
(2012) 08 AHC CK 0051

In the Allahabad High Court

Case No : First Appeal From Order No. 756 of 2012

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Ram Ratan and Others

RESPONDENT

Date of Decision : 24-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2), 96
Motor Vehicles Act, 1988 — Section 166, 173

Citation : (2013) 3 ALJ 600

Hon'ble Judges : Vishnu Chandra Gupta, J;Devi Prasad Singh, J

Bench : Division Bench

Advocate : U.P.S. Kushwaha, for the Appellant;

Judgement

Devi Prasad Singh, J.—This is an appeal u/s 173 of the Motor Vehicles Act. (in short, Act) against the impugned award dated 19.5.2012, passed in Motor Accident Claims case No. 435 of 2007. The claimant Ram Ratan had filed the claim petition u/s 166 of the Motor Vehicles Act against the appellant as well as respondents 2 and 3 on account of injuries sustained in an accident on 25.7.2007 while driving a bus bearing No. UP-32-Z-1877. The accident was alleged to have caused by UPSRTC Bus No. U.P.-40-D-4801 on 25.7.2006 when the claimant was driving the bus and reached near the forest barrier on Sitapur Road, P.S. Maniyao, Lucknow. Bus No. U.P.-40-D-4801 coming from reverse direction being driven rashly and negligently hit the claimant's bus No. UP-32-Z-1877. In consequence thereof, the claimant suffered grievous injuries. The claimant was driving private bus as its driver carrying passengers from Lucknow to Azmer Sharif. On account of injuries caused in the said accident, the claimant preferred the claim petition before the tribunal for compensation. In the said accident, it is alleged by the claimant that he suffered partial paralysis with grievous injuries. During the course of trial, the tribunal has framed following issues:

1. Whether on 25.7.2006 at about 5.30 a.m. near forest barrier, Sitapur Road, P.S. Maniyao, Lucknow while the claimant was driving bus No. U.P. 32-Z-1877

going from Lucknow to Azmer Sharif, the bus No. U.P.-40-D-4801 coming from reverse direction hit the claimant's bus. In consequence thereof, the claimant suffered grievous injuries?

2. Whether the bus was insured by the insurance company (respondent No. 3 of the claim petition)?

3. Whether the driver of the bus was having valid driving licence on the date of accident?

4. Whether the claimant is entitled for compensation?

2. In support of the accident in question, the insurance cover, copy of the Driving Licence, copy of registration book and copy of permit as well as fitness certificate with regard to bus No. UP 32-Z-1877 were filed along with discharge certificate, First Information Report etc.

3. During the course of trial, on behalf of the claimant, Rs. 15 lacs was claimed as compensation along with interest. In support of the accident, the claimant himself appeared as P.W. 1 and got himself cross-examined and filed an affidavit stating that the accident had occurred because of rash and negligent driving of UPSRTC bus No. U.P.-40-D-4801. During cross-examination as P.W. 1, the claimant asserted that on account of grievous injuries caused in the said accident, he suffered 40% of disability and in its support filed disability certificate, in original, issued by the doctor. It is stated that he was admitted in the hospital for fifteen days. In its support, he filed medical receipts, discharge card etc.

4. On behalf of the respondents, D.W. 1 Prakash Mani Tiwari appeared who was driving bus bearing No. U.P.-40-D-4801 and stated that the accident occurred because of negligence on the part of the claimant and also stated that the roadways bus was also damaged. However, no First Information Report was lodged nor any evidence was led in support of the contention made orally by D.W. 1. In his statement, D.W. 1 Prakash Mani Tiwari admitted that in the whole night of 24th, he had driven the bus of roadways.

There appears to be justifiable reason not to lodge a First Information Report in the event of damage caused and otherwise also, since the bus belonged to State Road Transport Corporation.

5. After considering the evidence led by the parties, the tribunal arrived to the conclusion that the bus of UPSRTC was driven negligently and rashly and hit the claimant's bus causing grievous injuries. The tribunal further recorded a finding that the bus was insured with the appellant Oriental Insurance Company and the driver was having valid driving licence and there was permit for the route in question. After considering the material evidence on record and keeping in view 40% disability to the claimant and his income at the rate of Rs. 3,000/- per month, the tribunal awarded compensation of Rs. 2,40,800/- along with interest at the rate of 6% from the date of moving of application.

6. While assailing the impugned award, Mr. U.P.S. Kushwaha, learned counsel for the appellant raised following issues:

1. Appeal u/s 173 of the Motor Vehicles Act is at par with an appeal filed u/s 96 of the C.P.C. and it cannot be decided at admission stage without reappreciating the evidence on record.

2. Though the claimant has filed affidavit followed by cross-examination by the appellant and other defendants but in absence of examination-in-chief, the evidence cannot be relied upon.

3. The bus of the UPSRTC, bearing No. UP-40-D-4801 does not possess permit to ply over the route in question. The permit was for other bus. The permit does not contain the number of the bus. Photostat copy of the permit has also been annexed with present appeal as Annexure No. 1. Mere authorisation with regard to 12 buses shall not be sufficient. It is stated that the part of the permit has not been filed. Learned counsel for the appellant has relied upon Section 103 of the Act to press that the permit with regard to particular bus was necessary.

7. Now, coming to first limb of argument with regard to statutory right of the appellant to claim admission of the appeal filed u/s 173 of the Act.

8. Section 96 of C.P.C. provides that an appeal shall lie from every decree passed by any court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such court. It further provides that an appeal shall lie from an original decree passed ex parte and no appeal shall lie from a decree passed by Judge, Small Causes Court except on a question of law that too when the amount or value of the subject matter of the original suit does not exceed Rs. 10,000/-.

9. A decree has been defined u/s 2(2) of the C.P.C. and decree-holder has been defined u/s 2(3) of C.P.C. which is reproduced as under:

2(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include--

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation--A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final;

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made;

Thus, decree has been further defined as preliminary decree and final decree

under Explanation clause of Section 2(2).

10. Apart from Section 96, under which the first appeal is filed against the judgment and decree of the trial court, is u/s 104 CPC where an appeal shall lie against an order passed under other provisions of CPC, i.e. order passed under Sections 35A, 91, 92, 95, imposition of fine and civil detention or order passed against which no appeal is expressly provided by the rules. The provision with regard to appeal u/s 104 CPC has been further dealt with under Order XLIII, Rules 1 and 2 of the CPC.

11. Under Order XLIII, Rule 1, various provisions have been given where an appeal shall lie from an order.

12. Order has been defined u/s 2(14) of the CPC which is reproduced as under "2(14). "order" means the formal expression of any decision of a Civil Court which is not a decree.

13. There appears to be no room of doubt that the order and decree are different judicial dictums dealing with different nature of decision of the court.

14. An appeal filed u/s 96 CPC is heard by the appellate court in pursuance to the provisions contained in Order XLI. Order XLI provides the form of appeal, contents of memorandum of appeal. Order XLI, Rule 5 further provides that an appeal shall not operate as stay of proceedings under a decree or order appealed from. The court has got power for sufficient cause shown by the appellant requiring security to be taken for the restitution of any property. Order XLI, Rule 11 further provides that the appellate court may dismiss the appeal without sending notice to the lower court. Under Rule 11A, it has been further provided that the courts shall decide the appeal expeditiously, say within sixty days from the date on which the memorandum of appeal is filed and fix a date for hearing of appeal in case it is not dismissed under Order XLI, Rule 11, CPC. For convenience. Order XLI, Rules 11, 11A and Rule 12 are reproduced as under:

11. Power to dismiss appeal without sending notice to Lower Court.

[(1) The Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal.]

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

[(4) Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment.]

11 A. Time within which hearing under rule 11 should be concluded.

Every appeal shall be heard under Rule 11 as expeditiously as possible and endeavour shall be made to conclude such hearing within sixty days from the date on which the memorandum of appeal is filed.]

12. Day for hearing appeal

(1) Unless the Appellate Court dismisses the appeal under Rule 11, it should fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court.

15. A detailed procedure has been provided under Order XLI with regard to rights of the parties and empower the appellate court to remand a matter, if necessary. The appellate court has been conferred power to take additional evidence under Order XLI, Rule 27 of the CPC. Mode of taking additional evidence has been given under Order XLI, Rules 28 and 29.

16. In view of above, so far as the submission of the learned counsel for the appellant is concerned, not sustainable and the appellant does not possess right to claim admission of appeal even u/s 96 CPC.

17. The Allahabad High Court in a case, reported in Shyam Prasad Mishra and Another Vs. Vijay Pratap Singh and Another, has affirmed the aforesaid proposition of law and held that an appeal u/s 96 CPC is not to be admitted as a matter of right or even under convention unless court is satisfied about the merits of the Appeal. Order XLI, Rule 11 makes it obligatory for the court to satisfy itself about merit of the case and examine the appeal and if lacks merit may dismiss it in pursuance to power conferred by Order XLI, Rule 11 of CPC.

18. So far as an appeal under Order XLIII, Rule 1, CPC is concerned, since it is against an order passed during pendency of trial, such appeal may be decided by the courts after considering the finding on merit at admission stage as such and for that summoning of record is not necessary. Of course in case the court satisfies on merit of the case, it may admit the appeal and decide the same on merit with or without summoning the record.

19. Proceeding under Motor Vehicles Act is summary proceeding. That is why, tribunals have been constituted u/s 165 of the Motor Vehicles Act. Instead of providing the claimant to file a plaint or written statement by the respondent, Section 166 of the Act contains simplicitor provision and permit the claimant to file an application in the required format by the legal representative of the deceased or by the injured applicant. Option has been given to the claimant either to move application before the tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides.

20. u/s 168 of the Act, the tribunal has been conferred power to award

compensation after providing an opportunity of being heard and holding an enquiry into the claim as the case may be. The legislature to their wisdom has used the word, "enquiry" u/s 168 of the Act and not the "trial" relating to a suit and the tribunal has to deliver an award and not a judgment and decree. Section 168 of the Motor Vehicles Act is reproduced as under:

168. Award of the Claims Tribunal.

On receipt of an application for compensation made u/s 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:

Provided that where such application makes a claim for compensation u/s 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct.

21. Section 170 of the Act further provides certain conditions with regard to impleadment of insurer and u/s 171, an interest may be awarded.

22. Appeals are filed u/s 173 of the Act and for an amount less than Rs. 10,000/-, no appeal lies. A provision has been made u/s 174 of the Act to recover money from insurer as the arrears of land revenue payable under the award. Jurisdiction of the Civil Court has been barred u/s 175 of the Act.

23. The overall reading of statutory provisions contained in the Act reveals that strict procedural provision contained in the CPC has not been made applicable to the proceeding before a tribunal under the Act. Much emphasis has been given by the appellant's counsel to Section 108 of the CPC which provides that the provision with regard to appeal for rightful decree shall also apply to appeals from appellate decrees and from orders made under the CPC or under any special or local law in which a different procedure is not provided. Argument

advanced by the learned counsel for the appellant seems to be misconceived.

24. Clause (a) of Section 108 CPC relates to appellate decrees. Order passed u/s 173 of Motor Vehicles Act is not a decree. Clause (b) relates to an order made under CPC or under any special local law in which different procedure is not provided. With regard to claims under the Act, Section 168 read with U.P. Motor Vehicles Rules, 1998 (in short, 1998 Rules) contains required procedure, different than CPC.

25. The Government has been conferred power to frame rules u/s 176 of the Act and in consequence thereof, the State Government framed rules, namely, U.P. Motor Vehicles Rules, 1998.

26. Keeping in view the combined reading of the statutory provisions contained in the Act and Rules, neither the claimant nor the insurer can claim as a matter of right admission of an appeal. It is for the appellate court to look into the matter and appreciate the finding recorded by the tribunal and if necessary, the appeal may be admitted or may be dismissed at the threshold of admission stage in absence of any merit in the matter. Summoning of record is not necessary for hearing of an appeal filed u/s 173 of the Motor Vehicles Act, unless the appellate court is satisfied. The appellant cannot claim admission of an appeal as a matter of right. Hence, the first argument advanced by the appellant's counsel fails.

27. Coming to second limb of argument. It is vehemently argued by the appellant's counsel that the claimant has filed an affidavit, in response to which he has been examined orally by the defendant's counsel. In absence of examination-in-chief, proceeding vitiates. Specific query was made by the court whether the appellant or the respondents had raised objections and took a plea that the tribunal should record examination-in-chief, the response is negative. Neither in the memo of appeal nor during the course of argument, it has been pleaded or stated that the objection was raised during the proceeding against the filing of affidavit by the claimant. Once the appellant participated in the proceeding and raised no objection; rather cross-examined the prosecution witnesses including the claimant based on facts brought on record by affidavit, then at first appellate stage, such argument is not sustainable keeping in view the letter and spirit of Section 168 of the Act. Learned counsel for the appellant has invited attention to different provisions contained in Chapter IXX of the Motor Vehicles Rules, 1998. It shall be appropriate to consider the provisions regulating the trial before the tribunal.

28. Rule 204 of 1998 Rules provides that an application u/s 166 of the Act shall be moved as far as possible in Form SR-49 to a petition u/s 166 of the Act. Rule 205 provides that an applicant shall be examined personally on oath, "if the applicant is present personally" and such examination shall be reduced to writing. Discretion has been given to the tribunal to examine personally on oath and that too in case the applicant is present personally. Otherwise, the tribunal may proceed on the basis of application moved in the required format and for the

reasons to be recorded under Rule 206, the tribunal can dismiss summarily in case there is no sufficient ground to proceed therewith.

29. Notices are to be given under Rule 207. Appearance and oral examination of the parties, framing of issues, summoning of witnesses determination of issues and method of recording evidence are provided under Rules, 208, 209, 210, 211 and 212 which are reproduced as under:

208. Appearance and oral examination of parties. (1) The owner of the motor vehicle and the insurer, may, at or before the first hearing or within such further time as the Claims Tribunal may allow, file a written statement dealing with the claim raised in the application, and any such written statement shall form part of the record.

(2) Where the claim is contested, the Claims Tribunal shall, with a view to elucidating matters in controversy between the parties, examine orally such of the parties to the claim proceeding as it deems fit and shall reduce the substance of the examination, if any, to writing.

209. Framing of issues.--After considering the application and the written statements and oral statements of the parties, the Claims Tribunal shall proceed to frame the issues on which the right decision of the claim appears to it to depend.

210. Summoning of witnesses.--Where an application is presented by any party to the proceeding for summoning of witnesses, the Claims Tribunal shall on payment of the expenses involved, if any, issue summons for the appearance of such witnesses, unless it considers that their appearance is not necessary for a just decision of the case.

211. Determination of issues.--After framing the issues the Claims Tribunal shall proceed to record evidence thereon which each party may like to produce.

212. Method of recording evidence.--The Claims Tribunal shall, as examination of a party or a witness proceeds, make a brief memorandum of the substance of what is deposed and such memorandum shall be written and signed by the Claims Tribunal and shall form apart of the record:

Provided that the evidence of any medical witness shall, as nearly as may be, be taken down word for word:

Provided further that where the claims tribunal is unable to make a memorandum it shall cause the reason of such inability to be recorded and shall cause the memorandum to be made in writing from its dictation.

30. A plain reading of the aforesaid provision reveals that under Rule 208, when the parties put in appearance, then with a view to elucidating matters, the tribunal in case deems fit may examine orally the parties of the claim petition and reduce the substance of the examination to writing. Under Rule 212, the tribunal shall make a brief memorandum of the substance of what is deposed

and such memorandum shall be written and signed by the Claims Tribunal.

31. A plain reading of these provisions reveals that discretion has been given to the tribunal to proceed with oral examination of the witnesses. The provisions contained in Rules 208 to 212 should be read in context to the word, "enquiry" used in Section 168 of the Act. Being summary trial, discretion has been given to the Presiding Officer of the tribunal to record oral testimony under Rule 208 by using word, if deems fit. However, discretion being judicious in nature, in case an objection is raised to the affidavit filed by a person, then it shall be incumbent on the tribunal to record examination-in-chief with due permission to cross-examine such witnesses. In any case, if without raising any objection, an affidavit is relied upon by the parties and the defendant cross-examines the applicant during the course of proceeding before the tribunal, then no objection may be raised at appellate stage and trial shall not vitiate. During the course of argument, it has been admitted that no objection was raised by the appellant before the tribunal when the tribunal has relied upon the affidavit filed by the claimant and permitted the appellant to cross-examine a witness. Moreover, it was open for the appellant while filing written statement to raise objection by due pleading but the same admittedly has not been done.

32. It is vehemently argued by the appellant's counsel that B part of the permit which permits the UPSRTC to ply 12 buses of its fleet of Lucknow-Sitapur Road was not filed. It is submitted that UPSRTC could not have plied the bus having permit to ply 12 buses over the route in question. Attention has been invited to Section 103 of the Act. On a query made by the court as to whether either in the written statement or orally, objection was raised with regard to permit filed before the trial court, the reply is negative. It is submitted that there appears to be fault during the course of trial on the part of the appellant's counsel. The trial under the Act in pursuance to 1998 Rules read with Section 168 is summary procedure and in case neither pleaded nor argued raising certain plea, that too with regard to validity or genuineness of document, then it does not seem to be permissible to raise the plea for the first time in appeal without adopting recourse of Order XLI, Rule 27 CPC. In case the appellant want to add new plea or rely upon certain new evidence which was not part of pleading before the tribunal then that could be done only by adopting recourse of Order XLI, Rule 27 so that the claimant respondent would have got an opportunity to rebut the same. In absence of any application moved, such plea is not permissible for admission of appeal.

33. Even otherwise, argument advanced by the learned counsel for the appellant does not seem to be sustainable. Section 103 of the Act was amended by the State Amendment by U.P. Act No. 5 of 1993 given effect from 16.1.1993. The amended portion is reproduced as under:

Uttar Pradesh:

In section 103, after sub-section (1), the following sub-section shall be inserted,

namely:--

(1A) It shall be lawful for a State transport undertaking to operate on any route as stage carriage, under any permit issued therefor to such undertaking under sub-section (1), any vehicle placed at the disposal and under the control of such undertaking by the owner of such vehicle under any arrangement entered into between such owner and the undertaking for the use of the said vehicle by the undertaking.

[Uttar Pradesh Act 5 of 1993, Sec. 2 (w.e.f. 16-1-1993)].

Sub-Section (1A) of Section 103 of the Act added through U.P. Amendment (supra) at the face of record provides that it shall be lawful for the State Transport Undertaking to operate on any route as stage carriage, under any permit issued therefor to such undertaking under sub-section (1), any vehicle placed at the disposal and under the control of such undertaking by the owner of such vehicle under any arrangement entered into between such owner and the undertaking for the use of said vehicle.

34. In the present case, attention has not been invited to any pleading before the trial court and argument advanced that the bus of the UPSRTC plying over the route in question was not covered by sub-section (1A) of Section 103 of the Act. Legislature to their wisdom has used the word, "vehicle placed at the disposal and under the control of such undertaking" means vehicle placed at the disposal, of the owner of such vehicle under any arrangement made under any agreement entered into between such owner as well as the vehicle plying under the control of UPSRTC.

35. One of the important feature which may be noted is that since the appellant has neither pleaded nor persuaded the tribunal to frame issue on the ground of invalidity of the permit, no such issue was framed. Even, in this Court instead of filing an application under Order XLI, Rule 27 along with the appeal to bring on record the permit and other related documents and make a prayer, the appellant has filed a photostat copy of the permit which reveals that the permit was issued to ply 12 buses of. UPSRTC fleet. Unless an application is moved under Order XLI, Rule 27 fulfilling the necessary conditions provided therein, such plea may not be entertained or brought on record through affidavit as part of appeal may be relied upon to admit the appeal. We may take judicial notice of the fact that while filing appeal u/s 173 of the Motor Vehicles Act, it is now common feature that the appeals are filed in contravention of pleading before the tribunal and that too, without bring relevant material on record. There appears to be no room of doubt with the proposition of law that the question of law may be raised at any stage before the lower court as well as in this Court while preferring the appeal (under Section 173 of the Act) vide Dayanand Rayu Mandrekar Vs. Chandrakant Uttam Chodankar and Others, . While raising such question of law, the courts cannot decide the same in case they are based on new facts and documentary evidence which has not been brought on record through

appropriate application giving due opportunity, otherwise to rebut the same.

36. It is unfortunate that the law with regard to pleading is gradually not adhered to by the parties during the course of trial or while preferring the appeal. Relevant documents must be brought on record during trial before the tribunal with appropriate related pleading in the application and the written statement. In a case reported in Union of India (UOI) and Another Vs. Sudershan Gupta, , their Lordships of Hon''ble Supreme Court have dismissed the petitions on the ground that in absence of documents, no finding may be recorded.

37. In Union of India (UOI) and Others Vs. Jagdish Pandey and Others, , Hon''ble Supreme Court held that the parties are expected to raise specific pleading before the first forum for adjudication of the dispute. To quote relevant portion:

It is a well settled rule that parties are expected to raise specific pleadings before the first forum for adjudication of the dispute. Those pleadings are the basis of the case of the respective parties even before the appellate/higher Courts. The parties would be bound by such pleadings, of course, subject to the right of amendment allowed in accordance with law. In the present case, no such amendment has been carried out even before the High Court and it will be unfair for this Court to get into the controversy of factual matrix of the case at this stage of the proceedings, particularly, when there exists no justification whatsoever on record as to why even these averments were not made before the Tribunal and not even before the High Court, despite the fact that the Tribunal had specifically made comments in this regard in its judgment.

38. In Subhadra and Others Vs. Thankam, , while considering the significance of pleading and its rectification under Specific Relief Act, their Lordships held that the finding recorded by the subordinate forum ordinarily should be relied upon with regard to factual matrix and rectification is permissible only on limited ground subject to condition that the ingredients stated in Section are satisfied (Section 26 of the Specific Relief Act). Similarly, in the present context, unless the application is moved under Order XLI, Rule 27 and the ingredients contained therein are satisfied, new plea may not be taken into account for the purpose of disposal of appeal.

39. In a case reported in Kalyan Singh Chouhan Vs. C.P. Joshi, where question was raised with regard to pleading in the election petition, Hon''ble Supreme Court held as under:

17. During the trial of an election petition, it is not permissible for the court to permit a party to seek a roving enquiry. The party must plead the material fact and adduce evidence to substantiate the same so that the court may proceed to adjudicate upon that issue. Before the court permits the recounting, the following conditions must be satisfied:

(i) The Court must be satisfied that a prima facie case is established;

(ii) The material facts and full particulars have been pleaded stating the

irregularities in counting of votes;

(iii) A roving and fishing inquiry should not be directed by way of an order to recount the votes;

(iv) An opportunity should be given to file objection; and

(v) Secrecy of the ballot requires to be guarded.

(Vide: Dr. Jagjit Singh Vs. Giani Kartar Singh and Others, ; Suresh Prasad Yadav Vs. Jai Prakash Mishra and Others, ; M. Chinnasamy Vs. K.C. Palanisamy and Others, ; Chandrika Prasad Yadav Vs. State of Bihar and Others, ; Tanaji Ramchandra Nimhan Vs. Swati Vinayak Nimhan and Others, ; Gursewak Singh Vs. Avtar Singh and Others, ; and Baldev Singh Vs. Shinder Pal Singh and Another,).

18. In Gajanan Krishnaji Bapat and another Vs. Dattaji Raghobaji Meghe and others, ; this Court held that the court cannot consider any fact which is beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality the result of the election has been materially affected.

19. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, ; Om Prakash Gupta Vs. Ranbir B. Goyal, ; Ishwar Dutt Vs. Land Acquisition Collector and Another, ; and State of Maharashtra Vs. Hindustan Construction Company Ltd.,).

In the same case (supra), their Lordships have further considered the earlier judgments of Supreme Court with regard to pleadings and issues. To quote:

20. This Court in Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, held as under:

6.... It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet....In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the questions.

21. This Court in Bachhaj Nahar Vs. Nilima Mandal and Another, , held as under:

12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue.... Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

23. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.

22. In J.K. Iron and Steel Co. Ltd., Kanpur Vs. The Iron and Steel Mazdoor Union, Kanpur, , this Court observed:

24....It is not open to the Tribunals to fly off at a tangent and, disregarding the pleadings, to reach any conclusions that they think are just and proper.

40. Aforesaid proposition has been reiterated by the Hon"ble Supreme Court in another case reported in State of Madhya Pradesh Vs. Union of India (UOI) and Another, followed by a recent judgment reported in Union of India (UOI) Vs. Ibrahim Uddin and Another, . In the case of Ibrahim Uddin (supra), Hon"ble Supreme Court while holding that admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. In certain cases, it operate as an estoppel. Documents filed at admission stage does not seem to be part of record, neither any issue was framed before the tribunal, cannot be relied upon.

41. While considering Order XLI, Rule 27 CPC in the case of Ibrahim Uddin (supra), Hon"ble Supreme Court held that the appellate court should not travel outside the record of lower court and cannot take any evidence in appeal subject to exception provided under Order XLI Rule 27 of the CPC under which additional evidence may be taken in actual cases. It is further held by the Supreme Court that it is not the business of the appellate court to supplement the evidence adduced by one party or other in the lower court. In absence of satisfactory reason for non-production of the document, additional evidence should not be admitted in appeal. Whenever, the appellate court admits an appeal, it should record reasons for doing so. To quote relevant portion:

25. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an

exception, Order XLI, Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah Vs. A. Seetharama Reddy and Others, ; Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others, ; Soonda Ram and Another Vs. Shri Rameshwarlal and Another, ; and Syed Abdul Khader Vs. Rami Reddy and Others,).

26. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S.K. Mohammed and Others Vs. Mohamad Iqbal and Mohamed Ali and Co.,).

27. Under Order XLI, Rule 27 Code of Civil Procedure, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. (Vide: Lala Pancham and Ors. (supra)).

28. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide State of U.P. Vs. Manbodhan Lal Srivastava, ; and S. Rajagopal Vs. C.M. Armugam and Others,).

29. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain

evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

30. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

31. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

36. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

42. In the present case, neither application has been moved under Order XLI, Rule 27 with regard to additional evidence nor any issue was framed before the trial court. Order XIV, Rule 1 CPC reads as under:

O. XIV. Rule 1(1) Framing of issues.--(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

.....

43. In the present case, while filing present appeal; it has not been pleaded that the issue with regard to permit was raised or argued before the tribunal. In catena of judgments, Hon"ble Supreme Court ruled that it is neither desirable nor required for the courts to frame an issue not arising from the pleadings on record. The court should not decide an issue on a matter/point on which no issue has been framed vide Sita Ram Vs. Radhabai and Others, .

44. It is trite in law that object of framing of issue is to ascertain the area of dispute and pinpoint the regulation for determination by the court so that no party at the trial is taken by surprise. It is the issue fixed and not the pleading that guide the parties in the matter of adducing evidence. Where the evidence is not in line with the pleading and is at variance with it, such evidence cannot be looked into or relied upon vide Kashi Nath (Dead) through Lrs. Vs. Jaganath,

45. In view of above, in absence of any pleading with regard to question raised

that too with regard to evidence for which no application has been moved under Order XLI, Rule 27 raising a new plea before this Court, the appeal seems to be not sustainable and lacks merit. The impugned order passed by the tribunal does not seem to suffer from any impropriety or illegality.

46. One other unfortunate part on the part of the appellant is that while preferring the appeal, the appellant has not pointed out the facts and circumstances under which he has raised new ground/plea before this Court. He has tried to set up a new case with regard to which no issue was framed before the tribunal and concealed the material fact with regard to pleading before the tribunal. There appears to be abuse of process of law whereby court's time has been wasted. Appeal is liable to be dismissed with costs.

47. It shall be appropriate that the High Court Rules may be amended and it should be provided that while filing appeal, the appellant must certify that the appeal filed and ground taken is based on pleading and evidence on record before the trial Court/tribunal.

48. Disclosure of pleading and material before the tribunal is necessary, to exercise power under Order XLI, Rules 11 and 11A of CPC, for disposal of appeal at admission stage and check the filing of appeal lacking merit.

Registrar General may apprise Hon"ble Chief Justice, so that appropriate decision may be taken, subject to His Lordship's pleasure.

Accordingly, the appeal fails and is dismissed with costs quantified to Rs. 25,000/- which shall be deposited in this Court within two months and shall be remitted to mediation centre, Lucknow. In the event of default, it shall be recovered as arrears of land revenue by the District Magistrate concerned. Registry to take follow-up action. However, it shall be open for the appellant to move appropriate application to adjust the statutory deposit of Rs. 25,000/- in lieu of cost.

Let a copy of the present judgment be sent to Registrar General who shall place it before the Hon"ble Chief Justice.