant fact. In the present case it was not on the basis of the judicial admission that the first defendant filed the application under Order XII Rule 6. On the contrary, it was on the basis of the admission which the original plaintiff,

the father of the present surviving first plaintiff and the surviving first plaintiff himself has made in Civil Suit No. 76/1986 on the files of the Civil Judge through their depositions. According to the trial Court as well as the lower appellate Court, the most important issue which arose for determination in the present suit is whether the property which is scheduled to the suit, particularly, the 'B' schedule property, the high-rise 7 storied commercial building situated at M. G. Marg, the most important commercial centre of Gangtok, the capital city of Sikkim, was property belonging to a Hindu Undivided Joint family in which late Bhaskaranand Agarwal, the original first plaintiff and the father of the present first plaintiff Umesh Agarwal and the present first defendant Mahesh Agarwal or whether 'B' schedule property which is the principal bone of contention between the parties is the absolute property of the third defendant, Mridula Agarwal. If as a matter of fact, an unambiguous admission has been made by the present first plaintiff in respect of the 'B' schedule property to the effect that the 'B' schedule property has never been property of a Hindu Undivided Family in which he was a

member or to the effect that the 'B' schedule property at the time he made the admission belonged absolutely to his brother, the present first defendant, the same admission could have been of some consequence.

**43.** The findings of the Courts below that the present first plaintiff and his father clearly and unambiguously admitted in Civil Suit No. 76/1986 that the 'A' and 'B' scheduled property was not joint family property will be found to be erroneous when their testimonies are gone through.

**44.** It must immediately be noticed that the subject matter of the Civil Suit No. 76/1986 was not the present 'B' schedule property which is a 7 storied commercial building. On the contrary the subject matter of that civil suit was only a small portion of one of the storeys of that building under the possession of a tenant by name New India Transport Company to whom it had been let out by the present first defendant. If the 7 storied building was actually owned by a Hindu Undivided Family in which Mahesh Agarwal, Umesh Agarwal and late Bhaskaranand

Agarwal were members then merely because a small portion of that building was let out to the New India Transport Company by Mahesh Agarwal, Mr. Mahesh Agarwal will not become the absolute owner of that 7 storied building.

**45.** I bear in mind the trite principles pertaining to the ownership law as enunciated by S.D. Mitra in his classic works on Co-ownership and Partition and say that even in an arrangement of co-ownership which it is one of tenancy in common, leasing out of a building belonging by one co-owner and collection of rent by that particular co-owner will have to be presumed to be leasing out and collection of rent by that co-owner representing the other co-owners also.

**46.** It is needless to mention that if the 7 storied building 'B' scheduled property is a joint property belonging to a Hindu Undivided Joint Family then leasing out and collection of rent by that member of a family even if he is the Karta will not by itself result in partition and allotment of leased out portion exclusively to that particular lessor.

In this context, it should be found that under Exhibit P-1 the entire 'A' schedule property which takes in 'B' schedule property also was allotted by the Sikkim Government in favour of a Hindu Undivided Joint Family in which late Bhaskaranand Agarwal, the father of the present first plaintiff and first defendant was a member and that later Exhibit P-2 family arrangement was entered into at Calcutta on 06.06.1968 between the members of that Family under which 11 items of immovable properties including present plaint schedule properties are allotted to the branch consisting of Bhaskaranand Agarwal and his two sons. I have no difficulty to opine that the claim of the Plaintiffs based on the claim that the property is a joint family property based as the same is on Annexures P-1 and P-2 is not a claim which can be brushed aside even without a trial.

**47.** Exhibit P-1 is the allotment of 14.09.1944 by the Government of Sikkim in favour of a registered partnership firm in the name of 'M/s Shree Mulchand and Sons' and Exhibit P-2 is the family arrangement dated 06.06.1968. These two documents are not seen disputed by the first

defendant or the third defendant. The case of the contesting respondent is that pursuant to Exhibits P-1 and P-2, there was a process of partition which resulted in allotment of 'B' schedule property situated at M.G. Marg, Gangtok and certain properties situated at Mangan Bazaar (North Sikkim) and at Dickchu exclusively in favour of Mahesh Agarwal which lead to the establishment of a proprietary concern by name 'Shree Mulchand and Sons' belonging to Mahesh Agarwal alone. There is no taboo for oral evidence in law; many of the family arrangement are entered into orally. However, when the parties are claiming under an oral family arrangement, the burden should be heavy on them to show that pursuant to the oral partition they have taken separate and exclusive possession of the portions allotted to them in the oral partition. A survey of materials which are available before me give some support to the defendants version that there has been a partition as claimed by them and the 'B' schedule property were allotted to Mahesh Agarwal.

**48.** But, I am not called upon in this second appeal to decide regarding the ownership of 'B' schedule property.

The crucial issue which I am called upon to decide in the second appeal is whether the Court below is justified in deciding the suit finally invoking the provisions of Rule 6 Order XII CPC. As already pointed the admissions relied on by the first defendant in his application under Order XII Rule 6 are not judicial admissions and they are at best evidentiary admissions. It is trite position of law that when a cause is decided against a particular person on the basis of an admission made by him, the maker of the admission should be confronted with the admission. All admissions including judicial admission can be withdrawn or explained. I do not find any unambiguous admission made by the first plaintiff or his father in Civil Suit No. 76/1986 which was only in respect of a small portion of the 'B' schedule property. As regards to the so called admissions he has come out with certain explanations whether this explanation is convincing is a matter to be decided by the Court at the trial after recording evidence and not on the basis of oral arguments addressed by the parties at the Bar alone.

**49.** I will immediately observe that the submissions of Mr. Rai regarding the genuineness of Annexures P-1 and P-2 were very appealing. At the same time, I am not inclined to take any decision on one way or the other regarding the genuineness of these documents. That aspect also should be decided in the proper manner i.e. by giving opportunity to the plaintiffs to prove them. Proving them as genuine documents will not be an easy task for the plaintiffs.

**50.** Having kept in my mind the principles laid down by the Hon'ble Supreme Court in the various decisions cited before me including the judgment in **Karam Kapahi's case** relied upon by both the parties, I am of the view that this is not a fit case where the Courts below could have decided the suit fully and finally acting only on apparent admission made by the first plaintiff and his father in respect of a small portion of 'B' schedule building in a previous suit against a tenant. As it would be seen from the rival submissions addressed before me which have been dealt with in detail in paragraphs 12 to 34 of this judgment, there was serious issues in the suit to be tried - whether an

oral partition has taken place as contended by the defendants whether the third defendant would get title on the basis of a Gift Deed, which is not attested by witnesses are only some of them.

**51.** I feel that the long delay already occasioned in the matter of disposing this contentious litigation must have been one of the reasons which persuaded the trial Court to invoke Order XII Rule 6 CPC. The anxiety of the trial Court to dispose of a long pending litigation is understandable. I also share that anxiety. However, the Courts below should have been more cautious and should not have been unmindful of the scope of acting on evidentiary admissions while deciding a highly contentious suit even without trial. I am, therefore, of the view that the impugned judgment has to be interfered with answering the four substantial questions of law indicated herein immediately above in favour of the appellant. I am also issuing directions regarding the expeditious disposal of Civil Suit No. 10/1994, which is already about two decades old. I, therefore, set aside the impugned judgment, the judgment of the trial Court as well as the order of the trial

Court on the application under Order XII Rule 6 CPC and remit the suit back to the trial Court.

**52.** I clarify that I have not decided any of the issues between the parties in the suit including the issue as to whether the properties in question are joint family properties. I also clarify the genuineness and the probative value of the two documents pressed into service by the appellants No. 2 and 3 in the context of the application under Order XII Rule 6 is to be tried and decided by the Court below. The Court below should not be influenced by any observation made in this judgment of mine or by the judgment of the lower appellate Court or by its own first judgment. The Court below is directed to try and dispose of the suit as early and at any rate within a time frame of four months from receipt of the records. Top priority will be given to the case which as already stated that the case is almost 20 years old. The suit will be tried on a day to day basis and decisions on the issues arising in the suit shall be taken. The decision should be taken on the basis of evidence which comes on record. The parties are directed to enter appearance before the Court below on 16.08.2013.

**53.** Transmit the Lower Court Records forthwith. The Court below will fix a date for trial on that day and try the suit on day to day basis and render judgment within the time frame as already said. At any rate it should be ensured by the Court below that the judgment in the suit is delivered by 31.12.2013.

**Sd/-**

**(Pius C. Kuriakose)**
**Chief Justice**
**06.08.2013**

**Approved for reporting : Yes / ~~No~~**
**Internet : Yes / ~~No~~**

**pm/jk**