Nagar Palika Parishad Thru Chairman ... vs M/S Krishna Chemicals, Lucknow & 3 ... on 10 December, 2019

Equivalent citations: AIRONLINE 2019 ALL 2058

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Reserved

Court No. - 8

Case :- SECOND APPEAL No. - 221 of 2002

Appellant :- Nagar Palika Parishad Thru Chairman Lakhimpurkheri & Another

Respondent :- M/s Krishna Chemicals, Lucknow & 3 Others

Counsel for Appellant :- Dheeraj Srivastava,Shailendra Singh Chauhan

Counsel for Respondent :- Rajiv Bhatnagar

Hon'ble Virendra Kumar-II,J.

1. The present second appeal has been preferred assailing impugned judgment and order dated 16.02.2002 delivered by the court of learned Additional District Judge Xth, Lucknow in Regular Civil Appeal No. 107 of 1993 (Executive Officer, Nagar Palika, Lakhimpur Kheri Vs. M/s Krishna Chemicals) and impugned judgment and order dated 18.9.1993 delivered by the court of learned Civil Judge IVth, Lucknow in Regular Suit No. 231/1985 (M/s Krishna Chemicals Vs. State of U.P. and others).

2. Learned trial court has decreed suit of the plaintiff/ respondent for recovery of amount of Rs. 77,936.30/- along with interest at the rate of 18% per annum. Learned first appellate court has dismissed appeal preferred by the appellant.

3. The present second appeal was admitted vide order dated 23.5.2002 on the following substantial questions of law:-

> "1. Whether any invalid or illegal contract may be enforced against the parties concerned?
>
> 2. Whether section 97 of Nagar Palika Adhiniyam, (1916) and Section 70 of Indian Contract Act may be ignored while deciding Regular Civil Appeal.
>
> 3. Whether time barred Regular Suit may be entertained and decreed.
>
> 4. Whether the trial court concerned has got territorial jurisdiction to entertain Regular Civil Suit?"

Principles for entertaining Second Appeal

4. On the point of admission of Second appeal, the following exposition of law is relevant:-

5. In the case of Thulasidhara v. Narayanappa, (2019) 6 SCC 409 the Hon'ble Supreme Court has held as under:

> "7.1. At the outset, it is required to be noted that by the impugned judgment and order [Narayanappa v. Rangamma, 2007 SCC OnLine Kar 737] , in a second appeal and in exercise of the powers under Section 100 CPC, the High Court has set aside the findings of facts recorded by both the courts below. The learned trial court dismissed the suit and the same came to be confirmed by the learned first appellate court. While allowing the second appeal, the High Court framed only one substantial question of law which reads as under:
>
> "Whether the appellant is the owner and in possession of the suit land as he purchased it in the year 1973, that is, subsequent to the date 23-4-1971 when Ext. D-1, partition deed, Palupatti is alleged to have come into existence?"

No other substantial question of law was framed. We are afraid that the aforesaid can be said to be a substantial question of law at all. It cannot be disputed and even as per the law laid down by this Court in the catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only with the second appeal involving a substantial question of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC.

7.2. As observed and held by this Court in Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722], in the second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law;

or

(ii) Contrary to the law as pronounced by the Apex Court;

or

(iii) Based on inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in the second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal.

7.3. When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in Ishwar Dass Jain v. Sohan Lal [Ishwar Dass Jain v. Sohan Lal, (2000) 1 SCC 434] . In the aforesaid decision, this Court has specifically observed and held: (SCC pp. 441-42, paras 10-13) "10. Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so.

11. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. ...

12. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. ...

13. In either of the above situations, a substantial question of law can arise."

6. In the case of Gurnam Singh v. Lehna Singh, (2019) 7 SCC 641 the Hon'ble Supreme Court has held as under:

> "13.1.The suspicious circumstances which were considered by the learned trial court are narrated/stated hereinabove. On reappreciation of evidence on record and after dealing with each alleged suspicious circumstance, which was dealt with by the learned trial court, the first appellate court by giving cogent reasons held the will genuine and consequently did not agree with the findings recorded by the learned trial court. However, in second appeal under Section 100 CPC, the High Court, by the impugned judgment and order has interfered with the judgment and decree passed by the first appellate court. While interfering with the judgment and order passed by

> the first appellate court, it appears that while upsetting the judgment and decree passed by the first appellate court, the High Court has again appreciated the entire evidence on record, which in exercise of powers under Section 100 CPC is not permissible. While passing the impugned judgment and order, it appears that the High Court has not at all appreciated the fact that the High Court was deciding the second appeal under Section 100 CPC and not first appeal under Section 96 CPC. As per the law laid down by this Court in a catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only when the second appeal involves a substantial question of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC. As observed and held by this Court in Kondiba Dagadu Kadam [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722] , in a second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:
>
> (i) Contrary to the mandatory provisions of the applicable law;

or

(ii) Contrary to the law as pronounced by the Supreme Court;

or

(iii) Based on inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal."

7. Hon'ble Supreme Court in State of M.P. v. Dungaji, (2019) 7 SCC 465 has propounded regarding interference by High Courts in exercising of power under Section 100 C.P.C. as follows:

> "10. Now, so far as the impugned judgment and order [Dungaji v. State of M.P., Second Appeal No. 580 of 2003, order dated 29-10-2010 (MP)] passed by the High Court declaring and holding that the marriage between Dungaji and Kaveribai had been dissolved by way of customary divorce, much prior to the coming into force the provisions of the 1960 Act and therefore after divorce, the property inherited by Kaveribai from her mother cannot be treated to be holding of the family property of Dungaji for the purposes of determination of surplus area is concerned, at the outset, it is required to be noted that as such there were concurrent findings of facts recorded by both the courts below specifically disbelieving the dissolution of marriage between

Dungaji and Kaveribai by way of customary divorce as claimed by Dungaji, original plaintiff. There were concurrent findings of facts recorded by both the courts below that the original plaintiff has failed to prove and establish that the divorce had already taken place between Dungaji and Kaveribai according to the prevalent custom of the society. Both the courts below specifically disbelieved the divorce deed at Ext. P-5. The aforesaid findings were recorded by both the courts below on appreciation of evidence on record. Therefore, as such, in exercise of powers under Section 100 CPC, the High Court was not justified in interfering with the aforesaid findings of facts recorded by both the courts below. Cogent reasons were given by both the courts below while arriving at the aforesaid findings and that too after appreciation of evidence on record. Therefore, the High Court has exceeded in its jurisdiction while passing the impugned judgment and order in the second appeal under Section 100 CPC.

11. Even on merits also both the courts below were right in holding that Dungaji failed to prove the customary divorce as claimed. It is required to be noted that at no point of time earlier either Dungaji or Kaveribai claimed customary divorce on the basis of divorce deed at Ext. P-5. At no point of time earlier it was the case on behalf of the Dungaji and/or Kaveribai that there was a divorce in the year 1962 between Dungaji and Kaveribai. In the year 1971, Kaveribai executed a sale deed in favour of Padam Singh in which Kaveribai is stated to be the wife of Dungaji. Before the competent authority neither Dungaji nor Kaveribai claimed the customary divorce. Even in the revenue records also the name of Kaveribai being wife of Dungaji was mutated. In the circumstances and on appreciation of evidence on record, the trial court rightly held that the plaintiff has failed to prove the divorce between Dungaji and Kaveribai as per the custom.

12. At this stage, it is required to be noted that before the competent authority, Kaveribai submitted the objections. Before the competent authority, she only stated that she is living separately from Dungaji and Ramesh Chandra, son of Padam Singh, has been adopted by her. However, before the competent authority neither Dungaji nor Kaveribai specifically pleaded and/or stated that they have already taken divorce as per the custom much prior to coming into force the 1960 Act. Therefore, as rightly observed by the learned trial court and the first appellate court only with a view to get out of the provisions of the Ceiling Act, 1960, subsequently and much belatedly, Dungaji came out with a case of customary divorce. As rightly observed by the learned trial court that the divorce deed at Ext. P-5 was got up and concocted document with a view to get out of the provisions of the Ceiling Act, 1960. As observed hereinabove, the High Court has clearly erred in interfering with the findings of facts recorded by the courts below which were on appreciation of evidence on record."

8. Hon'ble the Apex Court in the case of Narayana Gramani v. Mariammal, reported in (2018) 18 SCC 645 has held as under:-

> 17. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of respondent and, therefore, sub-section (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal. (See Santosh Hazari v. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179] and Surat Singh v. Siri Bhagwan [Surat Singh v. Siri Bhagwan, (2018) 4 SCC 562 : (2018) 3 SCC (Civ) 94])

9. In the case of Arulmighu Nellukadai Mariamman Tirukkoil v. Tamilarasi, reported in (2019) 6 SCC 686, Hon'ble Apex Court has held as under:-

10. The need to remand the case has occasioned because we find that the High Court failed to frame any substantial question of law arising in the case while admitting the appeal as required under Section 100(4) of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") and further failed to decide the appeal as provided under Section 100(5) CPC.

11. It is noticed that the High Court framed two substantial questions of law (see para 7 of the impugned judgment [Tamilarasi v. Arulmighu Nellukadai Mariamman Tirukkoil, 2011 SCC OnLine Mad 1684]) for the first time in the impugned judgment [Tamilarasi v.Arulmighu Nellukadai Mariamman Tirukkoil, 2011 SCC OnLine Mad 1684] itself. In other words, what was required to be done by the High Court at the time of admission of the appeal was to formulate a question of law after hearing the appellant as provided under Section 100(4) CPC, but the High Court did it in the

impugned judgment. Similarly, the High Court could have taken recourse to the powers conferred by the proviso to Section 100(5) CPC for framing any additional question of law at the time of final hearing of the appeal by assigning reasons for framing additional question, if it considered that any such question was involved. It was, however, not done. Instead, the High Court framed the questions for the first time while delivering the impugned judgment.

12. In our considered opinion, the procedure and the manner in which the High Court decided the second appeal regardless of the fact whether it was allowed or dismissed cannot be countenanced. It is not in conformity with the mandatory procedure laid down in Section 100 CPC.

13. Recently, this Court had an occasion to examine this very question in Surat Singh v.Siri Bhagwan [Surat Singh v. Siri Bhagwan, (2018) 4 SCC 562 : (2018) 3 SCC (Civ) 94] . The law is explained in paras 19 to 35 of this decision which read as under: (SCC pp. 567-69) "19. ... Section 100 of the Code reads as under:

> "100. Second appeal.--(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) An appeal may lie under this section from an appellate decree passed ex parte.
>
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
>
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.'

20. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that

question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court.

21. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of respondent and, therefore, sub-section (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal.

22. Adverting to the facts of this case at hand, we are at a loss to understand as to how the High Court while passing a final judgment [Bhagwan v. Murti Devi, 2006 SCC OnLine P&H 2175] in its concluding paragraph could frame the substantial question of law for the first time and simultaneously answered the said question in appellant's favour. Obviously, the learned Judge must have done it by taking recourse to sub-section (4) of Section 100 of the Code.

23. Here is the case where the High Court was under a legal obligation to frame the substantial question at the time of admission of the appeal after hearing the appellant or/and his counsel under sub-section (4) of Section 100 of the Code, but the High Court did it while passing the final judgment in its concluding paragraph.

24. Such novel procedure adopted by the High Court, in our considered opinion, is wholly contrary to the scheme of Section 100 of the Code and renders the impugned judgment legally unsustainable.

25. In our considered opinion, the High Court had no jurisdiction to frame the substantial question at the time of writing of its final judgment in the appeal except to the extent permitted under sub-section (5). The procedure adopted by the High Court, apart from it being against the scheme of Section 100 of the Code, also resulted in causing prejudice to the respondents because the respondents could not object to the framing of substantial question of law. Indeed, the respondents could not come to know on which question of law, the appeal was admitted for final hearing.

26. In other words, since the High Court failed to frame any substantial question of law under sub-section (4) of Section 100 at the time of admission of the appeal, the respondents could not come to know on which question of law, the appeal was admitted for hearing.

27. It cannot be disputed that sub-section (5) gives the respondents a right to know on which substantial question of law, the appeal was admitted for final hearing. Sub-section (5) enables the respondents to raise an objection at the time of final hearing that the question of law framed at the instance of the appellant does not really arise in the case.

28. Yet, the other reason is that the respondents are only required to reply while opposing the second appeal to the question formulated by the High Court under sub-section (4) and not beyond that. If the question of law is not framed under sub-section (4) at the time of admission or before the final hearing of the appeal, there remains nothing for the respondent to oppose the second appeal at the time of hearing. In this situation, the High Court will have no jurisdiction to decide such second appeal finally for want of any substantial question(s) of law.

29. The scheme of Section 100 is that once the High Court is satisfied that the appeal involves a substantial question of law, such question shall have to be framed under sub-section (4) of Section 100. It is the framing of the question which empowers the High Court to finally decide the appeal in accordance with the procedure prescribed under sub-section (5). Both the requirements prescribed in sub-sections (4) and (5) are, therefore, mandatory and have to be followed in the manner prescribed therein. Indeed, as mentioned supra, the jurisdiction to decide the second appeal finally arises only after the substantial question of law is framed under sub-section (4). There may be a case and indeed there are cases where even after framing a substantial question of law, the same can be answered against the appellant. It is, however, done only after hearing the respondents under sub-section (5).

30. If, however, the High Court is satisfied after hearing the appellant at the time of admission that the appeal does not involve any substantial question of law, then such appeal is liable to be dismissed in limine without any notice to the respondents after recording a finding in the dismissal order that the appeal does not involve any substantial question of law within the meaning of sub-section (4). It is needless to say that for passing such order in limine, the High Court is required to assign the reasons in support of its conclusion.

31. It is, however, of no significance, whether the respondent has appeared at the time of final hearing of the appeal or not. The High Court, in any case, has to proceed in accordance with the procedure prescribed under Section 100 while disposing of the appeal, whether in limine or at the final hearing stage.

32. It is a settled principle of rule of interpretation that whenever a statute requires a particular act to be done in a particular manner then such act has to be done in that manner only and in no other manner. (See Interpretation of Statutes by G.P. Singh, 9th Edn., p. 347 and Baru Ram v. Prasanni [Baru Ram v. Prasanni, AIR 1959 SC 93].)

33. The aforesaid principle applies to the case at hand because, as discussed above, the High Court failed to follow the procedure prescribed under Section 100 of the Code while allowing the second appeal and thus committed a jurisdictional error calling for interference by this Court in the impugned judgment.

34. While construing Section 100, this Court in Santosh Hazari v. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179] succinctly explained the scope, the jurisdiction and what constitutes a substantial questions of law under Section 100 of the Code.

35. It is, therefore, the duty of the High Court to always keep in mind the law laid down in Santosh Hazari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179] while formulating the question and deciding the second appeal."

(emphasis in original)

14. In the light of the foregoing discussion, we cannot sustain the impugned judgment [Tamilarasi v. Arulmighu Nellukadai Mariamman Tirukkoil, 2011 SCC OnLine Mad 1684] which, in our view, is not in conformity with the mandatory requirements of Section 100 CPC and hence calls for interference in this appeal.

15. The appeal thus deserves to be allowed and it is accordingly allowed. The impugned judgment is set aside. The case is remanded to the High Court for deciding the second appeal afresh in accordance with law. The High Court will frame proper substantial question(s) of law after hearing the appellant and if it finds that any substantial question(s) of law arises in the case, it will first formulate such question(s) and then accordingly decide the appeal finally on the question(s) framed in accordance with law.

Factual matrix

10. Brief facts of the dispute between both the parties, is regarding supply of 50 handcarts on the basis of supply order dated 10.12.1976 given by the Chairman of Nagar Palika, Lakhimpur Kheri on the basis of quotation No. KC/76-77 dated 9.12.1976.

11. The plaintiff has contended and pleaded in plaint of Suit No. 231 of 1985 (M/s Krishna Chemicals Vs. State of U.P. and others) that defendant no. 2 was elected as President of Nagar Palika, Lakhimpur Kheri. He was controlling authority and was also responsible for placing supply orders on behalf of the Nagar Palika, Lakhimpur Kheri. The defendant no. 2 invited quotation for supply of handcarts, on the basis of aforesaid invitation. The plaintiff sent his quotation from Lucknow with specification mentioned in paragraph no. 9 of the plaint showing cost Rs. 560/- of each cart. It is specifically mentioned on disputed bill Ex. Ka-3 that all disputes were subject to Lucknow jurisdiction.

12. It is further pleaded that the defendant no. 2 President of Nagar Palika, Lakhimpur Kheri placed an order dated 10.12.1976 Paper No. 23-C/12 to the plaintiff at Lucknow for supply of 50 handcarts and accepted cost of Rs. 560/- for each handcart. The aforesaid order was received by the plaintiff at its Lucknow office and the plaintiff dispatched the material from its Lucknow office to Lakhimpur Kheri on 30.12.1976. 50 handcarts were received by the concerned official of Nagar Palika Lakhimpur Kheri on the bill no. 108/76-77 dated 30.12.1976 amounting to Rs. 30,805.10/-.

13. It is further contended that the defendant no. 2 had accepted delivery of 50 carts and utilized these carts. The defendant had not paid amount of bill/cost of handcarts to the plaintiff and informed the plaintiff about some proceedings of recovery of damages pending against the Ex-President of defendant no. 2. The situation of the defendant no. 2 had changed and defendant no. 3 acted as Administrator of Nagar Palika, Lakhimpur Kheri. The proceedings pending against Ex-President of defendant no. 2 were dropped due to his death.

14. It is also pleaded that the defendant no. 2 vide letter dated 22.2.1984 informed the plaintiff that it asked defendant no. 3 to obtain permission from defendant no. 1. The defendant no. 4 informed the plaintiff vide letter dated 24.2.1984 about letter dated 22.2.1984 sent to defendant no. 3. The defendant no. 1 and 2 acknowledged the outstanding payment, even then defendant no. 3 is not interested in paying the amount due to the plaintiff. Therefore, plaintiff gave notice dated 15.5.1985 under Section 80 C.P.C. and demanded payment of Rs. 30,805.10/- along with interest at the rate of 18% per annum.

15. On the basis of aforesaid contentions, the plaintiff claimed relief decree for payment of Rs. 30,805.10/- against the defendant and also a decree for payment of Rs. 47,131.20/- towards 18% per annum during period from 30.1.1977 upto the date of suit and a decree for pendenti-lite and future interest at the same rate.

16. The trial court proceeded ex-parte against the defendant no. 1 to 3 as they did not file their written statements. The defendant no. 4 - the Executive Officer of Nagar Palika Lakhimpur Kheri filed his written statement before the trial court. It was contended by him that Ex- President of defendant no. 2 was never legally competent to enter into any agreement without impleading the Executive Officer of defendant no. 2. It was accepted that proceedings were initiated for recovery of disputed amount against the Ex-President of defendant no. 2 under Section 81 (4) of Nagar Palika Adhiniyam and control of Nagar Palika was handed over to defendant no. 3 as Administrator due to irregularities and illegalities committed by the then President of defendant no. 2.

17. It is also accepted that proceedings against Ex-President were dropped due to his death. The correspondence dated 22.2.1984 and 24.2.1984 made by the defendant has been accepted also. It is further contended that the defendant never denied for making payment to the plaintiff, because so far as the amount of Rs. 30,805/- is concerned, the same is admitted to be due. But the said payment was related to the policy matter of the defendant, as such, without the prior sanction of the Government, the payment of aforesaid amount cannot be made.

18. The defendant no. 4 has also accepted and admitted this fact that on the basis of report of Health Officer, Nagar Palika, the President of Nagar Palika, Lakhimpur Kheri passed supply order dated 10.12.1976 for supply of 50 handcarts. But the step of inviting the quotation was illegal. The Ex-President of Nagar Palika Lakhimpur Kheri was personally interested in accepting the quotation of the plaintiff. He had not consulted with the members of Nagar Palika Lakhimpur Kheri in this regard. As such, his acceptance for quotation of the plaintiff was illegal and invalid. The Ex-President late K.P. Tiwari was not legally competent to accept the quotation, because it was of more than Rs. 250/-. It required the consent of competent coram according to rules of Nagar Palika

Adhiniyam.

19. It is further pleaded in written statement of appellant/defendant no. 4 that according to Section 97 of the Nagar Palika Adhiniyam, the contract of worth of more than Rs. 250/- must be executed in writing. The Ex-President violated the aforesaid provisions. It is further contended that vide government order dated 11.10.1977, a recovery proceedings for damage and surcharge under Section 81 (4) of the Nagar Palika Adhiniyam were instituted against Ex-President late K.P. Tiwari. The defendant no. 4 clearly and specifically mentioned in letter dated 22.2.1984 that after the death of Sri K.P. Tiwari payment of disputed bill of the plaintiff would be made only after getting sanction from the Government. He has always been sincere and materializing the payment of the disputed bill to the plaintiff, as such, correspondence with the government was going on.

20. It is also pleaded that the plaintiff has charged exorbitant rates of handcarts supplied by him because cost of these handcarts were Rs. 235/-. The present suit of plaintiff was also barred by period of limitation because handcarts were supplied by it in the year 1976 and present suit has been instituted in the year 1985 after the gap of nine years. On the basis of above, pleadings it was contended that suit of the plaintiff is liable to be dismissed with special cost.

21. On the basis of aforesaid pleadings of both the parties, learned trial court has framed the following issues:-

> "(i) Whether the defendant no. 2 invited quotation for supply of handcrafts and plaintiff sent his quotations for the same which was accepted by defendant no. 2, as alleged in para 3 & 4 of the plaint? If so what right accrued to the plaintiff?
>
> (ii) What material under contract was dispatched by plaintiff from Lucknow was duly received by defendant no. 2 and was also utilized by them, as alleged in para 5 & 6 of the plaint? If so its effect?
>
> (iii) Whether the quotation invited by the defendant no. 2 and the order placed accordingly by defendant no. 2 was illegal as alleged in para 16 & 17 of w.s.? If so what will be the effect upon the supply made by the plaintiff to defendant no. 2?
>
> (iv) Whether the suit is barred by time?
>
> (v) Whether this Court has no jurisdiction to try the case as alleged in para 23 of w.s.?
>
> (vi) To what relief if any the plaintiff is entitled?"

22. The trial court has recorded the statement of PW-1 Krishna Agarwal, Proprietor of M/s Krishna Chemicals and DW-1 Kamal Jeet Singh. The plaintiff filed letters bill and supply order total ten documents through list 23-C. Ex .Ka-1, letter dated 24.2.1984 by which defendant no. 4 informed to the plaintiff that he has written letter dated 22.2.1984 (Ex. Ka-2) (to the District Magistrate, Lakhimpur Kheri). Bill Ex. Ka-3, supply order Paper No. 23-C/12 and notice under Section 80

C.P.C., Paper No. 7G/1-2 have been filed by the plaintiff. Five original letters have also been filed through list 26-C.

23. The trial court after considering the oral and documentary evidence adduced by the plaintiff and defendant decreed suit no. 231/95 of plaintiff vide impugned judgment and order dated 18.9.1993. The defendant Nagar Palika preferred Appeal No. 107 of 1993 before the first appellate court and after hearing both the parties, learned first appellate court had dismissed the aforesaid appeal vide impugned judgment dated 16.2.2002.

24. Aggrieved by the the aforesaid both the judgments, the present second appeal has been preferred by the Executive Officer of the Nagar Palika, Lakhimpur Kheri.

25. Learned counsel for respondent did not appear on 7.8.2019 and 6.9.2019. Therefore, vide order dated 13.11.2019, it was directed that if respondents would not appear then present appeal shall be disposed of ex-parte against respondents in accordance with law. Hence, the present appeal was heard ex-parte against the respondents on 4.12.2019.

26. I have heard learned counsel for appellant and perused the impugned judgment and order dated 18.9.1993, 16.2.2002 and also perused the record of Suit No. 231 of 1985 (M/s Krishna Chemicals Vs. State of U.P. and others).

27. Both substantial questions of law 1 & 2 are interconnected, therefore, these are being taken up together for decision.

28. This substantial question of law relates to issue no. 1 and 2 framed by the trial court regarding supply order passed by Ex-President of defendant no. 2 for supply of 50 handcarts. The defendant no. 4/appellant contended before the trial court that Ex-President of defendant no. 2 could not pass supply order on the basis of quotation, because cost of each cart was more than Rs. 250/-. The supply order was issued by Ex-President in violation of Section 97 of the Nagar Palika Adhiniyam, 1916 and Section 70 of the Indian Contract Act. The same plea was argued before the first appellate court.

29. The trial court and first appellate court dealt with the aforesaid issue no. 1 and 2 regarding invitation of quotations from the plaintiff and supply of 50 handcarts to the defendant no. 2. The proprietor of plaintiff PW-1 proved this fact that Ex-President Sri K.P. Tiwari of defendant no. 2 invited and accepted quotation for supply of 50 handcarts each costing Rs. 560/- and issued supply order dated 10.12.1976 Paper No. 23-C/12. He has proved bill Ex. Ka-3 and correspondence dated 24.2.1984 Ex. Ka-1 made by defendant no. 4 Executive Officer of Nagar Palika, Lucknow informing the plaintiff that for payment of Bill dated 30.12.1976 further proceeding shall be drawn on the basis of direction given by the District Magistrate.

30. Likewise, Ex. Ka-2 letter dated 22.2.1984 was written by defendant no. 4 to the District Magistrate, Lakhimpur Kheri asking him to obtain sanction of Government for payment of disputed bill. It is also mentioned in letter Ex. Ka-2 that proceedings drawn against Ex-President Sri K.P.

Tiwari were dropped due to his death.

31. As far as learned counsel for appellants has argued that Ex-President Sri K.P. Tiwari, was not competent to invite quotations in violation of Section 97 of the Nagar Palika Adhiniyam and Section 70 of Indian Contract Act. The first appellant court has considered this argument also and rejected it by observing that trial court has recorded finding in this regard that Ex-President of defendant no. 2 had accepted and issued supply order. The plaintiff supplied 50 handcarts to defendant no. 2, which were accepted on Bill Ex. Ka-3 by the concerned official and these handcarts were utilized by defendant no. 2.

32. Moreover, it is relevant to mention here that it is the internal matter of defendant no. 2 that proceedings were drawn against Ex-President late K.P. Tiwari regarding invitation of quotation from the plaintiff and he had accepted supply of 50 carts on higher rates amounting to Rs. 560/- instead of Rs. 235/-. On the other hand, defendant no. 2 or defendant no. 4 have not adduced any reliable defence evidence that actual cost/market value of handcart purchased by them was Rs. 235/- only.

On the point of concurrent finding, following exposition of is relevant:-

33. In S.V.R.Mudaliar (Dead) by Lrs. and Ors. Vs. Rajabu F.Buhari (Mrs) (Dead) by Lrs. and Ors. AIR 1995 SC 1607, the Court in paras 14 and 15 of the judgment has upheld the contention that though the appellate court is within its right to take a different view on the question of fact, but that should be done after adverting to the reasons given by trial court in arriving at the findings in question. Appellate Court before reversing a finding of fact has to bear in mind the reasons ascribed by Trial Court. Court relied and followed earlier decision of Privy Council in Rani Hemant Kumari Vs. Maharaja Jagadhindra Nath, 10 CWN 630 and in para 15 of the judgment said:

> "There is no need to pursue the legal principle, as we have no doubt in our mind that before reversing a finding of fact, the appellate court has to bear in mind the reasons ascribed by the trial court. This view of ours finds support from what was stated by the Privy Council in Rani Hemant Kumari Vs. Maharaja Jagadhindra Nath, (1906) 10 Cal.W.N. 630, wherein, while regarding the appellate judgment of the High Court of judicature at Fort William as "careful and able", it was stated that it did not "come to close quarters with the judgment which it reviews, and indeed never discusses or even alludes to the reasoning of the Subordinate Judge."

34. Following the above decision Hon'ble B.L.Yadav, J in Smt. Sona Devi Vs. Nagina Singh and Ors. AIR 1997 Patna 67 observed that whenever judgment of Appellate Court is a judgment of reversal, it is the primary duty of Appellate Court while reversing the findings of Trial Court to consider the reasons given by Trial Court and those reasons must also be reversed. Unless that is done, judgment of lower Appellate Court cannot be held to be consistent with the requirement of Order XLI, Rule 31, which is a mandatory provision.

35. The above view has also been followed recently in Jaideo Yadav Vs. Raghunath Yadav & Anr., 2009(3) PLJR 529 wherein the Court said that Trial Court recorded its findings but lower Appellate Court had not reversed the said findings and rather on the basis of some findings of its own, title appeal was allowed by lower Appellate Court without appreciating findings of Trial Court on the concerned issue. The court then said :

> "The law is well settled in this regard that where the judgment of the lower appellate court is a judgment of reversal it is primary duty of the appellate court to consider the reasons given by the trial court and those reasons must also be reversed."

36. This court has also followed the same view in Doodhnath and another Vs. Deonandan AIR 2006 Allahabad 3. Recently this view has also been followed in Second Appeal No. 47 of 2015, Awadh Narayan Singh Vs. Harinarayan, decided on 22.1.2015.

37. In the case of Ramathal v. Maruthathal, reported in (2018) 18 SCC 303, Hon'ble Apex Court has held as under:-

> 3. A brief reference to the facts which are necessary for disposal of the appeal before us are, the appellant herein who is the plaintiff in the suit (hereinafter "the buyer", for brevity) and Respondent 2 who is the defendant (hereinafter "the seller", for brevity unless context otherwise requires) entered into an agreement of sale in respect of suit schedule property on 10-12-1986. The sale consideration was fixed at Rs 1,01,000 per acre. An amount of Rs 40,000 was paid as earnest money. As per the terms of the agreement, one year was stipulated for completion of the sale by executing an absolute sale deed. Additionally, the agreement stipulated that the seller has to conduct a survey for the identification of the boundaries of the suit schedule property. As the said condition was not complied with by the seller, the buyer issued a notice dated 26-9-1987 calling upon the seller to comply with the stipulated obligation without any further delay. Confronted by continuous denials by the seller, the buyer having left with no option, has filed the instant suit seeking specific performance of the agreement of sale dated 10-12-1986.
>
> 10. The seller had agreed for conducting a survey of the scheduled property at their own cost and also agreed to demarcate the boundaries by affixing stones. Additionally, the sale consideration was agreed to be calculated according to the extent of land found in the survey. On the other hand, the buyer had agreed to pay the entire sale consideration within six months from the date of the contract. It is to be noted that the seller had agreed to rectify any hindrance which might occur in selling of the land other than those related to the Government, the panchayat, and the Housing Board and to extend the period of the agreement on happening of such hindrances. Moreover, the schedule of the property mentions the extent of property to be 1.87¾ acres.

11. Perusal of various conditions stipulated in the agreement makes it clear that the reciprocal promises were dependent on each other and must be determined on the true construction of the contract in the order which the nature of transaction requires. The view taken by the High Court, regarding the interpretation of the contract wherein the execution of the contract was independent of the payment obligation, is erroneous and cannot be sustained in the eye of the law as the contract needs to be read as a whole and not in a piecemeal approach as undertaken by the High Court. Therefore, the buyer's payment obligation and the obligation to execute the contract, was dependent upon the measurement to be conducted by the seller.

12. The factual aspect which was supposed to be considered was whether the survey was conducted by the seller or not. It is on record that DW 1 and DW 2 have stated that the survey was conducted subsequent to the execution of the agreement, but no documents were marked on behalf of the seller evidencing the fact that survey was undertaken. When both the courts below took a view that evidence of the witness was not believable on detailed consideration of their cross-examination and non-availability of documentary evidence to prove that survey was conducted, then the High Court should not have interfered with such factual findings by taking into consideration the oral evidence of witnesses without there being any documentary evidence. The crucial fact that the survey was not conducted had attained finality by the earlier judgment of the High Court in CRP No. 2195 of 1989. Therefore, once the trial court and the first appellate court which are the fact-finding courts have come to the specific conclusion that the plaintiff is entitled for specific performance of the agreement of sale, the High Court on reappreciation of evidence could not have upset the factual findings in second appeal.

13. It was not appropriate for the High Court to embark upon the task of reappreciation of evidence in the second appeal and disturb the concurrent findings of fact of the courts below which are the fact-finding courts. At this juncture, for better appreciation, we deem it appropriate to extract Sections 100 and 103 CPC, which reads as follows:

"100. Second appeal.--(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> ***
>
> 103. Power of High Court to determine issues of fact.-- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal--
>
> (a) which has not been determined by the lower appellate court or both by the court of first instance and the lower appellate court, or
>
> (b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."

14.A clear reading of Sections 100 and 103 CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the High Court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a second appeal is a substantial question of law involved in the case which has to be adjudicated by the High Court. It is the intention of the legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to Section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact-finding court. However, it is not an absolute rule that the High Court cannot interfere in a second appeal on a question of fact. Section 103 CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, the court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible; in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.

Under Order XLI, Rule 33 of C.P.C. reads as under:-

> "33. "Power of Court of Appeal-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an

appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

38. Hon'ble the Apex Court in the case of R.S. Anjayya Gupta v. Thippaiah Setty, reported in (2019) 7 SCC 300 has held as under:-

17. In a recent decision of this Court in U. Manjunath Rao [U. Manjunath Rao v. U. Chandrashekar, (2017) 15 SCC 309 : (2018) 2 SCC (Civ) 682] , the Court after adverting toSantosh Hazari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179, para 15], Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh [Sarju Pershad Ramdeo Sahu v.Jwaleshwari Pratap Narain Singh, AIR 1951 SC 120, para 15], Madhukar [Madhukar v.Sangram, (2001) 4 SCC 756, para 5], H.K.N. Swami v. Irshad Basith [H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243, para 3] and SBI v. Emmsons International Ltd. [SBI v.Emmsons International Ltd., (2011) 12 SCC 174 : (2012) 2 SCC (Civ) 289] went on to observe thus: (U. Manjunath Rao case [U. Manjunath Rao v. U. Chandrashekar, (2017) 15 SCC 309 : (2018) 2 SCC (Civ) 682] , SCC pp. 313-15, paras 11-14) "11. ... "3. ... Thus, in the first appeal the parties have the right to be heard both on the questions of facts as well as on law and the first appellate court is required to address itself to all the aspects and decide the case by ascribing reasons.'

12. In this context, we may usefully refer to Order 41 Rule 31 CPC which reads as follows:

"ORDER 41 Appeals from Original Decrees ***

31. Contents, date and signature of judgment.--The judgment of the appellate court shall be in writing and shall state--

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.'

13. On a perusal of the said Rule, it is quite clear that the judgment of the appellate court has to state the reasons for the decision. It is necessary to make it clear that the approach of the first appellate court while affirming the judgment of the trial court and reversing the same is founded on different parameters as per the judgments of this Court. In Girijanandini Devi [Girijanandini Devi v. Bijendra Narain Choudhary, AIR 1967 SC 1124] , the Court ruled that while agreeing with the view of the trial court on the evidence, it is not necessary to restate the effect of the evidence or reiterate the reasons given by the trial court. Expression of general agreement with reasons given in the trial court judgment which is under appeal should ordinarily suffice. The same has been accepted by another three-Judge Bench in Santosh Hazari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179, para 15] . However, while stating the law, the Court has opined that expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage to be adopted by the appellate court for shirking the duty cast on it. We are disposed to think, the expression of the said opinion has to be understood in proper perspective. By no stretch of imagination it can be stated that the first appellate court can quote passages from the trial court judgment and thereafter pen few lines and express the view that there is no reason to differ with the trial court judgment. That is not the statement of law expressed by the Court. The statement of law made in Santosh Hazari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179, para 15] has to be borne in mind.

14. In this regard, a three-Judge Bench decision in Asha Devi v. Dukhi Sao [Asha Devi v. Dukhi Sao, (1974) 2 SCC 492] is worthy of noticing, although the context was different. In the said case, the question arose with regard to power of the Division Bench hearing a letters patent appeal from the judgment of the Single Judge in a first appeal. The Court held that the letters patent appeal lies both on questions of fact and law. The purpose of referring to the said decision is only to show that when the letters patent appeal did lie, it was not restricted to the questions of law. The appellant could raise issues pertaining to facts and appreciation of evidence. This is indicative of the fact that the first appellate court has a defined role and its judgment should show application of mind and reflect the reasons on the basis of which it agrees with the trial court. There has to be an "expression of opinion" in the proper sense of the said phrase. It cannot be said that mere concurrence meets the requirement of law. Needless to say, it is one thing to state that the appeal is without any substance and it is another thing to elucidate, analyse and arrive at the conclusion that the appeal is devoid of merit."

39. Since the trial court and first appellate court have recorded concurrent finding that the plaintiff supplied 50 handcarts to the defendant no. 2 on the basis of supply order issued by Ex-President of defendant no. 2, therefore, his claim cannot be rejected on the basis of requirement of written agreement in this regard. Moreover, the proceedings drawn against Ex-President of defendant no. 2 has been dropped due to his death as revealed by letter dated 22.2.1984 Ex. Ka-2.

40. This fact is also mentioned in letter dated 25.2.1983 Paper NO. 23-C/9 written by defendant no. 4 to Deputy Secretary of U.P. Government Nagar Vikas Anubhag-6 Lucknow that payment of bill Ex. Ka-3 could not be made, regarding supply of handcarts made by the plaintiff in December, 1976. It was also mentioned that Ex-President Sri K.P. Tiwari expired in the year 1980, therefore, case for recovery could not be instituted and proceedings were dropped against him by the U.P. Government

vide letter no. 75353B dated 20.12.1980 of Anubhag-5th.

41. It is pertinent to mention here that the defendant no. 2 and 4 made regular correspondence since 23.8.1979 upto 22.4.1984 with the plaintiff and assured him for payment of bill Ex. Ka-3 after obtaining sanction from the U.P. Government.

42. The plaintiff PW-1 wrote letter dated 14.10.1977 to defendant no. 4 regarding payment of outstanding bill amounting to Rs. 11,225/- of 1975-76 and Rs. 30,805.10/- of 1976-77 and afterwards he sent notice dated 15.5.1985 under Section 80 C.P.C. to the defendants before institution of the present suit.

43. Learned trial court and first appellate court have recorded findings that defendant no. 2 accepted supply of 50 handcarts and utilized them for it. Therefore, the fact of supply made by the plaintiff on the basis of quotation and after acceptance of quotations and issue of supply order in his favour reveal that he has completed his part of contract.

44. The trial court has recorded finding that even if it be accepted that written agreement was required and contract was invalid, even then as propounded by Supreme Court in exposition of law in the case of New Marine Coal Co. (Bengal) Private Ltd. v. Union of India reported in (1964) SC 152. The claim of the plaintiff cannot be rejected.

45. On the point of Section 70 of Indian Contract Act, the Full Bench of Hon'ble Supreme Court in the case of New Marine Coal Co. (Bengal) Private Ltd. v. Union of India, reported in (1964) 2 SCR 859 : AIR 1964 SC 152 has held as under:-

> This appeal arises out of a suit filed by the appellant, the New Marine Coal (Bengal) Private Ltd, against the respondent, the Union of India, on the original side of the Calcutta High Court to recover Rs 20,343/8. The appellant's case was that it had supplied coal to the Bengal Nagpur Railway Administration in the month of June, 1949, and the amount claimed by it represented the price of the said coal and Sales Tax thereon. The appellant also made an alternative case, because it was apprehended that the respondent may urge that the contract sued on was illegal and invalid since it did not comply with Section 175(3) of the Government of India Act, 1935. Under this alternative claim, the appellant alleged that the coal had been supplied by the appellant not intending so to do gratuitously, and the respondent had enjoyed the benefit thereof, and so, the respondent was bound to make compensation to the appellant in the form of the value of the said coal under Section 70 of the Indian Contract Act. The appellant's case was that since the said amount had to be paid to it at its Explanade Office in Calcutta, the original side of the Calcutta High Court had jurisdiction to entertain the said suit. Since a part of the cause of action had accrued outside the limits of the original jurisdiction of the Calcutta High Court, the appellant obtained leave to sue under Clause 12 of the Letters Patent.

6. In the courts below, elaborate arguments were urged by the parties on the question as to whether the contract, the subject-matter of the suit, was invalid and if yes, whether a claim for compensation made by the appellant could be sustained under Section 70 of the Indian Contract Act. Both these questions are concluded by a recent decision of this Court in the State of West Bengal v. B.K. Mondal and Sons [AIR 1962 SC 779] . As a result of this decision, there can be no doubt that the contract on which the suit is based is void and unenforceable, and this part of the decision is against the appellant. It is also clear under this decision that if in pursuance of the said void contract, the appellant has performed his part and the respondent has received the benefit of the performance of the contract by the appellant, Section 70 would justify the claim made by the appellant against the respondent. This part of the decision is in favour of the appellant. It is therefore, unnecessary to deal with this aspect of the matter at length.

21.It is in the light of this legal position that the question about estoppel raised by the respondent against the appellant in the appellate court may be considered. Can it be said that when the appellant received the intimation card, it owed a duty to the respondent to keep the said card in a locked drawer maintaining the key all the time with its Director? It would not be easy to answer this question in the affirmative; but assuming that the appellant had a kind of duty towards the respondent having regard to the fact that the intimation card was an important document the presentation of which with an endorsement as to authorisation duly made would induce the respondent to issue a cheque to the person presenting it, can the court say that in trusting its employees to bring letters from the letter box to the Director, the appellant had been negligent? As we have already observed, in dealing with the present dispute on the basis that the intimation card had been dropped in the letter box of the appellant, it is possible to hold either that the said card was collected by the peon and given over to Mr Parikh, or it was not. In the former case, after Mr Parikh got the said card, it had been removed from Mr Parikh's table by someone, either by one of the employees of Mr Parikh or some stranger. In the latter case, though, technically, the card had been delivered in the letter box of the appellant, it had not reached Mr Parikh. In the absence of any collusion between Mr Parikh and the person who made fraudulent use of the intimation card, can the respondent be heard to say that Mr Parikh did not show that degree of diligence in receiving the card or in keeping it in safe custody after it was received as he should have? In our opinion, it would be difficult to answer this question in favour of the respondent. In ordinary course of business, every office that receives large correspondence keeps a letter box outside the premises of the office. The box is locked and the key is invariably given to the peon to collect the letters after they are delivered by postal peons. This course of business proceeds on the assumption which must inevitably be made by all businessmen that the servants entrusted with the task of collecting the letters would act honestly. Similarly, in ordinary course of business, it would be assumed by a businessman that after letters are placed on the table or in a file which is kept at some other place, they would not be pilfered by any of his employees. Under

these circumstances, if the intimation card in question was taken away by some fraudulent person, it would be difficult to hold that the appellant can be charged with negligence which, in turn, can be held to be the proximate cause of the loss caused to the respondent. In our opinion, therefore, Mukarji, J. was in error in holding that the respondent could successfully plead estoppel by negligence against the appellant. As we have already observed, the question as to whether the claim made by the appellant against the respondent under Section 70 is concluded by the decision of this Court in the case of B.K. Mondal and Sons [AIR 1962 SC 779] in favour of the appellant, and so, it must be held that the Division Bench of the High Court erred in dismissing the appellant's claim.

46. Section 70 of the Indian Contract Act, 1872 provides as follows:-

70. Obligation of person enjoying benefit of non-gratuitous act.-Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

47. Section 97 of the Municipalities Act, 1916 reads as under:-

Execution of contracts.- (1) Every contract made by or on behalf of a [Municipality] whereof the value or the amount exceeding Rs. 250 shall be in writing :

[Provided that unless the contract has been duly executed in writing, no work including collection of materials in connection with the said contract shall be commenced or undertaken].

(2) Every such contract shall be signed, -

(a) by the President or a [* * *] and by the executive officer or a secretary; or

(b) by any person or persons empowered under sub-section (2) or (3) of the previous section to sanction the contract if further and in like manner empowered in this behalf by the [Municipality].

(3) If a contract to which the foregoing provisions of this section apply is executed otherwise than in conformity therewith it shall not be binding on the[Municipality].

48. Since the plaintiff was invited to provide quotations by the Ex-President Sri K.P. Tiwari and issued aforesaid supply order and plaintiff-firm supplied 50 hand carts to defendant no. 2 on his behest. 50 handcarts were utilized by defendant nos. 2 and 4. Therefore, the trial court and first appellate court have recoded concurrent finding in this regard that defendants are bound to make compensation/cost of handcarts to the plaintiff regarding supply of handcarts. The concurrent

finding recorded by the trial court and first appellate court on issue no. 1 and 2 cannot be disturbed legally. It is also relevant to mention here that these findings have been recorded in correct perspective.

49. It is also relevant to mention here that findings recorded by the trial court and first appellate court regarding issue no. 1 and 2 were based on possible view to be taken on the basis of evidence adduced by the plaintiff and admission of the defendant no. 4 in his written statement regarding invitation of quotations and its acceptance by Ex-President of defendant no. 2 and issuance of supply order to the plaintiff by him. The defendant no. 2 had accepted 50 handcarts from the plaintiff.

50. On the basis of evidence and other material available on record, and aforesaid discussions and exposition of law, substantial questions of law no. 1 and 2 are hereby decided against the appellant. Moreover, the defendant no. 2 has initiated proceedings for recovery of cost of 50 handcarts from Ex-President Sri K.P. Tiwari, which were dropped afterwards due to his death in the year 1980. Therefore, there is no substance in argument of learned counsel for appellant.

Substantial question of law no. 3

51. Learned counsel for appellant has argued that regular suit instituted by the plaintiff was entertained and decreed, which was barred by period of limitation.

52. Both the courts below i.e. the trial court and first appellate court have considered this plea also and recorded findings that the defendants regularly assured the plaintiff for payment of bill Ex. Ka-3 and informed him that when the recovery proceedings initiated against Sri K.P. Tiwari would be concluded, his outstanding payment would be made. After death of Ex-President, it was informed by the defendants to the plaintiff that as and when sanction for payment of bill Ex. Ka-3 would be received from U.P. Government, then payment could made to the plaintiff by defendant no. 2 and 4.

Section 25 of the Indian Contract Act 1872 provides as follows:-

> 25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.--An agreement made without consideration is void, unless-- --An agreement made without consideration is void, unless--"
>
> (1) it is expressed in writing and registered under the law for the time being in force for the registration of 1[documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless.

(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.--Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.--An Agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Section 18 of the Limitation Act, 1963 reads as follows:-

18. Effect of acknowledgment in writing.--

(1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received. Explanation.--For the purposes of this section,--

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

Scheduled of Article 27 of the Limitation Act, 1963 reads as under:-

The Scheduled Periods of Limitation First Division-Suits Description of suits Period of limitation Time from which period begins to run

27.

For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.

Three years When the time specified arrives or the contingency happens.

53. The following exposition of law is relevant regarding acknowledgement of debt by the defendant within period of limitation according to provision of Section 18 of Limitation Act and acknowledgment of debt regarding claim of the plaintiff barred by period of limitation according to provision of Section 25 (3) of the Indian Contract Act, 1872:-

54. In the case of State Bank of India v. Kanahiya Lal & Anr. Reported in 2016 SCC OnLine Del 2639 High Court of Delhi has held as under:-

> 24. No doubt, there is a distinction between an acknowledgement under Section 18 of the Limitation Act and a promise under Section 25(3) of the Indian Contract Act inasmuch as though both have the effect of giving a fresh lease of life to the creditor to sue the debtor, but, for an acknowledgement under Section 18 of the Limitation Act to be applicable, the same must be made on or before the date of expiry of the period of limitation whereas such a condition is nonexistent so far as the promise under Section 25(3) of the Indian Contract Act is concerned. A promise under Clause 3 of Section 25 of the Indian Contract Act, even made after the expiry of the period of limitation would be applicable and would cause revival of the claim, notwithstanding the limitation. Under Section 25(3) of the Indian Contract Act, a promise in writing to pay in whole or in part, a time barred debt is not void.
>
> 29. Aforesaid letters (Ex.PW-2/2 & Ex.PW-2/3) indicate the categorical endorsement of the liability to make the payments, and thus, it could be treated as an implied promise to pay. The circumstances under which such an acknowledgement was made, viz. after the reminders by the Bank for repayment of the loan amount, further lends support to the hypothesis that the aforesaid letters are in the nature of a promise to pay. Prior to the aforesaid acknowledgements, there was a confirmation of the balance amount by the respondent/defendant. Any written acknowledgment after the confirmation of the balance amount can safely be treated as a promise to pay and not mere acknowledgement.
>
> 30. Thus the First Appellate Court was not justified in dismissing the suit of the appellant on the ground of the same being time barred.

55. In the case of Madishetti Shekar v. Puliyala Komurelli, reported in 2007 SCC OnLine AP 901 : AIR 2008 AP 131 High Court of Andhra Pradesh has held as under:-

> 16. Thus, it is clear that the mere fact that the liability is acknowledged by the party by itself does not save the limitation if such acknowledgment is made after the expiry of the period of limitation.
>
> 17.However, as rightly contended by the learned counsel for the respondent Section 25(3) of the Contract Act, 1872 operates as an exception to the law of limitation and where there is an agreement between the parties under which there is an express promise to pay the time barred debt, the suit cannot be held to be barred by limitation.
>
> 18. Section 25(3) of the Contract Act, 1872 runs as under:--
>
> 25. Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law:-- An agreement made without consideration is void, unless--

(1) and (2) .....

(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

....."

19.A plain reading of Section 25(3) of the Contract Act, 1872 shows that an agreement containing a promise with regard to a time barred debt falls within the exception provided under Section 25 of the Contract Act and makes it a valid transaction which can be enforced by law.

56. According to provision of Section 25 (3), it is provided that if any promise was made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of limitation of suits such agreement would not be void.

57. The aforesaid case enumerated in clause (1) (2) & (3) of Section 25 of the Indian Contract Act, 1872 would come within the category of an agreement and such agreement is a contract. Even though, argument of learned counsel for appellant may be accepted that prescribed period for recovery of outstanding payment by the plaintiff was only three years. There is no substance in his argument because, according to provision of Section 18 and Article 27 of the Limitation Act, 1963, it is provided that if claim of the plaintiff regarding outstanding dues payment/debt was acknowledged by the defendant time and again, then fresh period of limitation shall be computed from the date when the acknowledgement was so signed.

58. On perusal of record, and evidence adduced by the plaintiff on the basis of various correspondences during period from 23.8.1979 upto last correspondence made on 24.2.1984 by defendant no. 2 and 4 regarding outstanding payment/debt of the plaintiff and assurances made by them for payment of bill Ex. Ka-3 acknowledges the liability of defendant no. 2 and 4 and other defendants to pay the outstanding amount of bill Ex. Ka-3, which was acknowledged within prescribed period of limitation i.e. three years and before expiry of period of limitation. The defendant nos. 2 and 4 acknowledged the debt according to provision of Section 18 of the Limitation Act, 1963.

59. A reference of letter i.e. paper no. 23-C/4 dated 9.4.1984 written to Sri Har Deepak Singh, District Magistrate/Administrator, Nagar Palika, Lakhimpur Kheri by the Secretary, Awas and Nagar Vikas, Department of Government of U.P. is also relevant to mention here, by which, the Secretary of Government of U.P. directed the District Magistrate/Administrator of Nagar Palika, Lakhimpur Kheri to look into the matter and if payment is factually outstanding against the Nagar Palika, then arrange for payment of it. Another letter dated 24.4.1984 was also sent by the Secretary again to successor Sri S.L.S. Kumaiya, District Magistrate, Lakhimpur Kheri.

60. The plaintiff PW-1 has proved this fact that regular correspondences were made by defendant no. 4 to the District Magistrate and Deputy Secretary of Government of U.P. for obtaining permission for payment of bill of the plaintiff. Last letter was written by defendant no. 4 to District Magistrate, Lakhimpur Kheri on 22.2.1984 and he informed the plaintiff on 24.2.1984 regarding this correspondence. Therefore, assurances given by defendant no. 2 and 4, aforesaid correspondences and recovery proceedings initiated against Ex-President Sri K.P. Tiwari, were the reason for not making payment bill Ex.-3 of the plaintiff. These assurances became hurdle for payment of bill Ex. Ka-3.

61. The Administrator, Nagar Palika Lakhimpur informed the plaintff vide letter dated 11.10.1977 Paper No. 26-C/2 that inquiry was made on the basis of complaint received regarding purchase of handcarts and matter has been referred to Government of U.P. The proceedings were going on and for payment decision would be possible after conclusion of these proceedings. Likewise, vide Government Order No. 4347/11.3.1977 dated 11.10.1977 a direction was given that proceedings should be drawn according to provisions of Section 81 (4) of the Municipalities Act, regarding the complaints. The In-charge Nagar Palika Lakhimpur Kheri also wrote a letter Paper No. 23-C/4 to District Magistrate, Lakhimpur Kheri in this regard.

62. The Deputy Secretary, vide letter dated 29.6.1978 Paper No. 26-C/6 directed to District Magistrate, Lakhimpur Kheri in reference to letter dated 18.2.1978 that it would not be proper to make payment of disputed bill of the plaintiff before conclusion of proceedings drawn against Ex-President of Nagar Palika. The In-charge Nagar Palika, Lakhimpur Kheri also wrote a letter Paper No. 23-C/7 to District Magistrate, Lakhimpur Kheri in reference to Government Order dated 29.6.1978.

63. The Executive Officer of Nagar Palika, Lakhimpur Kheri wrote another letter dated 23.8.1979 Paper No. 23-C/10 to the plaintiff informing him that due to some legal and factual difficulties, it

was not possible to make payment of plaintiff's bill. In-charge Nagar Palika, Lakhimpur Kheri wrote again letter dated 25.2.1983 Paper No. 23-C/9 to Secretary of Nagar Vikas Anubhag-6, Department of Government of U.P. mentioning in it, reference of proceedings to be drawn against Ex-President Sri K.P. Tiwari under Section 81 (4) quoting Government Order No. 3002 dated 29.6.1978 and solicited direction for payment of Rs. 30,805.10/- in respect of plaintiff's disputed bill.

64. On perusal of these correspondences it reveal that payment of plaintiff's bill Ex. Ka-3 was dependent on contingencies created by the defendants on the basis of conclusion of proceedings against Ex-President Sri K.P. Tiwari and requirement of permission solicited from the Government of U.P. In these circumstances, they acknowledged the claim/debt of the plaintiff.

65. The aforesaid assurances, correspondences, initiation of recovery proceedings against Ex-President of defendant no. 2 and requirement of permission from Government of U.P. for payment of disputed bill comes within the contingency enumerated in Article 27 of the Schedule of Limitation Act, 1963.

66. Therefore, trial court and first appellate court have recorded findings in correct perspective that period of limitation was to run from the last correspondence dated 22.2.1984 Ex. Ka-1 and 2. Hence, there is no substance in argument of learned counsel for appellant and substantial question of law no. 3 is hereby decided against the appellant by holding that suit instituted by the plaintiff was not barred by period of limitation.

67. The defendant no. 4 has pleaded in his written statement regarding territorial jurisdiction of the court of learned Additional Civil Judge IVth Lucknow and this plea was considered by trial court and learned first appellate court. It is observed on the basis of pleadings of the plaintiff that supply order issued by Ex-President of defendant no. 2 was received by him at his office at Lucknow and offer of supply of 50 handcarts were accepted by the plaintiff at Lucknow. Moreover, on bill Ex. Ka-3 it was specifically mentioned that in case of dispute regarding supply of aforesaid 50 handcarts, all disputes were subject to Lucknow jurisdiction. The plea taken by defendant no. 4 was rejected by both the courts below i.e. trial court as well as first appellate court in correct perspective after considering the documentary evidence of supply order Paper No. 23-C/12.

68. On perusal of bill Ex. Ka-3 and supply order Paper No. 23-C/12, it reveal that supply order was accepted by PW-1 at his office at Lucknow and he supplied 50 handcarts through bill Ex. Ka-3 and these goods were accepted by the concerned official on 31.12.1976 at Lakhimpur Kheri. Therefore according to the provisions of Section 20 C.P.C. offer/order of supply of aforesaid carts given/issued by defendant no. 2 through Ex-President was placed to the plaintiff at Lucknow. After its acceptance, the plaintiff had supplied goods at Lakhimpur Kheri. Therefore, cause of action arose to the plaintiff after non-payment of bill Ex. Ka-3 and both the courts below at Lucknow as well as Lakhimpur Kheri were competent to entertain the present suit.

69. According to the provision of Section 20 of C.P.C. it is provided that a suit can be instituted at the place where cause of action arose or any of defendants resides and carry on business.

70. Section 20 of C.P.C. reads as under:-

> 20. Other suits to be instituted where defendants reside or cause of action arises.- Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-
>
> (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of th suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
>
> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
>
> (c) the cause of action, wholly or in part arises.

Explanation- A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

71. The supply order was accepted by the plaintiff at his office at Lucknow and he supplied 50 handcarts to the defendant no. 2 and performed his part of contract.

72. Therefore, courts below at Lucknow were competent to entertain suit of the plaintiff at Lucknow.

On the point of territorial jurisdiction, the following case law is relevant:-

73. Hon'ble the Apex Court in the case of A.B.C. Laminart (P) Ltd. v. A.P. Agencies, reported in (1989) 2 SCC 163 at page 171 has held as under:-

> 13. Under Section 20(c) of the Code of Civil Procedure subject to the limitation stated theretofore, every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It may be remembered that earlier Section 7 of Act 7 of 1888 added Explanation III as under:
>
> "Explanation III.--In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places, namely:
>
> (1) the place where the contract was made;
>
> (2) the place where the contract was to be performed or performance thereof completed;

(3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable."

14. The above Explanation III has now been omitted but nevertheless it may serve as a guide. There must be a connecting factor.

15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears. The above are some of the connecting factors.

74. In the aforesaid circumstances, learned trial court has considered all the pleas taken by defendant before it and decided those pleas on the basis of evidence adduced by the plaintiff and material/documents available on record and decreed the suit along with interest prevailing in respect of commercial transactions. The interest has been awarded on the outstanding amount of bills in correct perspective vide impugned judgment and order dated 18.9.1993.

75. Likewise first appellate court has also appreciated the oral and documentary evidence adduced by the both parties and applied its mind on the basis of issues framed by the trial court. The application of mind and appreciation of evidence by the first appellate court is apparent on perusal of impugned judgment and order dated 16.02.2002.

76. Both the courts below have recorded concurrent finding on the basis of possible view, therefore, there is no ground available for interference in aforesaid both the judgments. Both the aforesaid impugned judgments cannot be termed as perverse or against the evidence or based on inadmissible evidence or no evidence.

77. The impugned judgments are liable to be upheld and accordingly affirmed. Therefore, the appeal liable to be dismissed and is hereby dismissed.

78. The record of first appellate court and trial court be sent back to the trial court. The copy of the judgment be sent for further compliance.

Order Date :- 10.12.2019 Virendra