

GJKT010005252021



Presented on : 01-02-2021
Registered on : 01-02-2021
Decided on : 27-08-2024
Duration : 3 years, 6 months, 26 days

**IN THE COURT OF
8th ADDL DISTRICT JUDGE AT BHUJ,KACHCHH
Presided Over by S.M.KANABAR**

RCA/10/2021

Exhibit No.: 36

Appellant:

MALARA GROUP M K SHOPPING AND ALIED SERVICE T/H
ASHISHBHAI JOSHI

Age: 45

Occupation :

Address: AT G-25 GIDC GANDHIDHAM

VERSUS

Respondent:

1:ASHWINBHAI HARILAL PADHARIYA

Age: 44 Occupation :

Address: AT KARAN ENGINEERING BHARAPAR ROAD NARANPAR
TA BHUJ KACHCHH

2:MOHANBHAI DAYARAM SORATHIYA

Age: 44 Occupation :

AT BETHAK FALIYU SHINAY TA GANDHIDHAM

2.1:CHAMPABEN MOHANBHAI HADIYA

Age: 0 Occupation :

BUNGLOW NO.81

**SAIDHAM SOCIETY SURVEY NO 54/5 ADIPUR SAMSAN GAT
PASE ANTARJAL ADIPUR**

2.2:TARABEN MOHANBHAI HADIYA

Age: 0 Occupation :

**BUNGLOW NO.81 SAIDHAM SOCIETY SURVEY NO 54/5
ADIPUR SAMSAN GAT PASE ANTARJAL ADIPU**

Advocate for Appellant: M.D.BUCH

Advocate for Respondent: J.R.MEHTA

**Subject – Appeal u/s. 96 and Order
41 of the Code of Civil
Procedure.**

JUDGMENT

(Delivered on 31-08-2024)

(1) While preferring the appeal, appellant/original defendant No.1 filed the appeal under Section 96 of the Code of Civil Procedure against order of passing of decree by the learned 4th Additional Senior Civil Judge, Bhuj-Kutch in RCS No. 102/2015 on Dtd.26/10/2015, resultant, appellant filed the appeal and he is the appellant and original plaintiff as well as original defendant No.2 are the respondents before this court.

(2) While preferring the original suit, original plaintiff/respondent filed the suit for recovery of amount worth of Rs.2,85,832/- with interest from defendants stating that defendant No.1 was running the business under the name of Malara Group M.K. Shipping and Aliened cServices and defendant No.2 was running his business as the commission agent for providing machinery parts and send. Plaintiff further stated the

purchase of goods by defendant No.1 through defendant No.2 and stated total purchase of Rs.4,03,272/- and cash payment worth of Rs.1,40,000/- and remaining due worth of Rs.2,63,272/-. He stated issuance of email on Dtd.31/3/2010, 3/4/2010, 6/4/2010 and demand of due amount. Plaintiff stated non payment resultant, issuance of registered notice of Dtd./7/2010 and returned from defendant No.1 with endorsement of left and acceptance by defendant No.2 but did not receive any payment, resultant, filling of the suit for recovery of amount with interest @ 12% p.a.

(3) Original defendant No.1 filed his written statement vide Ex.19 and denied the factum of purchase of goods through defendant No.2 and stated filling of false suit under collusion by plaintiff and defendant No.2. He admitted receiving email and stated they are not bidding to reply any email. He stated filling of a notice with plaint which is not bearing any date. He denied service of notice. He stated that address was left by defendant No.1 before three to four years and stated his address as “Malara House, E/25, GIDC, Gandhidham, Kutch. He stated service of summons on same address by calling bailiff on telephone and cause service of summons. He stated not making any disclosure of bill, transport vehicle through which the alleged goods were sold out to them. He raised the issue of making bills late by 80 days and asked rejection of the suit.

(4) Original defendant No.2 filed his written statement vide Ex.21 and he admitted the suit of plaintiff and affirmed to act on behalf of defendant No.2 and denied his own liability and asked to allow the suit against defendant No.1.

(5) After recording of evidence and hearing of the party, learned trial court pleased to pass decree of the suit in favour of plaintiff,

resultant, the filling of appeal by the original defendant No.1. He raised following grounds.

- A. The judgment and decree passed by the learned trial court is not proper and legal.
- B. It was passed without proper perusal of evidence and pleadings.
- C. It was passed without service of notice to defendant No.1 for framing of issues.
- D. The nature of the suit was changed from Special Suit to Regular Suit but the notice was not served on defendant No.1 for it.
- E. The affidavit for examination in chief was not served on defendant No.1 and his right of cross-examination was not availed. The notice for the introduction of evidence is also not served on the defendant No.1.
- F. The right of cross-examination of defendant No.1 was also not closed and his call out was also not made at the time of cross-examination of the plaintiff.
- G. The alleged bill issued on 8/3/2010 and with having any aliened documentary proof of business between parties and it was contested by the defendant No.1 in his pleading, even though, it was considered by the learned trial court.
- H. There was no reference of bill in plaint or there was no reference of delivery of the goods through which vehicle and it was considered by the learned trial court without its proper proof and without filling of supportive evidence as per section 34 and 35 of Evidence Act.
- I. Plaintiff stated in plaint for sending of bill of Dtd.28/12/2009

but it was of Dtd.8/3/2010 and the bill of Dtd.28/12/2009 was not filed before the learned trial court, even though, it allowed suit relying of Ex.36.

- J. The learned trial court has not considered the collusion of plaintiff with defendant No.2 and without the proof of plaintiff's suit it was allowed.
- K. There was no privity of contract between plaintiff and defendant No.1 and there was no evidence of payment of Rs.1,40,000/- and bill of Ex.36 was not proved by pleading and evidence of plaintiff.
- L. The alleged demand notice was not bearing any date of issuance and it was not served on defendant No.1 and the summons was served through the telephone and receiving new address on telephone by plaintiff and such facts were disclosed before the learned trial court, even though, it was not considered.
- M. The burden to prove the case is on plaintiff and he had to prove it by filling all relevant documents, which was not done, hence, he contested the suit.
- N. The defendants were not residing in the jurisdiction of Bhuj Court and there was bare of jurisdiction, even though, it was not considered by the learned trial court.
- O. The order was passed under collusion of the parties.
- P. As per the pleading of the plaintiff, the transaction was caused with Karan Engineering but there was no explanation for the connection of Karan Engineering with plaintiff.
- Q. Defendant No.2 has not proved his case and only has supported the case of plaintiff.

Application for production evidence u/O. 41 R. 27 of CPC.

(6) Learned advocate of applicant applied for the filling of additional evidence of complaint he filed before the Bar Council of Gujarat against his advocate, who did not pay attention in the trial of his case and stated the documents as important for the just decision of the appeal.

Arguments :-

(7) Learned advocate of appellant side filed written argument vide Ex.33. He narrated the case of plaintiff, procedure going on in the original suit and relied on the provision of Order 18 Rule 4 of CPC and stated that it was the duty of plaintiff side to provide the copy of examination-in-chief to the opponent party but his copy is still on the record of court. He denied giving of any information for recording of evidence to defendant No.1 or his advocate. He also denied the closing of right of cross-examination of defendant No.1 by the then learned trial court. He stated engagement of advocate and filling of written statement and change of nature of the suit and transfer of the court and not having any notice to party or his advocate and stated the filling of complaint against advocate before Bar Council. He also denied the issuance of notice after framing of issues. He raised the issue of change of nature of suit from special suit to regular suit and not issuance of its notice to parties. He raised the issue of not having any privity of contract between the party as well as not giving any information of bill of 8/3/2010 to defendant by plaintiff. He raised the same issue of not making any disclosure of any fact of transportation or any fact of order number or bill number in deposition of plaintiff. He further argued on the issue of not filling of aliened documents as books of accounts with alleged bill of ex.36. He

further raised the issue that there was difference in contention in all the email and also stated that bill of March 2010 was forged and concocted. He relied on the principle of proof and pleadings and denied the proof of Ex.36 and stated it contrary to Section 34 and 35 of Evidence Act and raised the issue of not filling of any proof of order given from him to plaintiff. He further relied on the provision of Order 41 Rule 27 and 28 to show the procedure he initiated against his advocate and asked to allow the evidence. He further argued that document of mark 3/1 was of Dtd.28/12/2009 and but it was not produced and document of Ex.36 is of Dtd.8/3/2010 and alleged the grave error of learned trial court in considering the document of Ex.36. He stated the pleadings of plaintiff is contrary itself. He further argued that plaintiff has not proved his case and the alleged bill of Ex.36 was issued after 80 days from alleged bill and he argued it as contrary to the case of plaintiff. He further argued that bill of Ex.36 was suspicion and suit was not filed in proper manner and the method in which suit was tried, was prejudice to the defendant No.1 and also denied the privity of contract between party and asked to set-aside the decision of learned trial court. He further argued for not filling of evidence of payment of Rs.1,40,000/- and denied it from defendant No.1 and alleged the filling of suit in collusion with defendant No.2. He further raised the issue of non service of demand notice, which was without bearing any date of issuance and also raised the issue of change of his address and service of notice by bailiff through knowing address from phone. He raised the issue of jurisdiction of Bhuj Court and cause of action in Bhuj and relation of Karan Engineering with plaintiff and also raised the issue of same responsibility of defendant No.2 as of defendant No.1 and raised the issue of collusive litigation and asked to allow the appeal. Learned advocate relied on following decision.

- A. *Lal Devi and another Vs. Vaneeta Jain and others* [(2007). 7 SCC 200]
- B. [Surajdeo v. Board of Revenue U.P. Allahabad and others](#) reported in AIR 1982 All 23
- C. *Ram Prakash Agarwal v. Gopi Krishan*, (2013) 11 SCC 296
- D. [Ramon Services Pvt. Ltd vs Subhash Kapoor And Others on 14 November, 2000](#) November, 2000 reported in AIR 2001 SC 207
- E. *Premlal S/o Puranik Verma, Versus. 1. Kunti Bai W/o Ramnarayan Verma decided on 11th September 2019 by Hon'ble Chhattishgarh High Court.*
- F. *Debaraj Sahoo & Anr vs Union Of India 2024 Latest Caselaw 2755 Ori*

(8) Learned advocate of respondent side / original plaintiff side filed written argument vide Ex.35. He narrated that suit was filed on Dtd.22/10/2010 and declaration of address of defendant at Ex.4 and summons was served on same address as shown in Ex.8. He stated filling of vakalatnama by defendant No.1 vide Ex.10 and adjournment of case on Dtd.10/12/2010. He stated asking of adjournment for filling of written statement vide Ex.14, closure of right of filling of written statement and trying of lingering of the suit by defendant No.1. He further argued that filling of written statement by defendant No.2 vide Ex.21 and stated the address of defendant No.1 as true as per Ex.32. He raised the issue of abandonment of service of demand notice inspite of having same address. He also argued that defendant No.2 admitted claim of plaintiff and inspite of having two advocates on record for defendant No.1 side, they did not challenge the version of plaintiff. He further argued that document of Ex.40 is the email and it is admitted by the defendant No.1 for the due of

plaintiff. He further argued that document of Ex.40 is proof of transaction and denied any rebuttal evidence and asked the rejection of appeal.

(9) Learned advocate of appellant argued orally on same facts and law as narrated in written arguments.

Points of determination :-

(10) Recently Hon'ble Gujarat High Court declared in SECOND APPEAL NO.216/2021 decided on DTD.7/9/2022 that First Appellate Court has to frame issues i.e. point of determination and remanded many old appeals for fresh decisions. It was the practice to frame point of determination at the time writing appeal, but considering the decision of Hon'ble Gujarat High Court, it is the opinion of this court that in future, the party who lost the case, may raise grievance that he was not heard on the point of determination framed in appeal by first appellate court, thus, to prevent any kind of injustice, this court has framed following points of determination under Ex.29 and has putted it into knowledge of both the parties before proceedings of hearing.

1. Whether appellant is able to show that trial court has made error in evaluation of evidence filed before trial court?
2. Whether appellant is able to show that trial court has made error in the application of law relating to subject matter?
3. Is there any mistake in the finding given by the trial court on the issues framed by it?
4. Whether appellant is able to show that the order and decree passed in RCS No.102/2015 (Old SCS No.130/2010) on Dtd.26/10/2015 is wrong, illegal and perverse in the eyes of law?
5. What is order?

(11) **Followings** are the decisions of this court on the point of determination.

Point No.	Decision there on
1	In negative
2	Partly in affirmative
3	Partly in affirmative
4	Partly in affirmative
5	As per final order

:- Reasoning :-

(12) **Relevant provisions of Law.**

1. Evidence Act

A. Section 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 or 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.

B. Section 60. Oral evidence must be direct -

Oral evidence must, in all cases, whatever, be direct; that is to say;

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the

evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinions or to the grounds in which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds -

Provided that the opinion of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

C. Section 101. Burden of proof. - Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations (a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.

(b) A desires a Court to give judgement that he is entitled to certain land in the possession of B, by reason of facts which he asserts and which B denies, to be true. A must prove the existence of those facts.

D. Section 102. On whom burden of proof lies. - The

burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Illustrations (a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to retain his possession. Therefore the burden of proof is on A. (b) A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved. Therefore the burden of proof is on B.

E. Section 103. Burden of proof as to any particular fact. - The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Illustrations [(a)] A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission. (b) B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

(13) Relevant Decisions of Higher Courts.

(i) Effect of admission :-

* **Supreme Court of India in case of Govindammal (Dead) By Lrs. vs Vaidiyanathan And Ors. on 23 October, 2018** held that admission is the best evidence.

* Supreme Court of India in case of Vathsalsamanickavasagam & Ors vs N. Ganesan & Anr on 2 July, 2013 (2013) 9 SCC 152, Bench: B.S. Chauhan, Fakkir Mohamed Kalifulla stated that "Union of India Vs. Moksh

Builders and Financiers Ltd. and others - AIR 1977 SC 409 wherein it is held as under: "...It has been held by this Court in [Bharat Singh v. Bhagirath](#) [1966] 1 SCR 606 = AIR 1966 SC 405 that an admission is substantive evidence of the fact admitted, and that admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions." In taking this view this Court has noticed the decision in [Ajodhya Prasad Bhargava v. Bhawani Shanker](#) - AIR 1957 All 1 (FB) also."

* **Madras High Court in case of D.J.Rajendran vs K.Velumani on 21 September, 2020 held that section 58 –** Facts admitted need not be proved – No fact need to 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." The above said provision clearly proves that the fact admitted need not be proved.

* In Balraj Taneja and another v. Sunil Madan and another, AIR 1999 SC 3381, it was held that "The proviso quoted above, is identical with the proviso to S. 58 of the Evidence Act, which lays down those facts **admitted need**

not be **proved**."

* In City Montessori School v. State of Uttar Pradesh and Ors. 2009 (14) SCC 253 held that "It is furthermore well settled that a **fact admitted need** not be **proved**."

* Same ratio has been laid down in Nagindas Ramdas v. Dalpatram Ichcharam alias Brijram and others (1974) 1 SCC 242 and Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar v. Chandran and others (2017) 3 SCC 702 and Jagdish Patel vs. Shivnath and Others reported in (2019) 6 SCC 82,

(ii) Burden of proof

* Supreme Court of India Rangammal vs Kuppuswami & Anr. on 13 May, 2011 reported in (2011) 12 SCC 220 held in Para 14. Section 101 of the Indian Evidence Act, 1872 defines "**burden of proof**" which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.

* It has been further held by the Supreme Court in the case of State of J & K vs. Hindustan Forest Company, 2006 (12) SCC 198, wherein it was held that the **onus** is on the plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus.

* Supreme Court's Judgment in Parimal v. Veena @ Bharti (2011) 3 SCC 545 which held inter-alia: "15. The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. Section 103 provides that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person, who asserts the affirmative of the facts in issue."

* In Anil Rishi vs. Gurbaksh Singh reported in (2006) 5 SCC 558, it has been held: "19. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate

the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

* Supreme Court of India in case of Addagada Raghavamma And Anr vs Addagada Chenchamma And Anr on 9 April, 1963 reported in 1964 AIR 136, 1964 SCR (2) 933 held that " there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence."

* [In Mayawanti v. Kaushalya Devi](#) reported as **1990 SCR (2) 350, 1990 SCC (3) 1** and [Mirahul Enterprises and Ors. v. Mrs. Vijaya Sirivastava](#) reported as AIR 2003 Delhi 15, it was held that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made, the court will not make a contract for the parties.

* The decision of the Supreme Court in [Ganesh Shet v. Dr. C.S.G.K. Setty and Ors.](#) Decided on **on 15 May, 1998**

reported as 1998 (2) Civil Court Cases 711 (SC) wherein it is laid down that ""greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in contract; which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non-performance is not enough; its object is to procure a performance by the defendant and this demands a clear, definite and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced...."

* In Jagdish Patel vs. Shivnath and Others reported in (2019) 6 SCC 82, where the apex court has observed in the following manner: 44. In the suit for declaration for title and possession, the plaintiffs-respondents could succeed only on the strength of their own title and not on the weakness of the case of the defendants- appellants.

* Honb'le Gujarat High Court in State Of Gujarat vs Mali Ranchhod Kheta And Ors. on 11 November, 1995 reported in (1996) 2 GLR 501 held that "Section 101 of the Evidence Act provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 of the Evidence Act provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

* In AIR 2019 Supreme Court 4374, in the case of Raja Ram v. Jai Prakash and others, wherein the lordships have held as under:- " (A) Evidence Act (1 of 1872), S. 101 - Contract Act (9 of 1872), Ss.14, 16 - Burden of proof - Execution of sale deed - Challenge as to, on ground of physical condition and mental capacity of deceased, executant - No evidence regarding mental impairment of deceased except bald statement in plaint - No credible evidence that deceased was bed-ridden - Hardness of hearing by old age cannot be equated with deafness - Sale deed cannot be faulted."

(iii) Evidantary Value of Oral Evidence Against documentary Evidence :-

* In the case of Mahant Bhagwan Bhagat vs. G.N. Bhagat & Ors.: (1972) 1 SCC 486, the Hon'ble Supreme Court held that "documentary evidence will prevail over oral evidence."

* Commissioner of C. Ex. & Cus., Surat-I v. Jai Bhawani Metal Industries Court: Gujarat High Court Date: Apr 11, 2016 held that "It is well established law that documentary evidence will prevail over an oral evidence"

* **Smt. Anjali Debnath vs Sri Ratan Debnath**
2022 Latest Caselaw 51 Tri Citation : 2022 Latest Caselaw 51 Tri **Judgement Date** : 17 January, 2022 held that "13.

Furthermore, documentary evidence will prevail over the oral evidence of a witness. The findings of the learned appellate court that the plaintiff may not be in possession of the suit land and remanded the suit for determining her possession over the suit land, in my considered view, is wholly perverse and unwarranted causing grave miscarriage of justice since learned appellate court itself returned a finding that the plaintiff had been able to prove her title deed. 14. In my opinion, the learned first appellate court has not considered the maxim that possession follows title and documentary evidence will prevail over the oral evidence.”

* [M K Krishna Murthy Rao vs K S Sahul Hammed](#)

Judgment Date : 12 July, 2023 Citation : 2023 Latest Caselaw 4296 Kant “It is settled principles of law that the documentary evidence will prevail over the oral evidence.”

(iv) When Notice of case transfer is necessary

* Kanhu Charan Pradhan And Ors. vs Banambar Pradhan And Anr. on 27 April, 1985 reported in AIR 1986 Ori 213 it is held that when the transfer of case is made in one court to other court in the same station, then there is no need to issue notices to the parties or advocate for the transfer.

* Patna High Court in case of Sri Vishnu Kant Jha vs Sri Dinesh Jha And Ors. on 29 January, 1993 reported in AIR 1993 Pat 135 held that 15. Further question would arise in this case as to what procedure should be followed in relation to the party who is appearing, namely, who has filed

a case through lawyer or is contesting the same through lawyer by filing Vakaiatnama in the case. In cases where transfer order has been passed suo motu without giving notice to any of the parties or the same has been passed upon an application filed by any of the parties without giving any notice to other party, in such an eventuality, where a party has appeared in a case through counsel, the Court should give notice of transfer to the counsel of the parties who have already entered appearance. In case, counsel for the parties refuse to accept notice of transfer and show their inability to work before the transferee court, the court would be obliged to send notice to those parties whose counsel have refused to accept notices of transfer. If neither such steps are taken nor it is proved that such a party had knowledge of transfer of the case from any other source, then it can be safely said that "sufficient cause" was shown within the meaning of Order IX, Rules 4, 7, 9 and 13 of the Code and the final order passed by transferee court either dismissing the suit for default or passing ex parte decree or order, would be liable to be set aside on this ground alone.

16. The other question that arises in the case is as to what procedure should be followed in relation to those defendants/ opposite parties who have duly received summonses from the transferor court, but have failed to appear in spite of service thereof and the suit or proceeding has been transferred either in exercise of suo motu powers without giving notice or in exercise of powers of transfer upon an application without giving notice to such a party.

Can it be said that transferee court is obliged to issue fresh notice to such a party? I do not find any reason why notice should go again to such a party from transferee court. Once a party has been served with summons and he fails to appear on a date fixed in the summons but subsequently intends to appear, it cannot be said as a general rule that that very party will suffer, if no summons is issued afresh by transferee court. Such a party can, in that eventuality, go to the court from which it had received summons and from there it can very well know to which court proceeding has been transferred. Such a party in the event of non-service of fresh summons from transferee court would not generally suffer in any manner. Rather, on the other hand, if it is laid down that if such transferee court is required to issue notice afresh to the parties who have failed to appear in spite of service of summons from transferor court, then that would amount to causing unnecessary delay in disposal of the proceedings and would not serve cause of justice. It is common experience that cases are transferred on many occasion from one court to another for administrative reasons. If all the time notices are required to be given to such parties, then the suit will never become ready and there will be undue delay in disposal of cases for no justifiable reason. There may be cases where there are several dozens non appearing defendants and in some cases their number may exceed even hundred. If it is laid down that transferee court is required to serve notice upon such defendants, then laying down such a law cannot be said to be in furtherance

of justice, but the same would put hindrance in the speedy trial. Such an interpretation would be contrary to the intention of the legislature also as by Central Act 104/76, various amendments have been made in the Code and many amendments have been made for speedy trial of cases and immediate implementation of the judgment/ order through process of the executing court, e.g., if an execution case is levied within a period of three years from the date of decree, requirement of service of notice of the execution proceeding upon judgment debtor has been dispensed with.

* Patna High Court Jamila Khatoon And Anr vs Anwar Alam And Ors on 8 February, 2019 Author: [Birendra Kumar](#) the view of Sri Vishnu Kant Jha vs Sri Dinesh Jha And Ors. on 29 January, 1993 reported in AIR 1993 Pat 135 is reiterated.

(v) Effect of Judicial Admission :-

* Hon'ble Gujarat High Court in case of Valji Fatesing Tahkore Versus Vela Partha Garasia decided on Dtd.2/9/2011 held that Admissions are broadly classified into two categories (i) judicial admissions and (ii) extra judicial admissions – judicial admissions are formal admissions made by a party during the proceedings of the case. Extra judicial admissions are informal admissions not appearing on the record of the case. Admissions unless explained furnishes best evidence. Admissions in pleadings or judicial admission by themselves can be made the foundation of the rights of parties. In the case of Pari Kantilal Lalbhai (7, G.L.R., 1123

and), it has been held that when a party to a civil suit makes an admission in pleadings or in his evidence at the hearing of the suit, those admissions are conclusive and cannot be challenged.

Point No. 1 to 4 :-

(14) All the point of determinations framed by this court are interconnected, therefore, this court finds convenient to discuss all together to avoid repetition of the discussion.

(15) In case on hand following facts are admitted by the parties.

- A. Suit was filed as Special Civil Suit on Dtd.22/10/2010.
- B. Defendants served though the summons on Dtd.15/11/2010.
- C. Defendants represented through the advocate on record.
- D. The suit was transferred from Principal Sr. Civil Court Bhuj to 4th Sr. Civil Court, Bhuj on Dtd.1/2/2011.
- E. The advocates of the parties were aware of that transfer.
- F. As the learned advocate of defendants filed their written statement on 30/3/2011 before learned 4th Additional Sr. Civil Judge, Bhuj by opening of their right.
- G. The summons served on defendant was for appearance with evidence. i.e. for final hearing.
- H. The suit was converted in Regular Civil Suit on Dtd.13/2/2015, when it was on the docket of the 4th Additional Sr. Civil Court, Bhuj.

(16) Following facts are reveled from the preliminary evidence

filed with suit.

- A. Plaintiff filed the suit for the recovery of amount of bill filed at mark 3/1. (which was bearing date of 8/3/2010.)
- B. Plaintiff filed five emails stating his conversations with defendant No.1 for the demand of his due.
- C. Defendant No.1 filed his written statement vide Ex.19 and he admitted doing of business with the name as Malara Group.
- D. Defendant No.1 admitted of doing business transaction through defendant No.2.
- E. He admitted that plaintiff made email to him.
- F. He denied his responsibility to give reply of those emails.

(17) Now it is cleared from the pleadings of both the parties that defendant No.1 was doing business through defendant No.2 and as per his contention it was limited. It is also confirmed that plaintiff and defendant No.1 was having email conversation.

(18) Plaintiff filed the copy of bill at mark 3/1 i.e. Ex.36 was of bearing date of 8/3/2010 and it was admitted by the defendant No.1 under email of Ex.40 that there was due of plaintiff and he stated the plaintiff to contact Shri Narendrabhai for final settlement. The document of Ex.40 is issued for reply of document of Ex.39.

(19) Learned advocate of appellant raised the issue of not having any due and not mentioning of vehicle number and not service of notices for transfer of cases to the parties or advocates and not service of notice to the parties or advocates for framing of issues but it is trait of the era that person who is doing business and having clear confirmation of goods sell has to beg for his amount under various objection.

(20) The law stated in para No.13 (iv) is cleared that when the transfer of docket is made from same station from one court to another court, it is not necessary to issue notices for each transfer and when the general notice is issued for the transfer of cases by administrative authority is enough for information of learned advocate and parties.

(21) The email transaction is admitted fact under written statement and as there is no specific denial that alleged email filed with plaintiff was forged and concocted documents and as the transaction with plaintiff was admitted under Ex.40 and instructed him to contact specific person, it can not be the issue for plaintiff that for what reason he did not contact that person and filed the suit for recovery of amount. It is the burden on the defendant No.1 to show adverse situation.

(22) Here next question is of not service of evidence on learned advocate of defendant side and non closure of his right for cross-examination of plaintiff or non closure of his right of evidence but if the court considers the provision of Order 8 then all the questions are material-less under the light of document of Ex.40 and it was the duty of learned advocate of the parties to remain in court for each and every date on which the matter was adjourned suo motto or under the application of any party.]

(23) It is the grievance of the defendant No.1 i.e. present appellant side that he filed the complaint against his advocate for the in-activeness in litigation but it is the function of Bar Council and advocate, this court can not alter the decision of learned trial court on that ground where the claim of plaintiff is admitted by defendant No.1 under Ex.40. One decision on the ignorance of advocate and party is necessary to note here.

Hon'ble Apex court in case decided on 12th March 2019 parties

named as *Estate Officer, Haryana Urban Development Authority V. Gopi Chand Atreja reported in* 2019(3) CJ(Civ.)(SC) 750. *held that* If the appellants noticed that their lawyer was not taking interest in attending to the brief in question, then they should have immediately engaged some other lawyer to ensure that the appeal be filed in time by another lawyer."

(24) In case on hand, it is the allegations of the defendant that his advocate was not taking interest but what was his stand for his attendance for the litigation. Whether did he try to know the status of the case? Whether did he inquire from his advocate? The litigant is silent on the aspect.

(25) Learned advocate of appellant raised the issue of jurisdiction and denied territorial jurisdiction of learned trial court of Bhuj but it was not the issue before learned trial court and considering the provision of section 20 of The Code of Civil Procedure, the contention seems meritless.

(26) Learned advocate of appellant side raised the issue of provision of order 18 rule 4 of CPC for service of evidence to their advocate but this court finds the order of learned trial court for allowing the due amount of plaintiff as appropriate under section 58 of the Evidence Act but this court finds slightest defect in order of learned trial court as learned trial court has allowed the interest @ 12 % without having any written agreement on it as well as learned trial court has allowed interest on interest and cost of notice also. The provision of section 34 of CPC is cleared when there is no written contract for interest. Thus, there is slightest defect of application of law and decision taken by learned trial court on issue No.3 framed by it, which demands

interference from this court, hence, decision on point No.1 is given in negative and decision on point No.2 to 4 is given partly in affirmative and following final order is required to pass.

Final Order

1. The appeal filed by appellant/original defendant No.1 is partly allowed.
2. The judgment and decree passed by the learned^{4th} Additional Senior Civil Judge, Bhuj-Kutch in RCS No. 102/2015 on Dtd.26/10/2015, is hereby set aside.
3. The suit of plaintiff for the principle amount of Rs.2,63,272/- is allowed with interest @ 6% p.a. from the date of filling of the suit to till the realization of amount with allowing costs worth of Rs.500/- as of notice costs allowed by the learned trial court.
4. The plaintiff will be entitled to recover it from the defendant No.1.
5. Parties to bear their own costs.
6. If Plaintiff wants to apply for the immediate execution of decree as per the direction given by Hon'ble Supreme Court in **Case: Rahul S Shah vs. Jinendra Kumar Gandhi [CA 1659-1660 of 2021] Coram: CJI SA Bobde, Justices L. Nageswara Rao, S. Ravindra Bhat Counsel: Adv Shailesh Madiyal, Adv Paras Jain Citation: LL 2021 SC 230**, then the learned trial court shall considered the ratio laid down by the Hon'ble Apex Court in decision and shall given all necessary implementation for realization of decree.
7. Decree to be drawn accordingly.

8. Registry of this court is hereby directed to send the certified copy of this order with original Record and Proceedings back to trial court.

Singed & Pronounce in open Court Today 27st August 2024

Dt.27/8/2024

Place - Bhuj-Kutch

(Shilpa M. Kanabar)

8th Additional District Judge, Kutch-Bhuj

Code: GJ00814

PROCEEDINGS

23-27/8/2024	Matter is listed for order on Dtd.23/8/2024 but my senior clerk was on leave from 12/8/24 to 22/8/2024 and I had to do ministerial work also, hence, due to it was not able to judicial work in time and I had to postpone my judicial work to complete day to day ministerial work, I have posted the matter for decision on 31/8/2024
	But today not a single trial was run in my court and I have prepared judgment of this matter and as the matter is listed as targeted matter for my court, I does not find any inconvenience for early pronouncement of decision.
36	Judgment declared today
	Matter is disposed of accordingly.

(Shilpa M. Kanabar)

8th Additional District Judge, Kutch-Bhuj

Code: GJ00814