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MOHAN LAL

v.

ANANDIBAI & ORS.

March 3, 1971

B [J. M. SHELAT, I. D. DUA AND V. BHARGAVA, JJ.]

Practice and Procedure—Plea not raised in pleadings or issues or evidence—If could be allowed to be raised in arguments—Amendment of pleadings—When may be permitted.

C The appellant, who was the mortgagee purchased under two sale deeds dated 13th May, 1951 the mortgaged property in discharge of the mortgage. The respondents, who were the daughters of the original owner filed a suit claiming title to the property under gift deeds executed by their mother with respect to a share, (which she got under a sale deed from her husband) and by their father on 2nd May 1951, in respect of the entire property, and alleging that the sale deeds in favour of the appellant were collusive. The trial court held that the gift deed executed by the mother was valid but that the gift deed executed by the father D was fraudulent and not binding on the appellant. On appeal, the first appellate court held that both the gift deeds were invalid. It held that the mother had lost her right to her share, that the gift deed executed by the father was antedated having been in fact executed after 13th May, 1951, and that it was intended to defeat the sale in favour of the appellant. It also held that a judgment in another matter inter parties, delivered during the pendency of the appeal, operated as *res judicata*. It held that the gift deed by the father was antedated on the grounds, (i) it was belatedly registered E on 23rd August 1951 and (ii) the register of the petition-writer who wrote the gift deed was not produced thus raising a presumption against the respondents. In second appeal, the High Court held that the lower courts erred in deciding the case on the grounds of fraud or antedating when no such case was put forward in the pleadings, that on the question of *res judicata* there was not enough material, and that the case should be remanded permitting the parties to make amendments in their pleadings but only in respect of the plea of *res judicata*.

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In appeal to this Court it was contended that : (1) the High Court was not justified in setting aside the findings of the first appellate court that the gift deed executed by the father was fraudulent and ante-dated, (2) the appellant should have been given an opportunity to amend the written statement so as to include pleas in respect of the fraudulent nature and antedating; and (3) the High Court in fact had set aside all the find- G ings and therefore its order permitted the appellants to raise new pleas by amending the pleadings.

HELD : (1) (a) The pleadings in the written statement did not indicate that the appellant put forward the case that the gift deed was executed by the father after May 13, 1951 and that it was ante-dated. Not only was there no substance of such pleas there was not even a hint of such objections in the pleadings, and even the facts necessary for determining the H questions were not before the court. Even the parties and the trial court did not understand the pleadings as containing a plea that the gift deed was antedated and fraudulent in the sense of having been executed to defeat and delay the creditors of the father of the respondents. No issue

was framed on the question of fraud or antedating. Even in the course of evidence no questions were put on behalf of the appellant to the witnesses of the respondents suggesting such fraud or antedating. The question of the gift deed being fraudulent was raised for the first time before the trial court in the course of arguments after the parties had already concluded their evidence. [934 B-D; 935 B-D; 937 E] A

Therefore, there was no justification for the trial court to go into the question and record its finding. [935 D] B

Nagubai Ammal v. *B. Shama Rao*, [1956] S.C.R. 451; *Kunju Kesavan* v. *M. M. Phillip*, [1964] 3 S.C.R. 634, *Kidar Lall Seal* v. *Hari Lall Seal*, [1952] S.C.R. 179 and *Union of India* v. *M/s. Khas Karanapura Colliery Ltd.* [1968] 3 S.C.R. 784, referred to.

(b) The first appellate court committed a similar error in affirming this finding of the trial court and committed a greater error in going into the question whether the gift deed was antedated, because, the plea was raised for the first time before it only in the course of arguments. The delay in registration was not explained by the respondents because the plea was not raised in the trial court and was raised for the first time at the appellate stage. The register of the petition-writer was not a document maintained by or in possession of the respondents. Its non-production could only affect the evidence of petition-writer, but even if his evidence was not relied upon no finding of ante-dating could be given when there was no assertion and no evidence on behalf of the appellants. [935 E-F; 936 E-H] C D

(c) Further, the appellant was the only creditor of the respondents' father and the gift in respect of the properties already mortgaged could not in any way defeat or delay his right because the donee could only take the properties subject to the mortgage. [935 G-H] E

(d) The plea that the mother lost her right to her share of the property and that her husband acquired the right was immaterial, because, even if her gift deed was disregarded the title to the properties was acquired by the respondents through the gift deed executed by the father. [939 D-E]. . F

(2) The pleas regarding the fraudulent nature and ante-dating of the gift deed, should not be allowed to be raised by amendment because, a suit based on such pleas would be time barred and it would be unfair to the respondents to allow these pleas to be raised by amendment at such a late stage. The pleas of fraud and antedating in respect of the gift deed raise an entirely new cause of action and a case quite different from that pleaded in the original written statement. It would not be merely a case of a different or additional approach to facts already given in the written statement. [941 B-C] G

L. J. Leach & Company Ltd. v. *Jardine Skinner & Co.* [1957] S.C.R. 438 and *A. K. Gupta & Sons* v. *Damodar Valley Corporation* [1966] 1 S.C.R. 796, referred to.

(3) In directing that the findings of both courts are set aside the High Court was only referring to the points which it considered and on which it differed from the lower courts. Therefore, in permitting amendments, the High Court had given only liberty to the appellant to amend his written statement by setting out the requisite particulars and details of his plea of *res judicata* and other amendments which relate to the plea of *res judicata.* H

A The permission to amend could not be interpreted as giving liberty to the appellant to raise any new pleas which were not raised at the initial stage. [939 G-H;940 A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 473 of 1966.

Appeal by special leave from the judgment and decree dated
B August 14, 1964 of the Bombay High Court, Nagpur Bench in Appeal No. 93 of 1959 from Appellate Decree.

M. N. Phadke and *A. G. Ratnaparkhi*, for the appellant.

R. L. Roshan and *H. K. Puri*, for respondent Nos. 1 to 3.

The Judgment of the Court was delivered by

C

Bhargava, J.—This appeal by special leave has been filed by Mohan Lal who purchased the property in dispute from the original owner, Bhiwa, by means of two sale-deeds Exhibits D-1 and D-2 both dated 13th May, 1951. The properties were already mortgaged in favour of the appellant by two earlier
D mortgage-deeds executed on 23rd March, 1949 and 26th June, 1949 respectively. The plaintiff-respondents claimed that the two sale deeds were collusive transactions between Bhiwa and the appellant and that, in any case, Bhiwa had no right to sell these properties to the appellant, as the respondents had become owners of these properties prior to the execution of the sale-deeds. The four plaintiff-respon-
E dents are the daughters of Bhiwa by two wives, one of them being Smt. Hendri. According to their case, Bhiwa sold two of his malik-makbuza fields having an area of 11.33 acres by sale-deed Ext. D-31 to his wife Smt. Mendra and to his nephew. Barshya, each of the vendees getting a half share in those fields. Later, Barshya re-conveyed his share to Bhiwa on 20th July, 1921.
F With regard to the share sold to Smt. Mendra, disputes arose between her and Bhiwa. Bhiwa, consequently, filed a suit in the year 1941 for cancellation of the sale-deed Ext. D-31 and for a declaration that he was the owner of the entire fields. The suit was compromised and a decree was passed giving Smt. Mendra the right of ownership to ¼th share in those two fields. According
G to the plaintiff-respondents this share of Smt. Mendri was gifted by her to the plaintiff-respondents by two gift deeds Exts. P-1 and P-2 dated 3rd October, 1948 and 28th October, 1948. The title to the property to the extent covered by these two gift deeds was claimed by the plaintiff-respondents on the basis of those deeds. In addition, a deed of gift Ext. P-3 was executed by Bhiwa himself in favour of the plaintiff-respondents on 2nd May, 1951, and this
H covered the entire property in respect of which sale-deeds were later executed by Bhiwa in favour of the appellant on May 13, 1951. On the basis of this gift-deed, the plaintiff-respondents

claimed title to the entire property sold to the appellant by the two sale-deeds, so that claim in respect of part of the property was based on both the gift-deeds executed by Smt. Mendri, as well as the gift-deed executed by Bhiwa. Since the appellant came into possession under the two sale-deeds, the plaintiff-respondents brought a suit for declaration of their title and possession.

The trial Court held that the gift-deed Ext. P-3 executed by Bhiwa was fraudulent and, consequently, not binding on the appellant. The gift-deeds Exts. P-1 and P-2 executed by Smt. Mendri were held to be vaild. The plea of the plaintiff-respondents that the sale-deeds Exts. D-1 and D2 in favour of the appellant were not genuine was rejected. In respect of the property gifted by Mendri, the trial Court further recorded the finding that Mendri had not lost her right prior to the execution of the sale-deeds. This finding had to be given, as the appellant relied on the fact that there were proceedings under section 145 of the Code of Criminal Procedure between Bhiwa and Smt. Mendri after the compromise in Bhiwas suit recognising Mendri's right to 1/4th share in the two fields. In those proceedings, the entire fileds were declared to be in possession of Bhiwa and a direction was made by the Magistrate to Mendri to file a suit for getting her 1/4th share partitioned. No such suit was filed within the period of three years as required by Article 47 of the Indian Limitation Act, 1908. It was, therefore, urged that Mendri lost her right to the fields, so that the two deeds of gifts executed by her in favour of the plaintiff-respondents could not convey any title to them.

Against this judgment the trial Court, an appeal was filed by the plaintiff-respondents, while a cross-objection was filed by the defendant-appellant. The appeal and the cross-objection were heard by the Second Additional District Judge, Bhandara. The appeal by the plaintiff-respondents related to the property in respect of which their claim had been disallowed by the trial Court. while the appellant in the cross-objection challenged the decree in favour of the respondents in respect of 1/4th share of Smt. Mendri. The 2nd Additional District Judge dismissed the appeal of the respondents and allowed the cross-objection of the appellant. The appellant's cross-objection was allowed on the ground that Mendri had lost her right to the property before executing the gift-deeds in favour of the respondents on account of her failure to file a suit for partition or possession within three years after the order of the Magistrate under s. 145 of the Code of Criminal Procedure. The respondent's appeal was dismissed affirming the findings of the trial Court, but on two additional grounds. One ground was that the gift-deed executed by Bhiwa in favour of the plaintiff-respondents was in fact ante-dated and had been executed after the 13th May, 1951, so that it was

A fraudulent and was intended to defeat the sale in favour of the appellant. The second ground was that the suit of the plaintiff-respondents was barred by the principle of *res judicata* in view of an inter-parties judgment in Civil Suit No. 42-A of 1952 which did not exist during the pendency of the suit in the trial Court and was delivered while the appeal was pending in the appellate B Court.

Against this decree passed by the first appellate Court, second appeal was filed before the High Court of Bombay. The High Court held that both the lower courts had committed an error in deciding the case on the ground of fraud or ante-dating in respect of the gift-deed of Bhiwa dated 2nd May, 1951, because C no such case was put forward in the pleadings before the trial Court. The findings that the gift-deed was fraudulent and ante-dated were set aside and the gift-deed was, consequently, held to be valid. On the question of *res judicata*, the High Court came to the view that the material, which was placed before the first appellate Court to decide this quesion, was not sufficient, D though the first appellate Court was justified in entertaining this plea, because the judgment in Civil Suit No. 42-A of 1952 came into existence for the first time during the pendency of the appeal. Consequently, the High Court, while setting aside the decree passed by the first appellate court dismissing the respondents' suit, passed an order of remand permitting parties to make E amendments in their pleadings in respect of this plea of *res judicata*, and directing the trial Court to consider—prayer for allowing other amendments, but added a condition that amendments with respect to pleas of fraud, collusion or antedating in respect of the gift deed dated 2nd May, 1951 executed by Bhiwa in favour of the respondents were not to be permitted. It is against this order of the High Court that the present appeal has been F brought up to this Court by the defendant-appellant.

The main point urged on behalf of the appellant was that the High Court was not justified in setting aside the findings of the first appellate Court that the gift-deed dated 2nd May, 1951 was fraudulent and ante-dated, as there were sufficient pleadings to justify this point being entertained by that Court. In support of G this plea, our attention was drawn to paras 6 and 17 of the written statement of the appellant. In para. 6, the peading was that Bhiwa was all along in possession of the lands and the contentions of the plaintiffs to the contrary were denied. There was no valid transfer by Bhiwa before 13th May, 1951 in favour of the plaintiffs as alleged. It was denied again that plaintiffs were H in possession of the lands covered by the sale-deeds executed by Bhiwa in favour of the defendant, and a suit for mere injunction was incompetent. The pleading in para. 17 was that Bhiwa and

Mendri had been engaged for the past many years in litigation and the present plaintiffs had colluded with Bhiwa in seeking to set at naught the sale deed made by him in favour of the defendant which gave him a discharge of his liability and a release of estate from debt validly taken by him. Plaintiffs were thus not entitled to succeed. In the pleadings contained in these two paragraphs, we are unable to find any indication that the appellant wanted to put forward the case that the gift deed executed by Bhiwa was antedated and that, in fact this gift deed was executed after 13th May, 1951 and subsequently to the sale deeds in favour of the appellant. The collusion alleged in para. 17 did not purport to have any relationship with the deed of gift. That collusion between the plaintiff-respondents and Bhiwa was alleged to have been for the purpose of setting at naught the sale deed in favour of the appellant. There is indication that even the parties and the trial Court did not understand these pleadings as containing a plea that the gift deed was antedated and fraudulent in the sense of having been executed to defeat and delay the creditors of Bhiwa. No issue was framed on the question of fraud or antedating. Learned counsel for the appellant relied on issues 4, 12 and 13 to urge that such pleas were covered by the issues. These issues are as follows:—

(4) (a) Whether on 2-5-1951, Bhiwa made the gift of 5.66½ acres of land held in malik-makbuza rights and 2.8 acres of occupancy land in favour of the plaintiff ?

(b) Whether Bhiwa executed the gift deed in favour of the plaintiff ?

(c) Whether the plaintiffs accepted the gift and acquired possession of the property ?

(12) Whether the plaintiffs have brought this suit in collusion with Bhiwa ? If so, its effect ?

(13) Whether on 13-5-1951, Bhiwa was not the owner of the fields and he could not convey good title to the land in favour of the defendant ?

None of these issues appears to us to contain any suggestion that the gift deed by Bhiwa was executed to defeat and delay the creditors, or it was antedated. Issue 4(a) only challenges the execution of the gift itself; but there is no suggestion that the execution was either antedated or fraudulent. Issue No. 12, which seems to have been framed on the basis of the pleadings in para. 17 of the written statement, specifically charges the plaintiffs with bringing the suit in collusion with Bhiwa. The

A collusion mentioned in para. 17 was thus interpreted to refer to collusion in bringing the suit and not in execution of the deed of gift Ext. P. 3. Issue No. 13 only challenges the title of Bhiwa at the time of execution of the sale deeds in favour of the appellant and can, therefore, have no relation at all to the fraud or antedating in respect of the gift deed Ext. P-3. It is, thus, clear B that the pleadings were never interpreted up to the stage of the trial as containing any allegation of fraud or antedating in relation to the gift deed Ext. P. 3. Even in the course of evidence, no questions were put on behalf of the appellant to the witnesses of the plaintiffs suggesting such fraud or antedating, though questions were asked in respect of the proper and valid execu- C tion of the gift deed. It appears that, for the first time, the question of the gift deed being fraudulent must have been raised before the trial Court in the course of arguments after parties had already concluded their evidence, because the trial Court, in the judgment dealing with issues Nos. 12 and 13, proceeded to record a finding that the gift deed Ext. P.-3 was executed by Bhiwa fraudulently in order to defraud his creditors. On the D face of it, there was no justification for the trial Court to go into this question and record this finding when there were no pleadings in respect of it and, even during the course of trial, evidence was not led with the object of meeting such a plea. The first appellate Court committed a similar error in affirming this finding recorded by the trial Court. In fact, it proceeded to commit a E greater error in going into the question whether the gift deed was antedating having been executed after 13th May, 1951. Such a plea of antedating, it seems, was raised for the first time before the appellate Court in the course of arguments. There is nothing on the record to show that any such case was put forward at any earlier stage. The consequence is that the plaintiff-respondents F had no warning that such a case was being put forward and had no opportunity of tendering evidence to meet these objections. In respect of the plea of fraud, evidence could have been given that Bhiwa had other properties, so that no question of defrauding the creditors could arise. Both those courts also lost sight of the fact that, on the record, the appellant was shown to be the only creditor of Bhiwa; there were no other creditors. As G a creditor, he could not be defrauded, because his loans were secured by the mortgage deeds dated 23rd March, 1949 and 26th June, 1949. A gift by Bhiwa in respect of properties already mortgaged could not in any way defeat or delay the mortgagee's right, because the donee under the gift deed could only take the properties subject to the mortgages. The transfer by the deed H of gift could not in any way affect the mortgagee's rights under the mortgages. The finding about fraud recorded by the trial Court as well as the appellate Court was therefore, on the

face of it, totally unjustified, and the High Court was right in holding that they committed this error, and setting aside their findings.

So far as the plea of antedating of the gift-deed Ext. P-3 accepted by the appellate Court is concerned, the position is still worse. There was no suggestion at all that the gift deed was antedated either in the pleadings or in the course of evidence. No such suggestion was put forward to any witness of the plaintiff-respondents, nor was any statement made in this behalf by any witness of the appellant. The point was not even argued before the trial Court. It was not mentioned in any form before the appellate Court. It appears to have been raised for the first time in the course of arguments in the appeal, without notice to the other party. The point was again decided on the basis of the evidence which came in incidentally when parties were examining witnesses in respect of the issues framed by the trial Court. Only two circumstances were relied upon by the appellate Court to record this finding of antedating. One was that the gift deed was registered on 23rd August, 1951, even though it was executed on 2nd May, 1951, and no explanation was forthcoming for this inordinate delay. The second circumstance was that the petition-writer, who scribed the deed of gift, did not produce his register of documents required to be maintained by him under the rules, which was held to raise a presumption that, if that register had been produced, it would have shown that the gift deed was not written out on 2nd May, 1951. So far as the first circumstance is concerned, since no issue was framed. no occasion arose for the plaintiff-respondents to give evidence to explain the delay in registration. No question was put to any witness of the plaintiff-respondents why this delay had occurred The plea depended on questions of fact in respect of which evidence could have been given and facts elicited. Such a plea could not be considered for the first time at the appellate stage when the party concerned had no earlier warning and did not have any opportunity to give evidence explaining the reason for the delay. The second circumstance for holding against the respondents appears to be based on a misunderstanding of the position of law. The register of the petition-writer was not a document maintained by or in the possession of the respondents. They were not responsible for its non-production. No presumption could be raised against them for failure of its production by the petition-writer. At best, the non-production could affect the value of the evidence of the petition-writer. Even if his evidence was not relied upon, no finding of antedating could be given when there was no assertion and no evidence on behalf of the appellant to show that the gift deed had been ante-dated and had been executed after 13th May, 1951. The finding

A recorded was clearly without any evidence altogether. The High Court was, therefore, quite correct in setting aside this finding also.

Counsel for the appellant relied on four decisions of this Court in respect of his argument that the High Court was not B justified in rejecting the case of fraud and antedating, which had been accepted by the first appellate Court, merely on the ground of want of pleadings. The first case referred to is *Kidar Lall Seal and Another* v. *Hari Lall Seal*(1), where Bose, J., with whom Fazl Ali, J. agreed, said :—

> 'I would be slow to throw out a claim on a mere C technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, D provided that occasions no prejudice to the other side beyond what can be compensated for in costs."

The principle enunciated has no applicability to the facts of the case before us. As we have already indicated, the pleadings did not contain any reference at all to the question of the sale deed being fraudulent or antedated. Instead of the substance of the E pleas being there, there was no hint at all of these objections in the pleadings. The next case relied upon is *Nagubai Ammal & Others* v. *B. Shama Rao & Others*(2). That case related to a plea of *lis pendens*. The argument was that no plea of *lis pendens* was taken in the pleadings and, consequently, the evidence bearing on that question could not be properly looked into, and F no decision could be given based on the documents that the sale was affected by *lis*. The plea was not accepted on the ground that :

> "that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed G thereon, and adduce evidence relating thereto."

In the case before us, we have already shown that parties did not go to trial on the issue of fraud and antedating in respect of the gift deed Ext. P-3, nor did they adduce evidence relating to any such pleas. The third case relied upon by learned counsel is *Kunju Kasavan* v. *M. M. Philip, I.C.S. and Others*(3). In that H case, a contention was put forward that a notification or deposi-

(1) [1952] S.C.R. 179. (2) [1956] S.C.R.451.
(3) [1964] 3 S.C.R. 634.

tion of witnesses could not be looked into when there was no proper plea or issue about the exemption. The question was whether a particular notification had exempted one Bhagavathi Valli from the provisions of Part IV of the Ezhava Act. The Court held that this question was properly gone into and expressed its views in the following words :—

> "We do not think that the plaintiff in the case was taken by surprise. The notification must have been filed with the written statement, because there is nothing to show that it was tendered subsequently after obtaining the orders of the court. The plaintiff was also cross-examined with respect to the address of Bhagavathi Valli, and the only witness examined on the side of the defendant deposed about the notification and was not cross-examined on this point. The plaintiff did not seek the permission of the court to lead evidence on this point. Nor did he object to the reception of this evidence. Even before the District Judge, the contention was not that the evidence was wrongly received without a proper plea and issue but that the notification was not clear and there was doubt whether this Bhagavathi Valli was exempted or not. The parties went to trial fully understanding the central fact whether the succession as laid down in the Ezhava Act applied to Bhagavathi Valli or not. The absence of an issue, therefore, did not lead to a mis-trial sufficient to vitiate the decision."

Again, it is manifest that, in that case, parties had gone to trial consciously on that question and had given evidence, while the only omission was in the pleadings. In the case before us, we have already held that there was not merely omission in the pleadings, but, in fact, the question of fraud and antedating was never the subject-matter of any evidence and no party was ever conscious in the trial that such questions are going to be decided by the Court. The last case relied upon is *Union of India* v. *M/s. Khas Karanapura Colliery Ltd.*(1). In that case, this Court held that certain processes ancillary to the getting, dressing or preparation for sale of coal obtained as a result of the mining operations were being carried on. This conclusion was resisted on the plea that, in the writ petition, no specific case was pleaded under the second part of sub-s. (4) of section 4 and, therefore, it was not open for the Court to consider that aspect of the case. The Court said :—

> "We are unable to accept this contention. It is true that the pleadings on this point are rather vague; but

(1) [1968] 3 S.C.R.784.

A all the facts necessary for determining that question are before the court. That aspect of the case appears to have been fully argued before the High Court without any objection. The High Court has considered and decided that question. Hence the appellant cannot now be permitted to contend that for want of necessary
B pleadings that question cannot be gone into."

The circumstances of that case are again quite different from those in the case before us. In that case, all the facts necessary for determining the question were before the Court, while, in the present case, such facts could not come in, because the parties, at the time of trial, were not aware that these pleas of fraud and
C antedating are going to be considered by the courts. None of the cases relied upon by learned counsel affects the view taken by us that, in the present case, the High Court was fully justified in setting aside the findings of the appellate Court on the question of fraud and antedating.

D Learned counsel for the appellant also referred to the plea of limitation in respect of the right of Smt. Mendri through whom also title was claimed by the plaintiff-respondents in respect of some of the properties in suit. That plea becomes immaterial because, even if the gift deeds executed by Smt. Mendri are disregarded, the title to those properties was acquired by the respon-
E dents through the gift-deed Ext. P-3 executed by Bhiwa himself and the earlier title claimed need not, therefore, be gone into.

Lastly, counsel urged that now that the suit has been remanded to the trial Court for reconsidering the plea of *res-judicata* the appellant should have been given an opportunity to amend
F the written statement so as to include pleadings in respect of the fraudulent nature and antedating of the gift deed Ext. P-3. These questions having been decided by the High Court could not appropriately be made the subject-matter of a fresh trial. Further, as pointed out by the High Court, any suit on such pleas is already time-barred and it would be unfair to the plaintiff-respondents
G to allow these pleas to be raised by amendment of the written statement at this late stage. In the order, the High Court has stated that the judgments and decrees and findings of both the lower courts were being set aside and the case was being remanded to the trial Court for a fresh decision on merits with advertence to the remarks in the judgment of the High Court. It was
H argued by learned counsel that, in making this order, the High Court has set aside all findings recorded on all issues by the trial Court and the first appellate Court. This is not a correct interpretation of the order. Obviously, in directing that findings of

both courts are set aside, the High Court was referring to the points which the High Court considered and on which the High Court differed from the lower courts. Findings on other issues, which the High Court was not called upon to consider, cannot be deemed to be set aside by this order. Similarly, in permitting amendments, the High Court has given liberty to the present appellant to amend his written statement by setting out all the requisite particulars and details of his plea of *res judicata,* and has added that the trial Court may also consider his prayer for allowing any other amendments. On the face of it, those other amendments, which could be allowed, must relate to this very plea of *res judicata.* It cannot be interpreted as giving liberty to the appellant to raise any new pleas altogether which were not raised at the initial stage. The other amendments have to be those which are consequential to the amendment in respect of the plea of *res judicata.*

In support of the argument that the appellant should be allowed to amend his pleadings in respect of fraud and antedating also, reliance was placed on the decision of this Court in *L. J. Leach and Company Ltd.* v. *Jardine Skinner and Co.*(1), where an amendment was allowed at a very late stage by this Court. The Court held :—

> "The plaintiffs seek by their amendment only to claim damages in respect of those consignments. The prayer in the plaint is itself general and merely claims damages. Thus, all the allegations which are necessary for sustaining a claim for damages for breach of contract are already in the plaint. What is lacking is only the allegation that the plaintiffs are, in the alternative, entitled to claim damages for breach of contract by the defendants in not delivering the goods."

The dictum in that case has no application to the case before us in which there are no allegations or pleadings in the written statement in respect of the new pleas sought to be raised by amendment. Reference was also made to the decision of this Court in *A. K. Gupta and Sons* v. *Damodar Valley Corporation*(2) where the principle laid down was that :

> "the general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new case or cause of action is barred. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action, or raises a different case, but amounts to no more than a different

(1) [1957] S.C.R. 438. (2) [1966] 1 S.C.R. 796.

A or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation."

In the case before us, this principle, instead of helping the appellant, goes against him. In this case, the pleas of fraud and ante-
B dating in respect of the gift deed Ext. P-3 raise entirely new causes of action and a case quite different from that pleaded in the original written statement. It is not a case of a different or additional approach to facts already given in the written statement. These cases do not, therefore, help the appellant and would not justify our permitting amendment of the written statement
C at this late stage by varying the order of the High Court.

The appeal fails and is dismissed with costs in this Court.

V.P.S. *Appeal dismissed.*