
(2000) 03 AHC CK 0054

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 12958 of 1993

Shanti Rawat

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 09-03-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2)
Constitution of India, 1950 — Article 226
Uttar Pradesh Tenancy Act, 1939 — Section 180
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 171

Citation : (2000) 03 AHC CK 0054

Hon'ble Judges : Shitla Prasad Srivastava, J

Final Decision : Dismissed

Judgement

Shitla Prasad Srivastava, J.—This writ petition, under Article 226 of the Constitution of India has been filed by the petitioner with a prayer to quash the order dated 921993 of the respondent No.1 which is Annexure8 to the writ petition and further to quash the order dated 1181988 of the respondent No.2 which is Annexure7 to the writ petition. Annexure7 to the writ petition is the order passed by the SubDivisional Officer Haldwani, by this order the suit of the plaintiff for ejectment was decreed and four times of annual rent was awarded against the defendant and in favour of the plaintiff Annexure9 to the writ petition is appellate Court order passed by the Board of Revenue in Second Appeal No. 1 of 198889 arising out of the Judgment dated 1181988 passed by the Additional Commissioner, Kunaun Division Nainital arising out of original suit.

2. To understand the real dispute between the parties it is necessary to have a look to the pedigree, which has been given in paragraph 1 of the writ petition and it is quoted herein below:

Frank Rawat

J.S. Rawat

B.S. Rawat =Widow Smt. Shanti Rawat

Ranvir Singh Rawat (R. 19)

Pratap Singh Rawat (R.20)

Javant Singh Rawat (R.17)

Charulata Rawat (R. 18)

It is stated that Frank Rawat, who was fatherinlaw of the petitioner, has executed a lease deed on 1511950 in favour of Ram Kishun Shanguri and Sri Loknani Shanguri ancestors of respondent Nos. 3 to 16 in respect of the land measuring 117 bighas 13 biswas of village Loharia Sal Dhara Narsingh. Tehsil Haldwani, District Nainital. Which is the land in dispute for a fixed period of five years. It is stated by the petitioner that during the period of (ease Rakesh Shanguri and also Sri Frank Rawat died Sri J.S. Rawat and Sri B.S. Rawat sons of Frank Rawat after the expiry of the aforesaid period of five years sent notice to Loknani Shanguri and heirs of Ram Kishun Shanguri asking them to vacate the land and give back the possession in terms of lease of the land in dispute. Notice was replied by the occupiers. It was alleged in the reply that they are ready to vacate the land provided the land holders pay Rs. 42.000 as cost of improvement invested by the occupiers. The occupiers did not vacate the land in dispute hence Sri J.S. Rawat and Sri R.S. Rawat filed suit under Section 180 of the U.P.Tenancy Act against Sri Loknani Shanguri and heirs of Sri Ram Kishun Shanguri. The suit was contested by the defendants No. 1, 2, 3 and 5 on the ground that the defendants have invested about Rs. 42.000 in improvement of the land in dispute, therefore the said suit should be decreed subject to the payment of the said amount. The respondent Nos. 1, 6 and 7 also filed written statement through their guardian. The trial Court decreed the suit on 1441969. Thereafter U.P. Zamindari Abolition and Land Reforms Act. No. 11 of 1951 came into force on 171969. The defendants filed an appeal before the Commissioner taking a new plea of adhiwasi right because of the enforcement of the U.P. Zamindari Abolition & Land Reforms Act. The appeal was allowed on 3171973 and suit was remanded back to the trial Court to frame issues of adhiwasi right and its effect. After remand, the defendants filed application on 20111973 i.e. after 18 years of filing of the suit for amendment in the written statement to the effect that Frank Rawat has sold the land in dispute on 3031950 "for Rs. 4,500/. But this amendment application was rejected. The suit was ultimately decreed on 31.12.1985 against which the defendants filed an appeal before the Additional Commissioner which was allowed on 1181988. Against the Judgment the petitioner filed Second Appeal No. 1 of 198889 which was allowed on 811991 by the respondent No. 1. The judgment and decree dated 1181988 was set aside and that of the trial Court was maintained against the aforesaid judgment. The respondent Nos. 3 to 12, 15 and 16 filed Civil Misc. Writ Petition No. 6304 of 1991 in which legal and technical plea was raised that Nand Kishore Shanguri, respondent No. 8 in the second appeal died on 1651989 during the pendency of the second appeal and

his heirs were not brought on record. Therefore, the judgment of the Board of Revenue dated 811991 was nullity. It is stated that when the petitioner came to know she filed an application for recall of the judgment and decree dated 811991 and also applied for setting aside the abatement and to substitute the heirs of the deceased after condoning the delay before the Board of Revenue. This application was allowed by the Board of Revenue and second appeal was heard again on merit. Now the second appeal has been dismissed on 921993. The petitioner has challenged the two orders in this Court under Article 226 of the Constitution of India.

3. The contention of the petitioner is that the appeal has been dismissed on the ground that the defendant being subtenant have acquired adhiwasi right. They became Sirdar, Bhumidhar and the suit under Section 180 of the U.P. Tenancy Act was maintainable. The petitioner has further challenged the judgment and decree passed by the respondent No. 1 on different legal aspect, which is not necessary to be mentioned here at this time when a preliminary objection has been raised by the contesting respondents regarding the maintainability of the writ petition.

4. The contesting respondents have filed Civil Misc. Application No. 34782 of 1997 dated 1151997 that the writ petitions, be dismissed as abated. A copy of this application was served on the learned Counsel for the petitioner on 1351997. This application is supported by an affidavit of Vinai Shanguri, who is the son of late Madan Mohan Shanguri. He has deposed that he is paikar on behalf of other respondent Nos. 3 to 9 and 11 to 16. In the affidavit it is stated that Madan Mohan Shanguri respondent No. 10 died on 25121996 leaving behind him Vinai Shanguri and his two brothers, namely, Promod Shanguri and Ritesh Shanguri all son of Madan Mohan Shanguri as his heirs and legal representatives but the petitioner has not moved any substitution application for bringing the heirs of the respondent Madan Mohan Shanguri on record. It is stated in paragraph 4 of the affidavit that it was within the knowledge of the petitioner as entire death ceremony was performed at Haldwani at the residence of the respondent Nos. 3 to 9 and 11 to 16.

5. An application supported by an affidavit of Smt. Shanti Rawat, petitioner, sworn on 17th May, 1997 was filed on behalf of the petitioner under Order 22, Rule 9, C.P.C. with a prayer to set aside the abatement if any, due to non filing of the substitution application of the deceased respondent No. 10. An application for bringing the heirs has also been filed. An application has also been filed by the petitioner to dispose of the application for setting aside the abatement at an early date. A counteraffidavit has been filed on behalf of the contesting respondents against the application for setting aside the abatement. A copy of this counteraffidavit was served on the learned Counsel for the petitioner on 581997. In the counteraffidavit it is stated that the petitioner has full knowledge of the death of respondent No. 10 Madan Mohan Shanguri.

6. It is worth while to mention here that a counteraffidavit to the main writ

petition has already been filed by Prakash Chandra Shanguri, who is respondent No. 3 and pairokar of respondent Nos. 4 to 16. A copy of this counteraffidavit has been served on 1671993 on the learned Counsel for the petitioner, in paragraph 3 of this counteraffidavit. It is specifically stated that the writ petition is liable to be dismissed on the ground that Smt. Shanti Rawat w/o B.S. Rawat has no right to maintain the writ petition in view of the admitted pedigree given by the petitioner in paragraph 1 of the writ petition. In paragraph 4 of the counteraffidavit it is stated that Frank Rawat not only executed a document in favour of the answering respondent on 1511950 to be effective from 471951 but also transferred his title (the right of proprietorship) in favour of the answering respondents and made an application to the Kharn Department for the said purpose. They accepted the huge amount of money representing the real value of the property from the answering respondent for confirmment of actual title to the answering respondents. It is further stated that notice dated 1811995 sent by Sri J.S. Rawat was ineffective and illegal. The alleged tenancy has not been terminated by 1811955. It is further stated in the main counteraffidavit that in the lease itself it is mentioned as under:

"ZAMIN KE BEHTARIKE LIVE APP JO BHILAGAT LAGADEN".

7. It is further stated that the occupiers were rightly not liable to vacate the land as money was not paid by the heirs of Frank Rawat nor did they reimburse the answering respondents for the improvement. The plea with regard to the right of Sri Rawat and his right to eject as provided under Section 176 of the U.P. Tenancy Act has also been raised which is not necessary to deal at this stage. Learned Counsel for the petitioner has filed rejoinder affidavit along with application to list the case for admission at an early date. In the rejoinder affidavit of Smt. Shanti Rawat (Petitioner) in reply to the contents of paragraph 3 of the counteraffidavit where the right of Smt. Shanti Rawat to maintain the petition has been challenged it is stated in paragraph 4 of the rejoinder affidavit that Sri B.S. Rawat died long age during the pendency of the proceeding in the Court below. The petitioner, respondent Nos. 17 and 18 were substituted and were brought on record as heirs of Sri B.S. Rawat. Since then throughout the entire proceeding the petitioner has been prosecuting and pursuing the suit and all proceedings at every stage on her behalf and also on behalf of her son Sri Jayant Singh Rawat, respondent No. 17 and her daughter, Charulata Rawat respondent No. 18. It is stated that the right of the petitioner to prosecute and pursue other proceedings in suit was never challenged. Therefore, the contesting respondents cannot be permitted to raise this factual objection for the first time in the writ petition. It is further stated that the respondent Nos.17 and 18 were substituted as heirs of Sri B.S. Rawat and whenever any proceeding was taken the respondents have impleaded the petitioner and respondent Nos. 17 and 18 as heirs of the deceased plaintiff Sri B.S. Rawat and further that against the order of the trial Court dated 1971990 allowing the application of the petitioner for the appointment of receiver, when the defendants respondents filed Revision No. 162 of 197980, Sri Lok Mani Shanguri v. Sn R S. Rawat and others,

impleading the petitioner as respondent No. 3 the defendantrespondents impleaded the petitioner also as respondent and interested parties in the suit. It is further stated thatwhenRevisionNo.l62ofl97980was dismissed by the Board of Revenue the defendantrespondents filed Civil Misc. Writ Petition No. 642 of 1983 in the High Court (Sri Chandra Dutta Shanguri and others v. R.S. Rawat and others) including the petitioner as respondent No. 3 challenging both the orders of the Board of Revenue and trial Court dated 1351982 and 1971980 respectively. It is further stated that the defendants respondents filed an appeal before the Commissioner, Kumaun Division. Nainital as Appeal No. 54/92 of 198586 including the petitioner as respondent No. 1 and respondents 17 and 18 of the present petition as respondent Nos. 2 and 3 in the said appeal. The suit was dismissed by the Additional Commissioner against which the petitioner alone filed Second Appeal No. 1 of 198889 before the Board of Revenue on her behalf and also for and on behalf of the respondent Nos. 17 and 18 impleading them as respondent Nos. 14 and 15 in the said second appeal. It is further stated that the second appeal was allowed on 811991 against which the defendantsrespondents filed Civil Misc. Writ Petition No. 6304 of 1991Prakash Chandra Shanguri v. Board of Revenue and others, impleading the petitioner as respondent No. 3 and respondents Nos. 17 and 18 as respondent Nos. 4 and 5 in the said writ petition. The said writ petition is still pending. It is further stated that the second appeal has been illegally dismissed by the Board of Revenue on 921993 against which the petitioner alone has filed writ petition for herself and also on behalf of respondent Nos. 17 and 18. It is further stated that the defendantsrespondents cannot be permitted to raise the point regarding the right of the petitioner and Principles of estoppel will come in the way of the contesting respondents. The other pleas taken in the rejoinderaffidavit are regarding the title of the parties under the provisions of U.P. Tenancy Act etc. which are not relevant for the time being to decide the preliminary point.

8. An application has also been filed by Sri Aditya Narain, learned Counsel for the petitioner to transpose the name of the respondent Nos. 17 to 20 in the writ petition as petitioner Nos. 2 to 5 in the array of the parties in the writ petition and for consequential amendments in the writ petition also. This application is supported by an affidavit of Pratap Singh Rawat. In paragraph 3 of the affidavit it is stated that applicant Nos. 3 and 4 were outside in connection with their services while applicant Nos. 1 .and 2 were student studying as such the applicants could not join as appellants for filing second appeal before the Board of Revenue and second appeal was filed by Smt. Shanti Rawat alone for herself and on behalf of the applicants and under the similar circumstances after the judgment of the Board of Revenue writ petition was filed by Smt. Shanti Rawat alone on her behalf and on behalf of the applicants also. It is stated that no objection was raised on behalf of the respondents regarding non maintainability of the second appeal filed by the petitioner No. 1 alone before the Board of Revenue and also no objection was raised on behalf of the respondents even in Civil Misc. Writ Petition No. 6304 of 1991. The objection has been raised for the

first time in the counteraffidavit regarding the right of Smt. Shanti Rawat to maintain the writ petition on the ground that the widow has no right to file the writ petition. It is further stated in paragraph 7(iii) of the affidavit that as no objection was ever raised at the earlier available opportunity it is presumed that the respondents acquiesced waived this objection of misjoinder of the parties. In paragraph 7(iv) of the affidavit it is stated that though the writ petition is maintainable on behalf of Smt. Shanti Rawat alone but to avoid any technicality and further complications the applicants to be transposed as petitioners Nos. 2 to 5 is being filed. A counteraffidavit has been filed to this transposition application and in reply to the contents of paragraph 7 of the affidavit accompanying the transposition application it is stated that the application is highly belated and is based on concealment of relevant facts and it is further stated that the transposition application has been filed when maintainability of writ petition was challenged. A rejoinder affidavit has also been filed against the counteraffidavit. The rejoinder affidavit is of Pratap Singh Rawat reiterating the same facts that when second appeal was filed before the Board of Revenue by Smt. Shanti Rawat herself the maintainability could have been challenged there, but as it was not challenged and subsequently thereafter she filed an appeal etc. no objection was raised, therefore, now objection cannot be raised. An application has also been filed by learned Counsel for the petitioner with a prayer to over Rule the factual objection raised by the respondents for the first time in the counteraffidavit and to decide the writ petition on merit on 1511999 this Court simply passed order on this application to list with previous papers.

9. On 451998 a preliminary point was raised by Sri G.N. Verma, learned Counsel for the respondent that the present writ petition is not maintainable and it should be dismissed. It has been urged that this petition has been filed by Smt. Shanti Rawat, who is the widow of Sri B.S. Rawat and sons of the original plaintiff. It is submitted that when the suit was filed by Sri Frank Rawat, who died during the pendency of the suit, his two sons Sri J.C. Rawat and Sri B.S. Rawat were substituted. When B.S. Rawat died, Smt. Shanti Rawat was brought on record though she was not legal heirs of Sri B.S. Rawat being widow when sons Jayant Singh Rawat and Charulata Rawat were alive and the other heirs of original plaintiff who were on record and against whom decree was passed by the Board of Revenue dismissing the suit of the plaintiff on merit. It was for them (judgment debtor) to challenge the finding recorded by the Board of Revenue in writ petition. The present writ petition has been filed by Smt. Shanti Rawat alone. The judgment and decree became final against those who have not filed writ petition the decree being inseparable against the persons who have not filed writ petition, it shall be deemed to have become final against Smt. Shanti Rawat, if she is treated to be the heirs of the deceased plaintiff.

10. Sri Aditya Narain in learned Counsel for the petitioner wanted to reply the preliminary objection and the Court passed order that preliminary point shall be decided first before hearing the petition on merit. The preliminary point was heard on 1031999 and Sri Aditya Narain, learned Counsel for the petitioner

prayed some time for preparation of the legal position as to whether under Article 226 of the Constitution of India this Court can decide the question of heirship. The matter was postponed for 1731999. On 1731999 Sri K.M. Hajela, learned Counsel for the respondent, pressed this point again. His submission was that under Section 171 of U.P. Zamindari Abolition & Land Reforms Act, under the provisions of U.P. Tenancy Act the widow was not legal heirs for the devolution of the tenancy when son is alive. Therefore, the petitioner has no right to challenge the decree passed by the Board of Revenue under Article 226 of the Constitution of India, and thus it has become final against the present petition also.

11. Sri Aditya Narain, learned Counsel for the petitioner in reply to the argument of Sri K.M. Hajela, learned Counsel for the respondent has submitted that apart from the provisions of U.P. Zamindari Abolition & Land Reforms Act, and U.P. Tenancy Act there are other mode of devolution of tenancy and even if the petitioner was not heir it cannot be said (sic) as to whether she has received the property from the husband through any other mode of transfer, say, will or gift. His further contention is that during the pendency of the suit this widow, one daughter and son were brought on record and no objection was raised from the side of the respondents that widow is not legal heir and when appeal was filed in the Board of Revenue by the respondent the petitioner was impleaded as heir of Sri B.S. Rawat. Therefore, on principle of estoppel the contesting respondents cannot raise this preliminary point here. His further submission is that principle of constructive res judicata will also apply in the case as if the respondents had any objection with record to the heirship of the deceased plaintiff Sri B.S. Rawat they should have raised this point earlier and as they have not raised this point earlier therefore, the issue shall be deemed to have been decided against the respondents and principles of constructive res judicata will apply an even in the same proceeding where orders are passed at two different stages. His further submission was that as the record is not before this Court it is just possible that she inherited the property by any other mode of transfer and was impleaded as party in the proceeding before the Court below and that order will also operate as res judicata. Here also the principle on which the point is being raised is based on principles of Order 22, C.P.C.

12. Sri G.N. Verma, learned Counsel for the respondent has submitted that this point was raised by the respondent in the counteraffidavit but the petitioner has not explained her position that she had inherited the property by any other mode of transfer. After hearing learned Counsel for the parties on 1731999.1 passed order that though the arguments were heard and concluded on the preliminary point but before deciding this point I think that the petitioner should be given opportunity to produce the certified copy of the substitution application which was filed after the death of original plaintiff Sri B.S. Rawat along with supplementary affidavit. The case was adjourned and it was fixed for 2841999. This case was adjourned on 2841999 as Sri Aditya Narain, learned Counsel for the petitioner was not available. The case was adjourned for 851999. On 851999 the case was ordered to be listed on 1751999 as the cases of Sri Aditya Narain

were adjourned. On 1851999 the case was listed before Hon''ble J.C. Misra, J. On 2651999 the case was again adjourned and was listed before Hon''ble Onkareshwar Bhatt, J. On 1981999 an affidavit has been filed on behalf of the petitioner. This affidavit is of Rajendra Prasad who is the registered clerk of Sri Aditya Narain, learned Counsel for the petitioner. In paragraph 2 of the affidavit it is stated that in compliance of the order dated 1731999 a letter was sent to the petitioner to obtain certified copy of the substitution application which was filed on the death of Sri B.S. Rawat, the plaintiff. In paragraph 3 of the affidavit it is stated that when no instruction was received for want of particular of the record, Counsel for the petitioner sent letter dated 991999 to the petitioner by registered post with particular of the trial Court record. It is further stated that subsequently Sri A.D. Joshi, learned Counsel for the petitioner in the District Court informed the learned Counsel for the petitioner here what the trial Court record is not traceable and it is not reported to have been received back from the Court. As such, certified copy of the substitution application could not be obtained and it is not possible to file the same on record. Learned Counsel for the petitioner has filed written submission in the shape of an application paying Court fee thereon and has prayed to reject the preliminary objection raised on behalf of the respondent. A bare perusal of written submission would show that the learned Counsel for the petitioner Sri Aditya Narain has narrated the facts of the case and in paragraph 33 and onward of the written submission he has cited decisions in support of his contention, i.e. 1983 UPLBECpage 756 (FB), 1987 Vol. 1, UPLBEC page 350, AIR 1984, Supreme Court page 1020, 1998 Vol. 3 ALR page 718, AIR 1986, Supreme Court, page 1455 AIR 1973 Allahabad page 500, AIR 1980 Pat. Page 296, AIR 1948, Allahabad, page 60, AIR 1981, Pat. page 1(FB), AIR 1984, P & H page 51: AIR 1989, Orissa page 233, AIR 1989, Supreme Court, page 1834,1998 R.D. page 160 AIR 1986, Supreme Court page 391, AIR 1968. Supreme Court, page 941 AIR 1963, Supreme Court, page 1516, AIR 1987 Supreme Court., page 1325, AIR 1970, Supreme Court, page 108, AIR 1930 Allahabad page 786, AIR 1974, Supreme Court page 2105, AIR 1996 Supreme Court page 1092, AIR 1944, Nagpur, page 298, 1970 ALJ, page 323, AIR 1922, Pat. page 197,1921 Lahore page 60, AIR 1980 Sikkim page 1. It is significant to mention here that no written argument was called for by the Court nor all the decisions which have been quoted in the written submission, which has been filed in application form was cited before the Court by the learned Counsel for the petitioner even then in the interest of justice I have perused all the decisions mentioned in the application. The matter was postponed on the request of Sri Aditya Narain that he wants to file supplementary affidavit on 291099 Sri Aditya Narain, filed supplementary affidavit of the petitioner in his own accord. In paragraph 6 of the supplementary affidavit it is stated:

?(6) That the Counsel for the petitioner after getting the information of nonavailability of lower Courts record, and certified copy of the substitution application asked the deponent to inform him about basis upon which the deponent and her two children were substituted as legal representative of Sri

B.S. Rawat in the original suit, the deponent made efforts to trace out and found photostat copy of the will dated 1011972 of her husband Sri B.S. Rawat and also a photostat copy of the letter of Army Head Quarter, New Delhi dated 30th October, 1976. On further thorough search and efforts deponent was able to trace out and found the original Will and original letter. A true photostat copy of the said will dated 1011972 and letter of Army Head Quarter dated 30101976 are being filed and marked as Annexure No. 1 and Annexure No. 2 to this affidavit.?

In paragraph 7 of the supplementary affidavit it is stated that the will dated 1011972 is that last will of her husband Sri B.S. Rawat who was Major in Rajput Regiment in Army. In accordance with the said will the deponent is the sole legal representative of Major B.S. Rawat, her husband.

13. On 291999, Sri Aditya Narain, learned Counsel for the petitioner has submitted that as he has already submitted his argument in the shape of an application, therefore, he wants to place reliance on the same and will not advance any further argument. The judgment was reserved on the same day by me.

14. Before discussing the controversy and deciding the point as to whether the writ petition is maintainable on behalf of the petitioner alone or not I think it is necessary to point out the effect of the supplementary affidavit which has been filed by the petitioner on 291999. It is sufficient to observe that this supplementary affidavit has been filed only with a view to assert the right of the petitioner on the basis of the so-called will. In the supplementary affidavit it is not stated anywhere that the will which has been filed along with the supplementary affidavit was the basis of the substitution application which was filed before the Court below after the death of Sri B.S. Rawat. The petitioner was given ample opportunity to produce the copy of the application of substitution but as is clear from the affidavit of Rajendra Prasad, registered clerk of Sri Aditya Narain, learned Counsel for the petitioner that it could not be obtained, therefore, there is nothing on record that on what basis the petitioner was brought on record as legal heir of the deceased Sri B.S. Rawat, the original plaintiff.

15. As stated above, the controversy was as to who was the original plaintiff and who will succeed in his place after his death during the pendency of the suit. It is admitted to the parties that the petitioner was widow of Sri B.S. Rawat, the original plaintiff, and suit was filed originally under Section 180 of U.P. Tenancy Act. Therefore, after the death of Sri B.S. Rawat, the original plaintiff, the law of devolution of the tenancy as provided under the U.P. Tenancy Act was applicable. It is admitted to the parties that the suit continued after the U.P. Zamindari Abolition & Land Reforms Act came into force and Sri B.S. Rawat, the original plaintiff died when U.P. Tenancy Act was repealed. Therefore, the devolution of the tenancy right shall be governed under Section 171 of U.P. Zamindari Abolition & Land Reforms Act, which is as under:

171. General order of succession. Subject to the provisions of Section 169, when a Bhumidhar (****) or asami being a male dies, his interest in his holding shall devolve in accordance with the order of succession given below:

(a) the male lineal descendent in the line of descent in equal shares per strips:

Provided first that the son of a predeceased son how lowsoever shall inherit the share, which would have devolved upon the predeceased son, had he been alive:

Provided secondly, that subject to the provisions of first proviso, the share of a predeceased male lineal descendant will devolve upon his widow, who has got remarried, and

Provided thirdly, that, if no male lineal descendant in male line of descendant is alive the inheritance shall be governed by clause (b);

(b) widow and widowed mother and widow of a predeceased male lineal descendant in the male line of descendant who have not remarried:

Provided first that cowidow will together get one share, and:

Provided secondly that the widow of a nearer descendant will exclude that of a remoter one in the same branch.

(c) deleted (d) father

(e) deleted.

(ee) unmarried daughter.

(f) brother, being the son of the same father as the deceased.

(ff) unmarried sister.

(g) married daughter, (h) daughter's son.

(i) brother's son, the brother having been the son of the same father as the deceased,

(j) father's father,

(k) father's mother, who has not remarried.

(l) son's daughter.

(m) married sister,

(n) halfsister, being the daughter of the same father, the deceased.

(o) sister's son,

(oo) halfsister's son, the sister having been the daughter of the same father as the deceased,

(p) brother's son's son

(q) father's father's son.

(r) father's father's son.?

16. It is further admitted to the parties that the petitioner was impleaded as party at different stages of suit, appeal and writ petition filed earlier and no objection was raised from the side of the respondents. The question which is now to be decided is as to whether this preliminary point can be raised in the writ petition and as to whether the principles of waiver and constructive res judicata will apply in this case and the respondents on the principle of estoppel are also stopped from raising this point.

17. In this very context the other question which emerges is if the principle of estoppel, waiver or constructive res judicata does not apply whether the petitioner Smt. Shanti Rawat can file present writ petition, who is not legal heir of deceased husband when sons are alive on the date of death of the husband. In this very link the legal position also emerges that when the petitioner along with others who are respondents Nos. 17 and 18 were brought on record treating them to be heirs of the plaintiff and when the decree was passed against all of them at any stage and only one of them challenged the decree either by way of appeal or writ petition and others were impleaded as respondents or opposite parties and did not challenge the judgment and decree passed against them which was common judgment and decree against the petitioner also. The decree being inseparable whether it would become final against the persons who have not challenged the judgment or the decree which is challenged by one of the judgment debtor impleading other judgmentdebtor as respondents or it shall be deemed to be a challenge on behalf of those nonappealing judgmentdebtors and can it be said that the appeal or the writ petition was filed on behalf of those non appealing judgmentdebtors also.

18. As stated above, a bare perusal of rejoinder affidavit, (sic) affidavit an 1 application filed on behalf of the petitioner it is clear that the petitioner has asserted that whatever has been filed, appeal or writ petition, she has impleaded other judgmentdebtors as respondents therefore, it shall be deemed to have been filed on behalf of all the judgmentdebtors.

19. It is significant to mention here that in the present petition some of the respondents who are judgmentdebtors applied for transposition as petitioner. This itself shows that they did not join hands at the time of filing of the writ petition. If they are transposed as petitioners whether this will cure the defect when they were not transposed as petitioners whether this will cure the defect when they were not transposed appellant or the petitioner in the earlier proceeding which was decided on the sole move of the present petitioner as appellant.

20. After hearing learned Counsel for the parties at length and after considering the decisions which have been cited or quoted in the written submission filed by the learned Counsel for the petitioner and respondents I am of the view that

each and every aspect should be considered separately as raised by the learned Counsel for the parties. Since preliminary objection has been raised by the learned Counsel for the respondent it is for the learned Counsel for the petitioner to wash out the objection raised and to prove legal right of the petitioner to proceed with the writ petition.

21. The first point to be determined in the present case is as to who will be the legal heir of the original plaintiff, who died during the pendency of the cases. In view of the provisions in the U.P. Tenancy Act or in the U.P. Zamindari Abolition & Land Reforms Act, it is clear that the widow will not inherit right of the tenancy after the death of her husband when sons are alive. Therefore, the present petitioner was not legal heir of the deceased Sri B.S. Rawat, original plaintiff.

22. Now the second point is as to whether she inherited the property left by the husband after his death. Sri Aditya Narain. Learned Counsel for the petitioner urged that she might have inherited the property on the basis of will or gift. The question is not as to whether she might have inherited the property by any other mode of devolution or not. The question was as to how she was substituted as heir of the deceased and on what basis she was substituted. The suit was filed by the plaintiff Sri B.S. Rawat against the defendant. The original plaintiff died therefore it was for the heirs of the plaintiff to come on record as provided under law and procedure was to be followed as provided in the Civil Procedure Code. Admittedly, the petitioner was brought on record and the suit and appeal etc. proceeded with the name of the petitioner. Admittedly, nobody raised any objection. But now when objection and the question of legal heir ship has been raised it has to be decided. It is another thing as to whether this can be decided on the principle of constructive res judicata, waiver and estoppel or not but it is for the petitioner to prove that she was legal heir of the deceased plaintiff. Time was given to the petitioner to produce a copy of the substitution application filed by or on behalf of the plaintiff after the death of the original plaintiff. Sri B.S. Rawat, but as is clear from the affidavit filed by Rajendra Prasad, registered clerk of Sri Aditya Narain, learned Counsel for the petitioner, that it could not be obtained and the petitioner has shown her inability to file the same. Therefore, in view of the fact that the petitioner was not legal heir of the deceased plaintiff and no application for substitution to prove or to shown other mode of devolution of the right on the petitioner has been filed, it cannot be held that the present petitioner has inherited the tenancy right of her husband after his death when sons were alive. The supplementary affidavit filed by the petitioner on 29/9/99 appears to be an afterthought. In the supplementary affidavit it has not been stated by the petitioner that the alleged will which has been annexed with the supplementary affidavit was the basis of her substitution in the original suit. This document which has never been placed before the Subordinate Court in the suit cannot be taken into consideration for the first time in the writ petition. Therefore, I am clearly of the view that as law of the land stands the petitioner is not legal heir so far as devolution of the tenancy right is concerned of her deceased husband and she can not proceed with the suit or any other

subsequent proceeding, say, writ petition etc. as legal heirs of her deceased husband unless it is held that there can be an estoppel against the statute also.

23. After discussing and deciding the point of inheritance and the point of filing writ petition on behalf of the respondent Nos. 17 and to 20 now. I proceed to discuss the decisions cited by Sri Aditya Narain, learned Counsel for the petitioner in his written submission which are quoted in the judgment also on the point of principles of estoppel waiver and constructive res judicata,

24. Before deciding the principle of estoppel, waiver or constructive res judicata as argued by Sri Aditya Narain, learned Counsel for the petitioner I will deal with the right of appeal as provided under the relevant Rules and laws.

25. Admittedly, the suit was filed under Section 180 of U.P. Tenancy Act. The suit was decreed on 11/4/1969 i.e. before the enforcement of U.P. Zamindari Abolition & Land Reforms Act No. 11 of 1951 which came into force on 17/1/1969. The defendant filed appeal before the Commissioner taking new plea of Adhivasi right because of the enforcement of U.P. Zamindari Abolition & Land Reforms Act. This appeal was allowed on 3/7/1973 and the suit was remanded back to the trial Court to frame issues on Adhivasi right and its effect. The suit was decreed after remand on 31/12/1985. Therefore, the appeal was filed by the defendant before the Additional Commissioner, which was allowed on 11/8/1988. Against the aforesaid order the petitioner filed Second Appeal No. 1 of 1988/89. The question which has arisen is as to whether the petitioner can file the second appeal before the Board of Revenue or not.

26. Admittedly, the suit was filed by the husband of the petitioner and after his death, during the pendency of the suit, his son Sri Jayant Singh Rawat, daughter Charulata Rawat and the petitioner Smt. Shanti Rawat, widow of the original plaintiff, were brought on the record and the son remain party as legal heir of the deceased plaintiff throughout the proceeding. But the son did not file any appeal before the Board of Revenue when the defendant appeal was allowed by the first appellate Court, meaning thereby, the suit of the plaintiff was dismissed, as has been held above Smt. Shanti Rawat was not legal heir of the original plaintiff being widow when the son was alive. On the date of death of the original plaintiff she has no right to file appeal. The suit was decreed against the original plaintiff or against the legal heirs of the original plaintiff i. e. his son, who did not file appeal. As the son has not filed appeal and has also not challenged the judgment and decree passed by the Board of Revenue rather it has been challenged by the petitioner (not legal heir of the deceased plaintiff) the present writ petition is also not maintainable.

27. After deciding the aforesaid point now I proceed to deal with the principles of waiver estoppel and constructive res judicata and the fact of non filing of the present writ petition by other judgment debtors. Before dealing with this legal point I want to make it clear that when the present petitioner has no right to succeed the tenancy right of her deceased husband and respondent Nos. 17 and

18 were also brought on record as legal heirs of the deceased original plaintiff and they have not challenged the judgment and decree then any proceeding including the present writ petition filed by the present petitioner, who is not legal heir of the original plaintiff, cannot be said to be proceeding or writ petition on behalf of other judgment debtors also though the petitioner has stated in the application and affidavit when this preliminary point was raised that this writ petition and other proceedings were filed on behalf of other judgment debtor also. The petitioner has arrayed respondent Nos. 17 and 18 as opposite parties who were son and daughter of Sri B.S. Rawat (husband of the petitioner) and has not stated anywhere in the petition that this petition has been filed on behalf of the respondent Nos. 17 to 20, therefore, this cannot be said that the petition has been filed on behalf of the respondent Nos. 17 and 18 also.

28. Sri Aditya Narain, learned Counsel for the petitioner in his written submission has submitted that the question of locus standi, i.e. right of Smt. Shanti Rawat, petitioner, to maintain the writ petition is distinguished from the question of joinder of party. For that purpose he has placed reliance in a case reported in 1983 UPLBEC page 755 Umesh Chand Vinod Kumar and several others v. Krishi Utpadan Mandi Samiti Bharchana, District Etawa and another. This is Full Bench case wherein the question referred by the Divisional Bench was as under:

- (1) Whether an association of persons, registered or unregistered can maintain a petition under Article 226 of the Constitution for the enforcement of the rights of its members as distinguished from the enforcement of its own rights.
- (2) Whether a single writ petition under Article 226 of the Constitution is maintainable on behalf of more than one petitioner, not connected with each other as partner of those who have no other legally subsisting jural relationship, where the question of law and fact, involved in the petition, are common.
- (3) In case the answer to question No. 1 is in the affirmative, whether only one set of Court fees would be payable on such petition or each such individual petitioner has to pay Court fees separately.
- (4) In case answer to question No. 1 is in the negative, whether the defect of misjoinder of several petitioners in the writ petition can be order by requiring each such petitioner to pay separate Court fees.
- (5) Whether the petition is maintainable for questioning similar actions taken by different Mandi Samities independently of each other in cases where the aggrieved party seeks relief against, such Committee on identical grounds

29. While answering the first question, mentioned above, the Court observed that an association of persons registered or unregistered, can file a petition under Article 226 for enforcement of the rights of its members as distinguished from the enforcement of its own rights. After point through the entire judgment of the Full Bench I am of the view that the judgment of Full Bench is not applicable to the facts of the present case. Here writ petition has been filed by

the petitioner on her own behalf and it is not a writ petition on behalf of an association of the persons. Therefore, this case is not applicable to the facts of the present case. Sri Aditya Narain learned Counsel for the petitioner in his written submission has submitted that the question of legal representativeness of Smt. Shanti Rawat, petitioner, is now being disputed by the respondents as such this question of locusstandi cannot be gone into as the basic facts are in dispute. For that purpose he has placed reliance in a case reported in 1987(1) UPLBEC page 350 Committee of Management, Maharajganj Inter College Maharajganj Higher Secondary School, Azamgarh v. Deputy Director of Education 7th Region, Gorakhpur and others, Head note (g) of the aforesaid Judgment is as under:

?The question of locusstandi before the Court could be gone into only where the basic facts are not in dispute. In this case the bone of contention of each parties has been both here and before the authority passed the impugned order whether the removal of the petitioner was by the Committee of Management or by the Society. This question is a question basically of the facts and it is not possible for the Court to arrive at the conclusion on the basis of various registers and other documents, which were challenged by other side. Thus we are of the opinion that the present writ petition cannot be thrown on the basis that the petitioner has no locusstandi.?

30. In that case the question which was under challenge was the order passed by the District Inspector of Schools, Azamgarh, relating to the election of certain Committee of Management. While deciding the question of locusstandi in paragraph 16 of the judgment the Court held that the question of locusstandi raised before the Court could be gone into only where the basic facts are not in dispute. This case is not applicable to the facts of the present case as it is admitted that Smt. Shanti Rawat is the widow and on the date of death of original plaintiff his son was a live. Therefore, there is no dispute regarding the basic fact as to whether Smt. Shanti Rawat was legal heir of the deceased plaintiff or not. Therefore, the present petitioner No. 11 locusstandi even if the observation of the Court (sic) made case mentioned above is taken into consideration.

31. The other case reported in AIR 1984 Supreme Court page 1020 Hari Singh and others v. State of U.P. and others, has been cited by Sri Aditya Narain, learned Counsel for the petitioner relates to the land acquisition matter. Learned Counsel for the petitioner has not submitted in his written submission that which head note is applicable to the facts of the present case, therefore, this case cannot help the petitioner. Sri Aditya Narain, learned Counsel for the petitioner has further submitted in his written submission that Section 141 of the Civil Procedure Code as a whole is not applicable join the principle of Civil Procedure Code as a whole is not applicable but the principle of Civil Procedure Code governing the rights of the parties to maintain appeal and second appeal will apply to the writ petition also. For that purpose he has placed reliance in case reported in 1998 (33) ALR page 717 Shashi Bhushan Asthana v. UP Public

Service Tribunal, Lucknow and others. There cannot be any dispute about the proposition of law laid down in the case but how the petitioner is getting help of it has not been made clear by the learned Counsel for the petitioner.

32. The next case reported in AIR 1986 Supreme Court page 1455 (paragraph 18) is also not applicable to the facts of the present case. In paragraph 18 it is held that:

?In view of this categorical finding in Chauhan case, it was not open to the direct recruits to reagitate this point. Although by reasons of the explanation which was inserted in Second 141 of the Civil Procedure Code, 1908, by the Code of Civil Procedure (Amendment) Act, 1976, Section 11 of the Code does not in terms apply to any proceeding under Article 226 of the Constitution, the principle of res judicata does apply to all the writ petitions under Article 226. This point was, therefore, barred by the principle of res judicata and should never have been allowed by the High Court to be reagitated.?

33. Learned Counsel for the petitioner has urged that an objection to the nonjoinder or misjoinder of necessary party even under Order 22 of the Civil Procedure Code should have been taken at the earliest opportunity otherwise it will be deemed to have been waived. For that purpose he has relied upon a case reported in AIR 1973 Allahabad page 500 Ganga Prasad v. Sahdeo Prasad and another. Head note (A) of this case is where a plea of nonjoinder of necessary party requires proof of certain facts on the evidence on record then non raising it at the earliest stage as enjoined by Order 1, Rule 13 would amount to waiver of pleading the facts on which such a plea could be established. This case is also not applicable to the present case as the question which has been raised by the contesting respondent is not of nonjoinder of necessary parties rather it is case of right of the parties to nonjoinder of necessary parties rather it is a case of right of the parties to file appeal or writ petition. In this case as has been held earlier Smt. Shanti Rawat was not legal heir of the original plaintiff, therefore, if she has filed writ petition impleading the son of her husband, who was legal heir, as respondent, it is not a case of nonjoinder or misjoinder of necessary parties. It is a case in which petition has been filed by the person who had no right at all. Therefore, this case will be not help the petitioner. For that very purpose Sri Aditya Narain, learned Counsel for the petitioner has also cited decision reported in AIR 1980 Patna page 296. There appears some misprinting of page 296 in written submission. AIR 1980, Patna finishes at page 288. There is no page 296 as written by learned Counsel for the petitioner in his written submission. Learned Counsel for the petitioner has also not given the parties name to verify the case from the book of 1980. Learned Counsel for the petitioner has also placed reliance upon a case reported in AIR 1948 Allahabad page 60 Bhondhu v. Ch. Raj Singh, on the point that no plaint or appeal or writ petition should be dismissed but apparently chance should be given to the parties to amend the same. In the case the question of multifariousness was involved and it was held that the case being one of multifariousness, the Court instead of asking the

plaintiff to make good the deficiency in Courtfee should have called upon the plaintiff to exercise his option whether he wanted to proceed with the suit against both A and B and run the risk of its dismissal or proceed only against A or should have struck out B from the 1st dismissal or proceed only against A or should have struck out B from the array of defendants and proceeded with the suit. This case is not applicable firstly because there was no question of multifariousness but there was question of right to sue or proceed as legal heir of the deceased plaintiff moreover, the petitioner has no right to sue as legal heir of the original plaintiff. His further submission is that the respondent had liberty to challenge the impleadment of the petitioner as one of the legal representative of the deceased plaintiff as she was widow but since it was not challenged, therefore, it cannot be challenged here now. For that purpose he has given the past history of the case and has submitted that the respondents are barred on the principle of waiver, for that purpose he has placed reliance upon a case reported in AIR 1981 Patna page 1 (FB) and AIR 1984 Punjab & Haryana page 51 (note B) and AIR 1989 Orissa, page 233 (DB) and AIR 1989 Supreme Court page 1834 Now I am dealing with each and every as under.

34. AIR 1981 Patna page 1 (FB) Bibi Anna Khatun and other v. Zahir Hussain and another. This case is arising out of rent control proceeding where rent appears to have been deposited beyond time and the landlord has withdrawn the amount. The question was as to whether the principle of waiver will apply. This fact has no relevance to the present case. There can not be any estoppel against the statute. Admittedly, the petitioner was not the legal heir, under the U.P. Tenancy Act, of the deceased plaintiff being widow when the son was alive, therefore, even if no objection was raised regarding this legal position by the contesting respondent for want of proper legal advice, it can not be said that now they are estopped on principle of waiver. The second case is AIR 1934 Punjab & Haryana page 51 Qandhara Singh and others v. Union of India and others. This case is on the principle of Section 115 of the Evidence Act. In this case Head Note (B) is to the effect that where the land allotted to a person who had migrated from Pakistan to India in lieu of the land owned in Pakistan was cancelled by the Rehabilitation Authorities and thereafter the allottee took the land on lease from the Rehabilitation Authorities and started paying the lease money to them and the property was later auctioned and purchased by defendants and on application by the allottee it was re-auctioned and at the time of re-auction, the allottee competed the bid with defendants, and when he was unsuccessful in outbidding the defendants, he filed the suit challenging the order cancelling his allotment and he had not challenged the order of cancelling the allotment. By way of appeal it was held that the defendants were entitled to the benefit of Section 41 and principle of estoppel. It was further held that the conduct of the plaintiff was such that the defendants were led to believe that the plaintiff consented to the sale of the property and the purchasers acted in good faith in purchasing it at the time of auction the plaintiff's participation in the auction and earlier payment of lease money to the Rehabilitation Authorities showed that the defendants

believed that no dispute had been left between the plaintiff and Rehabilitation Authorities. In this situation it cannot be said that the defendants did not act in good faith. If the plaintiff was considering the transaction void, he should not have either paid the lease money or taken part in the bid. That conduct of the plaintiff was such that a purchaser at the time of auction could take it that the plaintiff did not claim the property. This case is not applicable because question of fact was not in controversy rather the question of law clear that the widow shall not inherit the property when the son is alive even if there was no objection from the side of the respondent regarding the heirship of the deceased plaintiff. The Court can very well see as to whether the petitioner was legal heir or not. There can not be any estoppel against the statute. The other case is AIR 1989 Orissa page 233. This case also is not applicable in view of the admitted fact and admitted position of law in the present case. In AIR 1989 Supreme Court page 1834 Provash Chandra Dalui and another v. Bishwanath Banerjee and another, under head note which has been cited by the learned Counsel for the petitioner is on the point of Section 115 of the Evidence Act. Head note is read as under:

?The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right. It means the forsaking the assertion of a right at the proper opportunity. Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estoppel. An estoppel may result though the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question.?

35. As stated above, there is no applicability of waiver. Therefore, this also does not help the petitioner. Learned Counsel for the petitioner has further placed reliance in cases reported in 1998 R.D. Page 160, AIR 1986 Supreme Court page 291 and AIR 1960 Supreme Court page 941. In 1998 R.D. Page 160 Jagbir Singh v. Vth Additional District and Sessions Judge, Bijnor and others, the Court held that a defence which has not been raised which could have been raised, shall be deemed to have been raised and decided by reason of Principles of constructive res judicata. The same can not remain open to be agitated at the time of execution. The fact of this case that in the execution an application was filed claiming that the suit property is mortgaged with the Land Development Bank. Therefore the decree is executable in view of the provisions contained in the U.P. Cooperative Land Development Bank Act, 1984. The case of the other side is that it has not been disclosed as to on which date the alleged mortgage was created in favour of the Bank and the alleged mortgage was created sometime in 1992 and that it was not mortgaged under Section 22 of the aforesaid Act. Therefore, the question that case was regarding the question of fact and not the question of law. Here in the instant case the question is regarding legal heirship,

therefore, this case is not applicable and will not help the petitioner. The other case is AIR 1986 Supreme Court page 391 *Forward Construction Co. and others v. Prabhat Mandal (Regd.) Andheri and others*. In this case head noted (A) and (B) deals with the principles of *res judicata*. This case is also not applicable to the facts of the present case as before the Supreme Court the question was regarding the subsequent plea (sis) in the writ petition. In the earlier writ petition the order under challenges was in respect of the plot reserved for bus depot, which was dismissed. Subsequent writ petition was filed challenging the commercial user, therefore, the present case is different one this that of other case. In the other decision reported in AIR 1960 Supreme Court page 911 *Satvadhvan Ghosal and others v. smt. Deorajin Debi* and another, the question was as to whether the principle of *res judicata* is applicable when interlocutory order is being challenged in appeal from final decree. As stated earlier there could have been any estoppel to the statute therefore this case is also not applicable in this case. Learned Counsel for the petitioner has further submitted that only one judgment debtor can maintain the appeal in view of Order 41, Rules 4 and 33 of Civil Procedure Code. Therefore, the writ petition was filed by one is also maintainable. For that purpose he has placed reliance in a case reported in AIR 1963 Supreme Court page 1516 *Panna Lal v. State of Bombay and others*, AIR 1987 Supreme Court page 1325 *Har Narain v. Chandgi etc.* AIR 1970, Supreme Court, page 108. It is sufficient to observe that the writ petition has been filed by a person who was not legal heir of the deceased plaintiff. Therefore, she has no right to sue or continue as successor of the deceased respondent. Therefore, provisions of Order 41, Rules 4 and 33 Civil Procedure Code, as mentioned above, are not applicable.

36. The next submission made by learned Counsel for the petitioner regarding the transposition of the respondent, who was legal heir of the deceased plaintiff. His submission is that extra inspection can be made in the writ petition also. For that purpose he has placed reliance in a case reported in AIR 1930 Allahabad page 786 *Gopi Nath and another v. (sic) and others*, where the Court considered the provisions of Order 1, Rule 10(2) and Order 1, Rules 41 and 33 of the Civil Procedure Code. Thereof cannot be any dispute that the Court has power of transposition under Order 1, Rule 10(2) of Civil Procedure Code. But a bare perusal of this order would show that this order is discretionary and when it is apparent from the fact of the present case that the legal heir of the deceased plaintiff did not chose of preferring the appeal before the Board of Revenue nor filed the present writ petition the Court has also to see as to whether any transposition is bona fide or this is only with a view to fill up the lacuna in the case. Here it is apparent that the son of the deceased plaintiff never filed appeal or writ petition rather remain satisfied when he was arrayed as respondent. Therefore, there is no question of transposition at this stage and this does not help the petitioner. Learned Counsel for the petitioner has further placed reliance in a case reported in AIR 1974 Supreme Court page 2105 *Babubhai Motibhai Patel v. Nandlal Khodidas Barot and others*, for the purpose of principle of applicability

of Civil Procedure Code in writ petition is not to be adhered as the object and scope of writ petition is to provide quick and inexpensive remedy to the aggrieved party and not to defeat the purpose by adopting the suit procedure. This case deal with the powers of the High Court to go into disputed question of fact and applicability of provisions of Section 141 of the Civil Procedure Code. The present case stands on different footing. Here a person has come to the Court and is praying for earlier which was not available to her as legal heir of the deceased plaintiff, therefore, under Article 226 of Constitution of India the High Court cannot help a person who has not come with clean hands and has not been able to prove that how she has succeeded to the tenancy left by her husband when son was alive on the date of death of the deceased. In AIR (sic) Nagpur page 298. Krishnahai w/o Bapuji Bari and others v. Mt. Parvati Bai w/o Dr. Shanker Pandurang Gogte and others, head note (b) has been cited on the point of transposition. This case has no application to the present case. Submission of the learned Counsel for the petitioner is that the impleadment of the. deceased party under the law on substitution under Order 22 of the Civil Procedure Code refers to the impleadment of legal representative of the heirs of the deceased party under law on the substitution application and not legal heir as such the question of heir ship is irrelevant for the purpose of substitution under Order 22 of Civil Procedure Code in a suit.

37. He has further submitted that legal representative may not be legal heir succeeding land under tenancy law but may have right, interest in the land by any other mode than succession. For that purpose he has placed reliance in a case reported in 1970 ALJ page 383, AIR 1922 Patna page 197,1921 Lahore, page 60 and AIR 1980 Sikkim page 1,1970 ALJ, page 323 Chaudhary Daulat Ram Singh v. Swami Dayal arid another, is division bench case of this Court. In this case the Court held that where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. The observation made by the Court is as under:

?The word ?Court? mentioned in Order XXII, Rule 5, refers to the ?Court? in which the suit is pending that Court alone has the jurisdiction to determine as to who will be permitted to continue the suit which is pending before it. Every person has a right to file a suit but the continuance of the suit filed by somebody else can be only under the provision of Order XXII C.P.C. If the Court trying a suit determines that a particular person is not entitled to continue the suit as the legal representative of the plaintiff then that order is final so far as that particular suit is concerned. No separate and independent suit can be filed for a declaration that a particular person is entitled to continue another suit which had not been filed by him on the ground that he was the legal representative of the plaintiff in the earlier suit and ?no suit can be maintainable for giving a declaration that a particular person is entitled to be substituted in place of the plaintiff in another suit. In our opinion the suit as framed was not maintainable.?

38. In this case writ petition is not a suit rather it is an application under Article 226 of the Constitution of India and when the question has arisen as to whether the petitioner was legal heir of the deceased plaintiff when the son is alive this question has to be determined by the Court, as observed by this Court in the case referred to by the learned Counsel for the petitioner. Therefore, this case will not help the petitioner. The other case is reported in AIR 1932 Patna and page 197. This case has no application to the present case. The other case reported in AIR 1921 Lahore page 60 TejBhan and others v. Wall Dad, has also been cited. The fact of the present case clearly shows that the judgment cited by him is not relevant. The other case relied upon by the learned Counsel for the petitioner is AIR 1980 Sikkim page 1 Jagan Singh v. State Transport Appellate Tribunal, Rajasthan and another. This case has also no relevance to the facts and circumstances of the present case.

39. Now I will deal with the argument and decision cited by the learned Counsel for the respondent Sri G.N. Verma, while giving reply to the argument advanced by the learned Counsel for the petitioner Sri Aditya Narain on the point of estoppel has submitted that there cannot be any estoppel against the statute and the contesting respondent can always at any time challenge that Smt. Shanti Rawat not being legal representative and heir of the deceased has no right to proceed with the case. For that purpose Sri Verma has placed reliance in a case reported in AIR 1988 Supreme Court page 644 Smt. Yamuna Bar Anant Rao Adhav v. Anant Rao Shivram Adhav and another, in which the Court has held in paragraphs 4,7 and 8 as under:

? The expression ?wife? used in Section 125 of the Code should be interpreted to mean only a legally wedded wife. The word ?wife? is not defined in the Code except indicating in the explanation to Section 125 its inclusive character so as to cover a divorce. A woman cannot be a divorcee unless there was a marriage in the eye of law proceeding that status. The expression must, therefore, be given the meaning in which it is understood in law applicable to the parties. The marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is therefore, not entitled to the benefit of Section 125 of the Code,?(paragraphs 4,8)

?The fact that wife was not informed about the husband's earlier marriage when she married him would be of no avail. The wife cannot rely on the principle of estoppel so as to defeat the provisions of the Act. ?(Paragraph 7)

40. The submission of Sri Verma is that the decree of the first appellate Court dismissing the suit of the plaintiff was inseparable and indivisible that being so the judgmentdebtor the respondent Nos. 19 and 20 sons of Sri J.S. Rawat having not filed second appeal in the Board of Revenue the decree of first appellate Court dismissing the suit became final against them. Similarly, the decree of the first appellate Court dismissing the suit also became final against the respondent Nos. 17 and 18 the son and daughter of late Sri B.S. Rawat as they have also not filed any second appeal against the decree of the first appellate Court. Therefore,

the legal position which emerges on above facts is that the present writ petition cannot be decided on merit^ in as much as the judgment and decree became final against the son and it being inseparable shall be deemed to have become final against the petitioner also. For that purpose he has placed reliance in a case reported in AIR 1972 Supreme Court page 1181 paragraphs 16, 22 and 23 Ramagya Prasad Gupta and others v. Murli Prasad and others, AIR 1973 Supreme Court page 205, paragraph 3 The D.F. Olsouth Kheri and others v. Ram Sanehi Singh and AIR 1974 Allahabad page 257. State v. Ramesh Devi and others (paragraph 3,4, and 5).

41. Head Note (c) of AIR 1988 Supreme Court, page 644 U (supra) is to the effect that the attempt to excluded altogether the personal law applicable to the parties from consideration is improper. Section 125 has been enacted in the interest of a wife and one who intends to take benefit under subsection(I) (a) has to establish the necessary condition namely. That she is the wife of the person concerned. The issue can be decided only by a reference to the law applicable to the parties. Here the question is that an application for maintenance can be maintained once the right under the Section is established by proof of necessary conditions mentioned wherein. It cannot be defeated by further reference to the personal law. The issue whether the Section is attracted or not cannot be answered except by the reference to the appropriate law governing the parties. The relevant paragraph in this case is paragraph 7 of the judgment which is as under:

?Lastly it was urged that the appellant was not informed about the respondents marriage with Lilabai when she married the respondent who treated her as his wife, and, therefore, her prayer for maintenance should be allowed. There is no merit in this point either, the appellant cannot rely on the principle of estoppel so as to defeat the provisions of the Act. So far as the respondent treating her as his wife is concerned. It is against of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party.?

42. The second case relied upon by the learned Counsel for the respondent is AIR 1982 Supreme Court page 121 Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai paragraph 22 of this judgment is relevant which is quoted below:

?It may be pointed out that estoppel deals with questions of facts and not of rights. A man is not estopped from asserting a right which he had said that he will not assert. It also a well known principle that there can be no estoppel against q statute. After the death of Motibhai his son Chinanbhai succeeded in law.?

43. The next case cited by the learned Counsel for the respondent is AIR 1972 Supreme Court page 1181 (supra) where provisions of Order XXII, Rule 4(3) read with Rule 11 of the Civil Procedure Code was considered and the Court

observed that under Rule 4(3) read with Rule 11 of Order XXII, C.P.C. the appeal abates as against the deceased respondent where within the time limited by law on application made to bring the heirs or legal representative on record as pointed out by this Court in the State of Punjab v. Nanthu Ram, (1962) 2 SCR 636. Further the Court observed in paragraph 22 of the aforesaid judgment which is as under:

?And now the question is whether the appellant who, in these appeals, have asked for the restoration of the decree of the Trial Court can be permitted to proceed with these appeals without deceased Jagdish Narain being represented. We think that the law on the point is quite clear. It was held as far back as in 1887 that suit brought for partnership accounts after a necessary party defendant has been committed is liable to be dismissed. See *Ramdayal v. Jumenjoy Coondoo*, (1887) ILR 14 Cal. 791, The above decision was followed in *Amir Chand v. Raoji Bhai*, AIR 1930 Mad. 714, with the observation that no dissent had ever been expressed from above decision. It was held that a suit for accounts cannot be maintained between some only of the partners of the firm but every partner must be made a party. The same consideration applies to an appeal arising out of a suit for dissolution of partnership and accounts. See *Raj Chunder San v. Gangadas Seal*, (1904) 31 Ind App 71 (PC). In that case A sued his partners, B, C, D & F for dissolution and for account of the partnership. A decree was passed in the suit by which it was ordered that a sum of Rs. 9,000/ should be contributed by A, B & C and that out of that sum Rs. 1,740/ should be paid to U and the rest to KA. appealed from the decree making B, C, D & F party respondents B & C also appealed from the decree making A, D and F party respondents, pending the appeal D died. No application was made by the appellants in either appeal to bring on the record the legal heirs of D within the period of limitation. It was held that the appeal was not competent for as the suit was for partnership accounts. It was not one in which the appellants could proceed in the absence of the legal representative of D. Their Lordships observed that in the absence of the legal representatives of one of the partners of the Court had no option and the appeals were perfectly idle. This decision of the Privy Council along with several others of High Court in the country were followed in *Kunj Behari Lal v. Ajodhia Prasad*, ILR 21 Luck 453 : (AIR 1947 Oudh 28) wherein the head note is as follows:

?There is an appeal arising out of a suit for accounts and partition of partnership property, which cannot be determined in the absence of all the parties interested, some of the respondents die and their legal representatives are not brought on the record within limitation and the right to sue does not survive against those respondents alone whose names are already on the record, the appeal fails in toto. Having regard to the clear position of law in this respect the failure to bring on record the heirs or legal representatives of deceased Jagdish Narain, one of the sharers in the subject matter of the suit, must inevitably lead to the dismissal of the appeals. That brings the case squarely in the second test referred to in the decision of this Court in *Nanthu Ram's* case referred to above.?

And ultimately the Court held in paragraph 23 of the judgment as under:

?In all such cases, even the first test would be satisfied. There is a High Court decree, which says that neither deceased Jagdish Narain nor anybody else was entitled to a share in the subject matter as against Murli Prasad who is held to be the sole proprietor of the business. If the present appellants were to succeed it would lead to the Court's coming to a decision that the deceased Jagdish Narain was entitled to a share in the subject matter of the suit as against Murli Prasad and the other alleged partners a decision which would be in conflict with the decision of the High Court and will be contradictory to it though it has become final with respect to the subject matter, between Murli Prasad and the deceased respondent.?

The other decision is reported in AIR 1973 Supreme Court page 204 Babu Sukhram Singh v. Ram Dular Singh and others. In this case interpretation of Order 22, Rule 4 was subject matter of decision. In paragraph 3 of the Court held as under:

?Now the question is whether the appeal has abated or not. As seen earlier in the plaint a joint claim is made against all the defendants. The first appellate Court, as mentioned earlier, decrees the suit in part against all the defendants. The High Court has dismissed the suit against all the defendants. In this Court relief asked for was against all the defendants. No separate claim was made against any of the defendants. Under these circumstances, quite clearly the appeal has abated as a whole under Order XXII, Rule 4 of the Civil Procedure Code. The appeal is accordingly dismissed. No costs.?

The other decision cited by the learned Counsel for the respondents is a case reported in AIR 1962 Supreme Court page 89 State Punjab v, Nathu, where also interpretation of Order 22, Rules 4 and 11 of Civil Procedure Code was the subject matter of the case. Paragraph 10 is relevant which is quoted herein below:

?It is however, contended for the State that according to the entries in the village records, Labhu Ram and Nathu Ram has equal shares in the land acquired and that therefore, the appeal against Nathu Ram alone can deal with half the amount of the award. We do not agree. The mere record of specific shares in the revenue records is no guarantee of their correctness. The appellate Court will have to determine the share of Nathu Ram and necessarily the share of Lakhu Ram in the absence of his legal representatives. This is not permissible in law. Further the entire case of Labhu Ram and Nathu Ram, in their application to the Government for the appointment of an arbitrator, was that the land jointly belonged to them and had been acquired for military purposes, that a certain amount had been paid to them as compensation that they received that amount under protest and that they were entitled to a larger amount mentioned in the application and also for the income tax they would have to pay on account of the compensation received being added to their income. Their claim was a joint claim

based on the allegation that the land belonged to them jointly. The award and the joint decree are on this basis and the appellate Court cannot decide on the basis of separate shares.?

44. Sri Hajea, learned Counsel for the respondent has further cited a decision delivered in the Writ Petition No. 14655 of 1995 Satya Narain Parasar v. Collector, Etah and others for the purpose that provisions of Civil Procedure Code will not mutatis mutandis apply to the writ proceeding and only principles will apply as such only principle relating to substitution are to be followed and after the death of any party in writ proceedings, application for substitution be made as early as possible and in case some delay is caused in making the substitution application it is for the party concerned to explain the same reasonably but the same is not to be tested strictly on the test of Order 22, Civil Procedure Code or Articles 120 and 121 of Limitation Act.

45. In view of the facts and circumstances of the case, as the writ petition is being dismissed as not maintainable the application dated 11/5/1997 by the petitioner for dismissal of the writ petition as dated passed the application by the petitioner under Order XXII, Rule 9, C.P.C. for setting aside the abatement is of no use and are also disposed of as per observation made above,

46. From the discussion made above and after hearing the learned Counsel for the parties, at length, and keeping in view the legal position I hold that this petition is not maintainable as the petitioner is not the legal heir of the deceased plaintiff. Accordingly, this petition fails and is dismissed. There will be no order as to costs.