
(1985) 04 AHC CK 0002
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No's. 3173 and 3174 of 1977

Mani Ram and Others

APPELLANT

Vs

Viresh Kumar and Others

RESPONDENT

Date of Decision : 24-04-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 100, 104, 45, 47
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 50
Uttar Pradesh Land Laws (Amendment) Act, 1975 — Section 25
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 143, 183, 212, 229B, 331

Citation : (1985) AWC 625 : (1985) RD 375

Hon'ble Judges : B.L. Yadav, J

Bench : Single Bench

Advocate : R.N. Singh, for the Appellant; G.N. Verma, for the Respondent

Final Decision : Allowed

Judgement

B.L. Yadav, J.—These two petitions involve similar questions of law and facts, hence they are being disposed of together by this common judgment.

2. These two petitions are directed against the judgment dated 27-10-1976 rendered by the Board of Revenue allowing two connected second appeal? filed by Respondent No. 4 and setting aside the judgments dated 14-2-1972 passed by the Additional Commissioner, Meerut Division, Meerut whereby the first appeals were partly allowed and partly the matter was remanded for determination of the factum of possession and its effect in two connected writs filed by the Petitioners u/s 229-B of the OP ZA and LR Act (for short the Act) whereby adoption of Respondent No. 1 by Smt. Mukandi Devi, widow of Munshi Lal was challenged and the Plaintiffs claimed relief for declaration of their sirdari and bhumidhari rights but those reliefs were refused by the trial court.

3. The Petitioners had filed two suits with the allegations that the land in dispute

belonged to one Munshi Lai who died in 1954 leaving Smt. Mukandi Devi as his widow who died on 12-7-1975 and the alleged adoption of Viresh Kumar, Respondent No. 1, by Smt. Mukandi Devi after the death of her husband was not legal, that the order for mutation was passed in favour of Respondent No. 1 Viresh Kumar, adopted son and the claim of the Petitioners was rejected. The Petitioners feeling aggrieved filed the present two suits for declaration that they were bhumidhars and sirdars and Respondent No. 1 Sri Viresh Kumar not being legally adopted son has no right to be recorded in the revenue papers in place of Smt. Mukandi Devi and Sri Munshi Lal.

4. The aforesaid suits were contested by Viresh Kumar, Respondent No. 1 who alleged that he was legally adopted by Smt. Mukandi Devi and his adoptive mother died much after the date of adoption and his name was correctly entered in place of the deceased as bhumidhar and sirdar and that the Petitioners have no right to succeed and they were not the heirs of the deceased. Hence their suits were liable to be dismissed.

5. The Assistant Collector, First Glass, Muzaffarnagar, dismissed both the suits holding that Viresh Kumar was legally adopted and he was correctly recorded in place of the deceased in the revenue papers and he continued in possession. The Petitioners preferred two appeals before the Additional Commissioner which were partly allowed holding that the adoption was invalid and the case was remanded for recording a finding about the possession and its effect on the rival claimants. Respondent No. 1 preferred second appeals which were allowed by the impugned judgment dated 27-10-1976 rendered by the Board of Revenue in two connected second appeals.

6. These writ petitions were decided earlier by me on 27-7-1984. But restoration applications were filed by Respondent No. 1 and the same were allowed and the judgment and order dated 27-7-1984 was recalled. This is how these petitions have come up again for disposal.

7. Sri R.N. Singh, learned Counsel for the Petitioners urged that the two connected second appeals were filed by Respondent No. 1 u/s 331(4) of the Act and the scope of inquiry by the Board of Revenue in second appeals was as provided u/s 100 Code of Civil Procedure. Under that section only the questions of law could have been gone into and the findings of fact could not be set aside. He further urged that even the Additional Commissioner has remanded the cases to the trial court for recording a finding about possession and its legal effect on the rival claims of the parties. But against such an order only second appeal could be filed u/s 331(4) of the Act and no First Appeal From Order could have been filed u/s 331(3) of the Act as the provisions of Section 331 do not contemplate any First Appeal From Order to be filed against the order of the Additional Commissioner remanding the matter to the trial court. He further urged, in the alternative, that the scope of inquiry for the First Appeal From Order was similar to the second appeals filed u/s 100 CPC on the question of law only, and the questions of fact cannot be gone into. He placed reliance on the case reported in

Abdul Gani v. Debi Lal AIR 1960 Raj 77, Seshammal v. Ruppanaiyyangar AIR 1946 Mad. 473 and Abrabim Khan v. Faizalunnissa ILR 17 Cal. 168 He also urged that in the Instant case whether the Respondent No. 1 was an adopted son or not was a finding of fact and the Additional Commissioner recorded a finding that Respondent No. 1 was not an adopted son and that finding of fact cannot be set aside in exercise of the jurisdiction u/s 100 Code of Civil Procedure.

8. Sri O.N. Verma, the learned Counsel for Respondent No. 1, on the other hand, urged that although second appeals were filed but under the law they were First Appeals From Order purporting to be u/s 331(3) of the Act and the scope of inquiry by the Board of Revenue in respect of First Appeal From Order was much wider than the inquiry of the second appellate court and even questions of fact could be gone into by the Board of Revenue. He urged that against the order of remand First Appeal From Order was maintainable. To substantiate his arguments he placed reliance on Mahendra Kumar v. Board of Revenue 1972 AWR 323 and Ram Asrey v. Ram Kripal 1971 AWRJS 45.

9. At the time of bearing of these petitions time was granted to the parties to file copies of the memorandum of appeals filed before the Board of Revenue to ascertain its nature, as to whether they were filed as Second Appeal or First Appeals From Order. Alongwith the supplementary affidavits the memorandum of Second Appeals have been filed by the learned Counsel for the Petitioners. This evinces that the said appeals were filed as Second Appeal No. (sic) of 1972 against the judgment and-decree dated 14-2-1972 in the connected appeal Nos. 524 and 526 of 1968 decided by the Additional Commissioner, Meerut Division, Meerut. It is accordingly evident that Respondent No. 1 did not intend to file First Appeal from Order nor he actually filed it as provided u/s 331(3) of the Act. He in fact filed Second Appeals which could have been filed only u/s 331(4) of the Act.

10. The learned Counsel for the Respondent No. 1, however, urged that it was purported as First Appeal From Orders u/s 331(3) of the Act against an order of remand and incorrectly, by a bonafide mistake, it was mentioned in the memorandum of appeals as Second Appeals u/s 331(4) of the Act and the scope of inquiry for a First Appeal From Order was much wider than the second appeal.

11. In Mahendra Kumar v. Board of Revenue U.P. 1972 AWR 323 was relied upon on behalf of Respondent No. 1. In that case it was held that the order of remand passed by the first appellate court was a final order disposing of the appeal and the Second Appeal to the Board of Revenue would be maintainable u/s 331(4) of the Act. Consequently the scope of inquiry for a Second Appeal from Order would be just like a Second Appeal u/s 100 Code of Civil Procedure, where only questions of law can be gone into. I am in agreement with the view that against the order of remand the Second Appeal From Order is maintainable before the Board of Revenue u/s 331(4) of the Act and not First Appeal From Order u/s 331(3).

12. In order to facilitate the appreciation of the respective arguments on this

point I would like to set out the relevant statutory provisions of Section 331 of the Act.

Section 331. Cognizance of suits etc. under this Act:

(1) Except as provided by or under this Act no Court other than a court mentioned in column 4 of Schedule II, shall notwithstanding anything contained in the Civil Procedure Code, 1908, take cognizance of any suit, application, or proceedings mentioned in column 3 thereof, or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application:

Provided that where a declaration has been made u/s 143 in respect of any holding or part thereof, the provisions of Schedule II in so far as they relate to suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof.

Explanation:- If the cause of action is one in respect of which relief may be granted by the revenue Court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.

(1-A) Notwithstanding anything in Sub-section (i) an objection that a court mentioned in column 4 of Schedule II, or as the case may be, a civil court, which had no jurisdiction with respect to the suit, application or, proceeding, exercised jurisdiction with respect thereto shall not be entertained to any appellate or revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(2) Except as hereinafter provided no appeal shall lie from an order or decree passed under any of the proceedings mentioned in column 3 of the Schedule aforesaid;

(3) An appeal shall lie from any decree or from an order passed u/s 47 or an order of the nature mentioned in Section 104 of the Code of Civil Procedure, 1908, (V of 1908) or in Order 43, Rule 1 of the First Schedule to that Code passed by a court mentioned in column No. 4 of Schedule II to this Act in proceedings mentioned in column No. 3 thereof to the court or authority mentioned in column No. 5 thereof.

(4) A second appeal shall lie on any of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (V of 1908) from the final order of decree, passed in an appeal under Sub-section (3), to the authority, if any, mentioned against it in column 6 of the Schedule aforesaid.

13. Sub-section (3) of Section 331 of the Act was added by U.P. Land Laws (Amendment) Act 30 of 1975 and Section 25 of the said U.P. Land Laws (Amendment) Act is set out below:

25--In Section 331 of the Principal Act for Sub-section (3) the following sub-section shall be substituted and be deemed always to have been substituted namely,

(3) An appeal shall lie from any decree or from an order passed u/s 47 or an order of the nature mentioned in Section 104 of the Code of Civil Procedure, 1908 or in Order 43 Rule 1 of the First Schedule to that Code passed by a court mentioned in column No. 4 of the schedule II to this Act in proceedings mentioned in column No. 3 thereof to the court or authority mentioned in column No. 5 thereof.

14. The aforesaid Section 25 of the aforesaid U.P. Land Laws Amendment Act, 1975 indicates that Sub-section (3) of Section 331 has got retrospective effect. Further Sub-section (1) provides that notwithstanding anything contained in the Civil Procedure Code, 1908 except as provided by or under this Act no court other than a court mentioned in column No. 4 of Schedule II shall take cognizance of any suit or application or proceedings mentioned in column 3 thereof. Again Sub-section (2) aforesaid provides that no appeal shall lie from an order or decree except as hereinafter provided which Obviously means that as provided under Sub-section (3) or Sub-section (4) of Section 331. It is accordingly evident that the analogy of the forum for appeal etc, as provided in the CPC would not apply to the provisions of the Act. From Sub-section (1) it is clear that whatever may be the provisions made under the CPC but it is only the court mentioned in column No. 4 i.e. the Court of the Tahsidar (for an application for surrender u/s 183) or Assistant Collector First Class (for a suit u/s 229-B) or a Collector (for a suit u/s 212 for ejectment or persons from land of public utility) who can entertain such suits or applications and such suits or applications could not be entertained by any other court.

15. Sub-section (2) of Section 331, imposes a restriction that except hereinafter provided no appeal shall lie from an order or decree passed under any of the proceedings mentioned in column 3 of the Schedule. This Sub-section (3) also imposes a limitation that it is only the court or authority mentioned in column No. 5 (the Commissioner) which can entertain First Appeal either from a decree or from an order. Sub-section (4) specifies that against the decree or order passed by the Court in column No. 5 (the Commissioner) the Second Appeal would be maintainable before a court mentioned in column No. 6, (the Board of Revenue).

16. The aforesaid statutory provisions do not leave any doubt that a First Appeal From Order can be filed as contemplated by Section 104 or Order 43 CPC before a Court provided in column No. 5 (i.e. Commissioner). If a First Appeal From Order has to be filed as contemplated by Sub-section (3) it can be filed only before the Commissioner.

17. The learned Counsel for the Respondent submitted that First Appeal From Order can be filed and was in fact filed before the Board of Revenue and the

Second Appeal filed by the Respondents may be treated to be First Appeals From Order. But I find that the Board of Revenue is not the Court provided in column No. 5 rather it is only the Commissioner's court which is mentioned there. If there is an order of the nature mentioned in Section 104 CPC or Order XLIII Rule 1 Code of Civil Procedure, in that case the appeal would be maintainable only before the Commissioner. This means that if an order which is contemplated by Order XLIII Rule 1 CPC has been passed by the Commissioner, as in the instant case, the order of remand as contemplated by Order XLIII Rule (u) Code of Civil Procedure, in that event no Appeal from that Order can lie before the Board of Revenue and it can lie, if at all, before the Commissioner only as it is only the Commissioner's court which has been mentioned in column No. 5 of the second schedule. But this would lead to an absurdity to think that against an order of remand passed by the Additional Commissioner or the Commissioner the First Appeal From Order would lie before the Commissioner or Additional Commissioner, appears to be a sheer impossibility as the Sub-sections (3) and (4) of Section 331 of the Act do not warrant such conclusions.

18. The intention of the legislature appears that against the order of the Asstt. Collector First Class rejecting an application to set aside a decree passed ex-parte (vide Order 43 Rule 1(d) CPC or an order refusing to set aside abatement of a suit (vide 0.43 Rule (1)(k) Code of Civil Procedure) a First Appeal From Order would lie to the Commissioner or Additional Commissioner but in a case where order of remand had been passed by the Additional Commissioner, as contemplated by 0.43 Rule 2(u) CPC the legislature has not contemplated a First Appeal From Order to be maintainable before the Board of Revenue.

19. I am of the opinion that if Legislature would have intended that the First Appeal From Order can be filed before the Board of Revenue, in that event under Sub-section (3) Instead of mentioning in column No. 5 as the authority or the court to which the appeal would be maintainable, column No. 6 would have been mentioned. The arguments advanced by the learned Counsel for the Respondents that the First Appeal From Order would lie to be Board of Revenue cannot be accepted as that can be possible only if in Sub-section (3) in place of Court or Authority mentioned in column No. 5, 1 have to read the Court or Authority mentioned in column No. 6. But that would amount to legislation, for which I have no power or authority.

20. Even though it may be assumed that there may be some omission in Sub-sections (3) and (4), inasmuch as in Sub-section (3), to the authority if any mentioned against it in column No. 6 of the Schedule aforesaid, ought to have been added in Sub-section (3) in column No. 5 thereof. But to fill up the omission while interpreting a particular part of statute is not the function of the Court. There is a maxim "Casus omissus", which applies. This maxim obviously means that while interpreting a statute even when there appears to be some omission it is for the legislature to rectify it and not for Courts. The function and duty of a court is not to legislate but to interpret only. Under the CPC against an order of

remand, First Appeal From Order is maintainable as provided u/s 104 and Order XLIII Rule 1 Code of Civil Procedure, but that analogy cannot be borrowed here as it is crystal clear from the language of Sub-section (3) of the Act that only the Court mentioned in column No. 5 (the Commissioner or Additional Commissioner) can entertain the appeal against the order as contemplated by Section 104 or Order XLIII Rule 1 Code of Civil Procedure.

21. I am of the opinion that as the meaning of Sub-sections (3) and (4) are quite clear and they admit of no exceptions that in case an order contemplated by Section 104 and Order XLIII Rule 1 CPC has been passed, the First Appeal From Order would lie before the Court or the authority mentioned in Column 5 (Commissioner or the Additional Commissioner's Court) and against such an order passed under Sub-section (i), Second Appeal From Order would be before the Court or the authority mentioned in Column 6 of the Schedule II (Board of Revenue). As the language of Sub-section (3) and (4) is quite clear, it becomes unnecessary to search for and select a particular meaning out of diverse meaning a word is capable of according to Lexico Oraphers. As the meaning of these sub-sections are quite clear that against the order of remand as mentioned under Order 43, Rule 1, (U) the First Appeal From Order would lie before the Commissioner and the Second Appeal From Order would lie before the Board of Revenue, the interpretation sought by the learned Counsel for the Respondents that First Appeal From Order would lie before the Board of Revenue is not, as such, acceptable? See *Mangoo Singh Vs. The Election Tribunal, Bareilly and Others*, . If I accept the arguments advanced by the counsel for the Respondents, that would clearly be adding some words to Sub-section (3) and subtracting some words from Sub-section (4). This is the function of the Legislature and not of the Court. In this connection it will be relevant to mention an observation in *Magor And St. Mellons Rural District Council v. Newport Corporation* (1951) 2 AELR 839 which is as follows:

All courts are warned that they are not entitled to usurp the legislative function under the disguise of interpretation.

22. The duty of a court, in such circumstances, has been pointed out by Sri Carleton Kemp Allen in his celebrated book "Law in Making 6th Edn." Chapter III p. 157 which is as follows:

The first theory associated principally with codified system assumes that the legal rule applicable to any particular case is fixed and certain from beginning, and all that is required of the judge is to apply this rule, as Justice according to law demands without reference to his own personal view.

23. It is also relevant to mention a maxim "UTRES MAGIS V\\LE.\\T QUAM APEREAT" which means that every word of statute must be considered according to the natural meaning and reference.

24. At the same time it is also pertinent to mention an observation in *A. Solomon v. A. Solomon and Co. Limited* 11897) AC 22, which is as follows:

In a court of law or equity what legislature intends to be done or not to be done can only be ascertained from what it is housing to enact either in expressed words or by reasonable and necessary implication.

25. These observations were quoted with approval in *Commonwealth Australia v. Bank of New South Wales* 1950 AG 235. In the case of *Commonwealth Australia* ratio, inter alia, was that the object of an Act and its intent, meaning and spirit can only be ascertained from the terms of the Act itself.

26. *Graiese on Statute Law* (7th Edn. p. 91) points out:

It is not, however, competent to a judge to modify a language of an Act...in order to bring it in accordance with his own view as to what is right or reasonable....General rule is that the language of an Act is to be read according to its ordinary grammatical constructions unless so reading would entail some absurdity, repugnancy or injustice.

27. In *Maxwell on the Interpretation of Statutes* (Twelfth Edition, Chapter 2, pages 28 & 29) there is an observation as follows:

The rule of construction is to intend the legislature to have meant what they have actually expressed. The object of all interpretation is to discover the intention of Parliament. But the intention of Parliament must be deduced from the language used...whereby, the use of clear and unequivocal language capable of only one meaning, anything is enacted, by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient....The duty of the Court is to expound the law as it stands and to leave the remedy (if one can be resolved upon) to others?See also *Sutters v. Briggs* (1922) 1 AC 1 and *Cartlegs v. Jopiing and sons Ltd.* (1923) AC 758.

28. I am of the opinion that as Section 331 itself makes an exception that whatever might be the procedure provided in the CPC but no court other than a court mentioned in Column No. 4 the trial court, Assistant Collector First Class, can entertain any suit or application as provided in column No. 3 of the IIInd Schedule and similarly against the orders mentioned in Section 104 or Order XLIII Rule 1 CPC an appeal has been provided u/s 331(3) to the Court mentioned in column No. 5 i.e. the Commissioner or the Additional Commissioner and second appeal has been provided u/s 331(4) only from the decree passed in an appeal under Sub-section (3) or from the final order. The order of remand is a final order.

29. In AIR 1949 1 (Privy Council) on pages 3 and 4 final order means an order which finally determines the rights of the parties and brings the case to an end. In the instant case the order of remand passed by the Additional Commissioner finally determines the rights of the parties, hence it was only a final order and nothing else. Against this order only Second Appeal From Order as contemplated

u/s 331(4) of the Act, was maintainable and not the First Appeal from Order. The concept of the First Appeal from Order as enunciated in Order XLIII Rule 1 CPG or Section 104 CPG would not apply to the provisions of Section 331 of the Act as those concepts have been clearly excluded by the positive language used in Sub-sections (1), (2) and (3) of Section 331 of the Act. These expressions show that, notwithstanding anything contained in the Code of Civil Procedure, no court other than a court mentioned in column No. 4 of the II Schedule would entertain suit or application mentioned in column No. 3 thereof. Again under Sub-section (2) it has been provided that except as hereinafter provided no appeal shall lie from an order or decree passed in any of the proceedings mentioned in column No. 3 of the Schedule. Under Sub-section (3), after the U. P. Laws Amendment Act No. 30 of 1975, it was provided with retrospective effect that an appeal (First Appeal) shall lie from an order passed u/s 47 or u/s 104 or Order XLIII Rule 1 Code of Civil Procedure. In the instant case the order passed by the Additional Commissioner was an order of remand which was a final order and against such final order it is only Second Appeal From Order which can be filed u/s 331(4) before the Board of Revenue (as provided under column No. 6) and that can be examined in view of the provisions of Section 100 Code of Civil Procedure. I am therefore, unable to accept the contentions raised by the learned Counsel for the Respondents.

30. In *Mahendra Kumar v. Board of Revenue* (supra) relied upon by the Respondents it has been held that the order of remand was a final and the appeal would lie to the Board of Revenue under Sub-section (4) of Section 331 of the Act. It was not held that the appeal to the Board of Revenue would be maintainable u/s 331(3) of the Act as was urged on behalf of the Respondents.

31. *Ram Asrey v. Ram Kripal* 1971 AWR JS 45 relied upon by the Respondents, was a case of rejecting an application for restoration in an appeal before the Commissioner, hence that is not indistinguishable.

32. The learned Counsel for the Respondents relied upon *Smt. Bhagwati Devi v. Board of Revenue* 1981 ALJ 1118 in support of his contention that in the memo of Second Appeal the First Appeal from Order was not mentioned. But in fact it was the First Appeal from Order against the order of remand passed by the Additional Commissioner. I directed the parties as stated earlier, to file a copy of the memo of Second Appeal so as to ascertain whether the Respondents intended to file a Second Appeal or to file a First Appeal from Order. from the memo of Second Appeal (Annexure-1 to the Supplementary Affidavit), it is clear that the Petitioner had filed the Second Appeal and not First Appeal from Order. Even at the time of arguments before the Board of Revenue the Respondents did not make any application to convert the Second Appeal into First Appeal from Order. The Respondents cannot be permitted to urge this point in the writ jurisdiction as he miserably failed to lay any foundation in his counter affidavit filed by him by stating that a prayer was made before the Board of Revenue to treat the Second Appeal as First Appeal from Order, but the Board of Revenue

failed to do so. No such averment has been made in the counter affidavit filed by the Respondents. The Respondents having availed the remedy of Second Appeal, they cannot be permitted to raise this point here in the writ jurisdiction. In *Smt. Bhagwati Devi v. Board of Revenue (supra)*, it was held on similar facts that unless an objection about the maintainability of the Second Appeal was raised before the Board of Revenue, the same cannot be permitted to be raised in the writ jurisdiction under Article 226 of the Constitution of India.

33. There is yet another aspect of the matter. u/s 331(1-A) of the Act there was a clear provision that if some party wanted to raise any

objection about the jurisdiction of a particular court, the same shall not be entertained by the appellate or the revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity. In the instant case it has to be interpreted that the objection about the maintainability of the Second Appeal to be decided as First Appeal from Order, must have been taken by the Respondents before the Board of Revenue itself. The Intention of the Legislature itself appears that the such objection was not intended to be raised in the writ jurisdiction of this Court. As such the case of *Smt. Bhagwati Devi v. Board of Revenue (supra)*, does not help the Respondents.

34. The last point to be decided in this case is that the Board of Revenue was required to decide the Second Appeal under the scope of Section 100 Code of Civil Procedure. Learned Counsel for the Respondents has urged that the scope of First Appeal from Order is much wider than that of the Second Appeal and the Board of Revenue has correctly decided the Second Appeal and has correctly appreciated the facts and evidence afresh. As held by me earlier that from reading Sub-sections (2), (3) and (4) of Section 331 it is evident that against the order of remand only Second Appeal would be maintainable u/s 331(4) and not the First Appeal from Order. The scope of Second Appeal from Order has been provided in Section 331(A) of the Act. The Second Appeal has to be decided in accordance with the provisions indicated u/s 100 Code of Civil Procedure. u/s 100 CPC only questions of law can be decided and no evidence can be appreciated or considered afresh. The appeal preferred by the Respondents was, therefore, not decided as First Appeal from Order, rather the same has been decided as Second Appeal from Order.

35. In the alternative even though it can be assumed that the First Appeal from Order was maintainable before the Board of Revenue, even in that event the scope of First Appeal from Order was not just like a regular First Appeal where the questions of fact are also to be decided.

36. As urged by the learned Counsel for the Petitioner's second appeal from order of remand was maintainable before the Board of Revenue the scope of inquiry would be as contemplated by Section 100 CPC as provided in Section 331(4) of the Act. Otherwise also the scope for inquiry of a First Appeal from Order of Remand would be only on questions of law as provided by Section 100

Code of Civil Procedure. He placed reliance on Abdul Ghani v. Devi Lal AIR 1960 Raj. 77 (supra) on which it was held that even in a First Appeal from Order under Order 43 Rule 1(u) CPC the scope of inquiry would be as provided u/s 100 CPC and the questions of facts cannot be gone into. In this case it was held that even in the First Appeal from Order of remand the questions of facts cannot be gone into. To the same effect are the following cases (i) Seshamraal v. Kuppanayangar AIR 1946 Mad. 475 and (ii) Abraham Khan v. Faizalunnissa ILR 17 Cal. 168.

37. It is, therefore, clear that in view of the provisions of Section 331(4) of the UP ZA and LR Act that the Second Appeal from Order can be decided only on the basis of some error of law and the questions of facts cannot be gone into. In the instant case the Board of Revenue has assumed the power of the first appellate court and has set aside the findings of fact about the factum of adoption recorded by the first appellate court. It is, therefore, obvious that the Board of Revenue has exceeded the jurisdiction u/s 100 Code of Civil Procedure. The order of the Board of Revenue cannot therefore be sustained in law.

38. The Additional Commissioner while deciding the first appeal has not appreciated the oral evidence about the validity or otherwise of the adoption correctly. The trial court has discussed in detail oral evidence from either side. The Additional Commissioner has just made a reference to the witnesses and thereafter has abruptly come to the conclusion. The trial court had the advantage of watching the demeanour of the witnesses and had recorded finding of fact about the validity of adoption after appreciation of the evidence particularly oral evidence in detail. The Additional Commissioner could not have set aside those findings based on appraisal of evidence in detail. The first appellate court lost sight of the fact that the trial court had the advantage of observing the manner in which the Plaintiff-witnesses and the Defendant-witnesses have given their testimonies. I am of the view that if there is conflict of oral evidence and the decision turns upon the credibility of the witnesses, the rule is to permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special features about the evidence of a particular witness has escaped the notice of the trial court or there is some other aspect of the matter which was not under the consideration of the trial court while considering the statements of the witnesses. Further testimony of some witness has also been rejected on the ground that he was relation or friend of the natural father of Viresh Kumar. But in a case where the adoption has to be proved the statement of only those witnesses can be admissible in view of Section 50 of the Indian Evidence Act who have got special means of knowledge about the fact they were deposing. Otherwise also it is well settled by now that the testimony of the witness cannot be rejected that he was a relation or a friend. It is a different aspect of the matter that a testimony of a friend or relation should be scrutinised with proper attention. The assessment of the evidence, therefore, made by the Additional Commissioner can also not be said to be satisfactory. See Madsudan Das v. Smt. Narayanl Bai AIR 1983 SO 114.

39. In view of the discussions made hereinbefore, the present petitions succeed and are allowed. The judgments of the Board of Revenue dated 27-10-1976 and that of the Additional Commissioner dated 14-2-1972 are hereby quashed. The case is remanded to the Additional Commissioner to decide the appeals afresh in accordance with law and in the light of the observations made above. There shall, however, be no orders as to costs.