

(2002) 08 SHI CK 0024

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No's. 13 of 1997

Smt. Kamal Abrol

APPELLANT

Vs

Bhagwan Dass and Others

RESPONDENT

Date of Decision : 21-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 7, 20, 22, 23
Hindu Marriage Act, 1955 — Section 19
Registration Act, 1908 — Section 33

Citation : (2002) 2 ShimLC 412

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : D.D. Sood and D. Dadwal, for RSA No. 13 and 14 of 1997 and Deepak Gupta, for RSA No. 103 of 1997, for the Appellant; K.D. Sood, Anish Garg for Respondent No.1 and Deepak Gupta and 5 for RSA No. 13 of 1997 K.D. Sood and Anish Garg for Respondent No. 1 and 2 for RSA No. 14 of 1997 K.D. Sood and Anish Garg for Respondent No. 1 for RSA No. 103 of 1997, for the Respondent

Final Decision : Allowed

Judgement

R.L. Khurana, J.—The above-noted three appeals arising out of the judgment and decree dated 27.12.1996 of the learned District Judge, Kangra at Dharamsala are being disposed of together by this single judgment.

2. Regular Second Appeals No. 13 and 14 of 1997 have been preferred by Defendant No. 4 against the dismissal of her appeal and allowing the cross appeal of the Respondents-Plaintiffs No. 1 and 2 vide the impugned judgment. Regular Second Appeal No. 103 of 1997 has been preferred by Defendant No. 3 against the allowing of the appeal of the Plaintiffs vide the impugned judgment and decree by the learned District Judge.

3. Briefly, the facts of the case giving rise to the present appeals may be stated thus. Defendant No. 3, who is a Government of India undertaking and is

controlled by Defendant No. 1 intended to open a retail outlet for the distribution of Liquefied Petroleum Gas (L.P.G) in Kangra town and for the purpose to appoint distributor. Applications in this regard were invited through a notice published in the "The Tribune" in its issue dated 14.8.1985. Such applications were invited from unemployed graduates, who were residents of Kangra District, not having a family income of more than Rs. 24,000/- per annum, and who are not having any close relative (as defined in the application form) as a dealer or distributor of any Oil Company and who was not a partner of any dealership/distributorship/agency of any Petroleum Corporation/Co. In pursuance of such notice a number of applications were received including from the Plaintiffs, Defendant No. 4 and Defendant No. 5. After scrutiny of such applications, the applicants including the Plaintiffs, Defendants No. 4 and 5, whose applications were found in order were called for interview at Kullu on 12.9.1987 by Defendant No. 2. Consequent upon such interviews, the Defendant No. 2 recommended the names of Defendant No. 4, Defendant No. 5 and the two Plaintiffs to Defendant No. 3 for being allotted distributorship/ dealership of LPG and finally a "letter of intent" dated 3.3.1988 was issued by Defendant No. 3 in favour of Defendant No. 4.

4. It appears that the two Plaintiffs (who had applied jointly as partners for the dealership of LPG) and Defendant No. 5 filed two separate writ petitions being CWP No. 998 of 1989 and 3163 of 1988, respectively, before the Punjab and Haryana High Court challenging the allotment of distributorship/dealership of LPG at Kangra in favour of Defendant No. 4 on the ground that the Defendant No. 4 was not a resident of District Kangra. She is a resident of District Mandi and that the residency Certificate produced by her in support of her candidature was not in order. Both these writ petitions were dismissed by a learned Single Judge on 13.2.1990. It was observed as under:

After going through the pleadings of the parties and the documentary evidence brought on the record in the form of written statements and having heard the learned Counsel, I am of the considered view that a writ petition under Articles 226 and 227 of the Constitution is not an appropriate remedy and the High Court is not an appropriate forum for settling disputed questions of fact. In fact, the writ jurisdiction is meant for the enforcement of rights of citizens and not for establishment of rival claims by leading evidence. No doubt, it has been held by the Supreme Court as well as this Court that in a given case the High Court under Article 226 of the Constitution, can exercise jurisdiction for even recording oral evidence in addition to appreciating the documentary evidence or arriving at a certain conclusion where it is satisfied that such a course would be necessary to avoid miscarriage of justice. Those are the cases where writ jurisdiction is invoked by the citizens for the protection of fundamental rights and the jurisdiction is exercised by the courts to reach injustice wherever it exists, and not in cases where claims and counter-claims of private individuals are staked for obtaining licenses, permits, quotas, agencies, etc. in the field of commercial ventures. Since disputed questions of facts are not to be gone into by the High Court under Article 226 of the Constitution, resort to Civil Court is the only

appropriate remedy. Consequently, these writ petitions are dismissed with no order as to costs.

5. The Plaintiff thereafter on 19.3.1990 filed a suit, out of which the present three appeals have arisen *inter alia*, claiming the following reliefs:

a decree for declaration to the effect that selection of Defendants 4 and 5 by Defendants 1 to 3 is wrong, illegal, null and void and is liable to be set aside/ ignored and therefore - "LETTER OF INTENT" dated 3.3.1988 for allotment of L.P.G. Dealership/ Distributorship of Hindustan Petroleum Corporation Ltd., issued by Defendant No. 3 in favour of Defendant No. 4 or allotment of L.P.G. Dealership/ Distributorship is wrong, illegal, null and void and does not confer any right, title and intent upon Defendant No. 4 for allotment of Dealership/ Distributorship of L.P.G. at Kangra and in fact, the Plaintiffs are entitled for the allotment of L.P.G. Dealership/ Distributorship at Kangra with a consequential relief of permanent injunction restraining the Defendants from proceeding to operate or running the Gas Agency LPG Dealership/Distributorship and also restraining the Defendants 1 to 3 from allotting the LPG Dealership/ Distributorship to the Defendant No. 4 with a mandatory injunction directing the Defendants 1 to 3 or Defendant No. 3 to allot the LPG Dealership/ Distributorship at Kangra to the Plaintiffs.

6. The Plaintiffs averred that Defendant No. 4 was not a resident of District Kangra and as such she did not fulfill the eligibility criteria. Defendant No. 4 was a resident of District Mandi. A false residency certificate dated 25.2.1988 showing her to be as resident of District Kangra, was obtained by her by misrepresentation of the true facts. Such residency certificate was cancelled by the competent authority subsequently on 5.8.1989 after due verification. It was further alleged that Defendant No. 4 was neither unemployed at the relevant time nor her family income was less than Rs. 24,000/- per annum.

7. In so far as Defendant No. 5 is concerned, the case of the Plaintiffs is that he too was not eligible since his family income was more than Rs. 24,000/- per annum and he was a managing partner of Messrs. Sanjay Filling Station, an Indian Oil retail outlet, at Gaggal in Tehsil and District Kangra.

8. The Plaintiffs claimed that they fulfilled the eligibility criteria in all respect and as such should have been allotted the LPG dealership/ Distributorship at Kangra.

9. No appearance was put in on behalf of Defendants No. 1 and 5 in spite of service. Both these Defendants were, therefore, ordered to be proceeded, against *ex-parte* vide order dated 27.6.1990 of the learned trial Court. The suit A of the Plaintiffs thus was resisted and contested by Defendant's No. 2 to 4.

10. Defendant No. 2 in its written statement averred that on the basis of the documents furnished, the Defendant No. 4 was found to be a resident of District Kangra since after her marriage with Shri Yashpal Abrol of village Bir in District Kangra. No contrary document was produced by the Plaintiffs before it showing

Defendant No. 4 to be a resident of District Mandi and not a resident of District Kangra. It was further pleaded that family income of both the Defendants No. 4 and 5 was also found to be less than Rs. 24,000/- per annum. Defendants No. 4 and 5 were found to be eligible. The selection was made on the basis of merits. The names of Defendant No. 4, Defendant No. 5 and that of the Plaintiffs were placed at serial Nos. 1 to 3 respectively in order of merit. Objections as to absence of cause of action against Defendant No. 2; want of jurisdiction of the court inasmuch as the Plaintiff had already availed the remedy by way of writ; maintainability of the suit; the suit being bad for misjoinder of parties, namely, Defendant No. 1 Union of India; suit being bad for absence of statutory notice and estoppels were further raised.

11. Defendant No. 3 pleaded that it had no role to play in the selection of the party for allotment of LPG Agency. Only applications are invited by it. The selection is to be made by Defendant No. 2, who is an independent body with a retired Judge of the High Court as its Chairman. Defendant No. 3 made the allotment of dealership only on the basis of the recommendations of Defendant No. 2. In so far as the other pleas raised by the Plaintiffs are concerned, Defendant No. 3 has taken the stand similar to the one taken by Defendant No. 2.

12. Defendant No. 4 while resisting the suit pleaded that she is a resident of District Kangra was unemployed at the relevant time having a family income of less than Rs. "24,000/- per annum. She fulfilled the eligibility and that the LPG dealership was rightly allotted in her favour. She denied that the residency certificate attached with her application was false having been procured by misrepresentation of facts. Certificate dated 9.9.1985 issued by Executive Magistrate, Baijnath was enclosed by her with her application. She and her husband own land and residential house in District Kangra. The selection was made by Defendant No. 2 purely on merits. It was also pleaded that Plaintiffs were not unemployed and were running business in partnership under the name and style of Messrs. Dault Ram and sons, Cloth Merchants, Kangra. Objections as to jurisdiction of the court at Kangra; absence of locus standi of the Plaintiffs and absence of cause of action were further raised.

13. On the pleadings of the parties, following issues were framed by the learned trial court on 11.7.1991:

1. Whether Defendant No. 4 Kamal Abrol is not the resident of Kangra District and thus not eligible for dealership of LPG Agency at Kangra as alleged? OPP
2. Whether annual income of Defendant No. 4 Smt. Kamal Abrol was more than Rs. 24,000/- (twenty four thousand) if so its effect? OPP
3. Whether no valid marriage took place between Smt. Kamal Abrol and Shri Yashpall Abrol, as alleged? OPP
4. Whether allotment of dealership of LPG to Defendant No. 4 is illegal, null and void as alleged? OPP

5. Whether the income of Defendant No. 5 Shri Abhey Singh was more than Rs. 25,000/- PA at the time he applied for LPG dealership as alleged? OPP
6. Whether Defendant No. 5 was managing partner of Sanjay Filling Station, Gaggal, as alleged, if so, its effect? OPP
7. Whether this Court has jurisdiction to try the suit? OPP
8. Whether Plaintiffs have no cause of action to file the suit? OPD
9. Whether Plaintiffs have no locus standi to file the suit? OPD
10. Whether the suit is bad for misjoinder of parties? OPD
11. Relief.

14. The learned trial court found Issues No. 1 and 4 to 7 in favour of the Plaintiffs and issues No. 8 to 10 against the Defendants. Issues No. 2 and 3 were decided in favour of Defendant No. 4. Consequent upon such finding, the learned trial court vide judgment and decree dated 16.6.1995, partly decreed the suit of the Plaintiffs in the following terms:

As a sequel of my findings on issues No. 1 to 10 above, the suit of the Plaintiffs is partly decreed for declaration that the selection of Smt. Kamal Abrol Defendant No. 4 and Defendant No. 5 Abhey Singh by Defendants No. 1 to 3 is wrong, illegal, null and void for dealership of LPG as the same is contrary to the mandatory conditions in the advertisement. It is made clear that it is up to the Defendants No. 1 to 3 to take decision as may be expedient in the circumstances to meet on the basis of previous selection and merit list already made or to issue fresh advertisement to proceed further for the purpose. In the circumstances of the case, the parties are left to bear their own costs.

15. Defendant No. 4 feeling aggrieved by the judgment and decree of the learned trial court declaring the allotment in her favour as wrong, illegal, null and void, went up in appeal, being Civil Appeal No. 116-D/XXIII of 1996/95. The Plaintiffs also felt aggrieved by the partial dismissal of their suit whereby the relief of mandatory injunction in their favour was declined. They too preferred an appeal being Civil Appeal No. 115-D/XXIII of 1996-95 before the learned District Judge, Kangra at Dharamsala. Both the appeals were disposed of by a common judgment dated 27.12.1996. The learned District Judge dismissed the appeal preferred by Defendant No. 4. The appeal filed by the Plaintiffs was allowed. The judgment and decree dated 16.6.1995 of the learned trial court was modified in the following terms:

In view of the foregoing discussion and findings, the appeal filed by Defendant No. 4 fails and the same is accordingly dismissed. However, the appeal filed by the Plaintiffs succeeds and the same is accordingly allowed. Consequently, the suit of the Plaintiffs is decreed for declaration to the effect that the appointment of Defendant No. 4 as dealer/distributor of LPG Gas Agency in Kangra town is illegal, wrong, null and void, as she was not eligible candidate along with

Defendant No. 5. In the absence of Defendants No. 4 -J and 5, now only the Plaintiffs are left to be given appointment of dealership/distributorship to run the LPG Gas Agency in Kangra town. Thus, keeping in view the period of litigation elapsed and the facts and circumstances of the case, the Defendants No. 1 to 3 are directed to act on the basis of previous selections and merit list already made. The suit of the Plaintiffs is decreed with costs throughout. Defendant No. 4 shall not be entitled to any investment made by her in the business consequent of the illegal and wrong allotment of the Gas Agency in her favour.

16. Aggrieved by the judgment and decree dated 27.12.1996 of the learned District Judge, Defendants No. 3 and 4 are before this Court by virtue of the present three regular second appeals. Regular Second Appeals y No. 12 of 1997 and 103 of 1997 have been respectively filed by Defendant No. 4 and Defendant No. 3 against the allowance of the appeal preferred by the Plaintiffs whereby the judgment and decree of the learned trial court was modified and a mandatory injunction was granted against Defendants No. 1 to 3 to grant the dealership of LPG agency in favour of the Plaintiffs. Regular Second Appeal No. 14 of 1997 has been filed by Defendant No.4 against the dismissal of her appeal thereby affirming the findings of the learned trial court holding the dealership allotted in her favour to be wrong, illegal, and null and void.

17. The three appeals came to be admitted for hearing on the following substantial questions of law:

1. Whether both the learned courts below were right in holding that courts at Dharamsala had jurisdiction to try the suit contrary to the provisions of Section 20 of the Code of CPC when admittedly the Oil Selection Board, Hindustan Petroleum Corporation Limited did not have their place of business or work in Kangra?

2. Whether both the learned courts below were right in holding that the order passed in Civil Revision No. 232/90 by the Hon"ble High Court amounted to conferring of jurisdiction on the learned courts below when the question of territorial jurisdiction was neither raised nor decided in the proceedings which were limited only to the refusal of injunction to the Respondent-Plaintiff?

3. Whether the judgment and decree of both the learned courts below is sustainable in view of the fact that grant of license/dealership for distribution of liquefied petroleum gas is at best a privilege and not enforceable right and whether in view of this settled legal proposition, the suit in question was maintainable?

4. Whether the judgment and decree of the learned courts below can be sustained in the admitted position that there were no allegations of mala fide or arbitrary against the oil selection board which had approved the grant of license for distribution for the Appellant/Defendants.

5. Whether the judgment and decree of both the learned courts below can be

sustained when on an ex facie reading of the evidence of the Plaintiff/ Respondent itself showed that Ex.PW 9/A had been obtained by the Plaintiff/ Respondent in collusion with the revenue officer?

6. Whether the judgment and decree of the learned courts below can be sustained when it has been admitted by PW 9 that the order Ex.PW 9/A had been passed in gross and flagrant violation of the provisions of natural justice, without any enquiry, without any notice and on the same day, on the basis of some information furnished by the Respondent/ Plaintiff and without any independent enquiry?

7. Whether the judgment and decree of the learned courts below can be sustained on the basis of condition of residency was a mandatory condition when it had not been established that it was so?

8. Whether the learned courts below was right in allowing only a part of the application under Order 41 Rule 27 of the Code of CPC completely ignoring the other documents and whose authenticity could not be doubted?

9. Whether the learned Appellate Court was right in granting in junction directing original Defendants No. 1 to 3 to make the allotment only in favour of the Plaintiff/ Respondent?

18. I have heard the learned Counsel for the parties and have also gone through the record of the case. My findings on the above substantial questions are as under:

Questions No. 1 and:

19. Both these questions relating to the territorial jurisdiction of the court are inter linked and inter-connected and as such are being taken up for consideration together.

The case put forth by the Defendant No. 4 as to lack of territorial jurisdiction of the court is that office of Defendant No. 3 is located at Chandigarh, seat of Defendant No. 2 is at Delhi interviews for selection of dealers were held at Kullu while the gas agency is located in Kangra. Since no loan has been obtained by the Plaintiffs as contemplated u/s 20(b), Code of Civil Procedure, Civil Court at Kangra had no territorial jurisdiction

20. Be it stated that earlier the trial court and the learned first Appellate Court had held that the court at Kangra had the territorial jurisdiction to try the suit in arriving at such findings the two courts below had also relied upon the observations made by a learned Single Judge of this Court in his order dated 4.4.1991 while disposing of Civil Revision Petition No. 232 of 1990 between the parties arising out of the present case in the proceedings under Order 39, Rules 1 and 2, Code of Civil Procedure. While dismissing the revision petition, the learned Judge observed that there was no jurisdictional error in the order under challenge.

21. During the pendency of the present appeals, the Plaintiffs were permitted to amend their plaint insofar as the pleadings as to cause of action, territorial jurisdiction of the Court at Kangra and valuation of the suit for the purpose of Court fee and jurisdiction were concerned. Vide order dated 8.6.1999 passed in CMP No. 158 of 1999 after allowing the amendment of the plaint as prayed for by the Plaintiffs, this Court directed as under:

Consequent upon such amendment having been allowed, the findings of the learned trial Court on issue No. 7 are set aside and the case is remitted to the trial Court for recording the findings on the basis of the fresh pleadings of the parties qua the jurisdiction of the Court.

22. In pursuance of such directions, the learned trial Court after affording an opportunity to the parties of being heard, returned its findings dated 31.8.1999. Issue No. 7 was decided against the Plaintiffs and it was held that the Courts in District Kangra had no territorial jurisdiction. In view of such findings, the present two questions, as formulated, do not survive for consideration.

23. The substantial question of law, which now survives consideration is:

Whether the Civil Courts in District Kangra had the territorial jurisdiction in the present case."

Section 20, Code of Civil Procedure, provides:

"Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

a) the Defendant, or each of the Defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

any of the Defendants, where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the Defendants who do not reside, or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part arises."

[Emphasis supplied]

24. As per the Plaintiffs own showing, Defendants No. 1 to 4 neither reside nor carries on business nor works for gain within the territorial jurisdiction of District Kangra. Admittedly, no leave as required u/s 20(b), Code of Civil Procedure, was obtained by the Plaintiffs either from the trial Court or from the learned first appellate Court. Before this Court, an application being C.M.P. No. 579 of 1999 was made by the Plaintiffs for leave u/s 20(b), CPC for filing the suit as against Defendant No. 4 in the court at Kangra. Such application was allowed by this

Court on 2.3.2000 and the requisite leave as against Defendant No. 4 was granted.

25. Again application being C.M.P. No. 161 of 2000 was made by the Plaintiffs on 6.3.2000 u/s 20(b), Code of Civil Procedure for leave to institute the suit against Defendants No. 1 to 3 in the Court at Kangra. Such application is being resisted and contested only by Defendant No. 4. No reply thereto was filed by Defendants No. 1 to 3. Though Defendant No. 1 is ex parte, Defendants No. 2 and 3 have not contested the application since no arguments in this regard were addressed by the learned Counsel for Defendants No. 2 and 3 on the question.

26. It may be pointed out that no objection as to want of territorial jurisdiction in the absence of requisite leave u/s 20(b), Code of Civil Procedure, was ever raised by Defendants No. 1 to 3 before the learned trial Court. Such Defendants, thus, would be deemed to have acquiesced to the institution of the suit against them at Kangra and, therefore, the question of grant of leave u/s 20(b), Code of Civil Procedure, qua them would not arise. These Defendants have been taking part in the proceedings before the learned trial Court without any objection, they have thus submitted to the jurisdiction of the Court in District Kangra.

27. There is no dispute that the leave u/s 20(b), Code of Civil Procedure, can be granted at any stage and even by the appellate Court. In view of the fact that no objection was raised by Defendants No. 1 to 3 as to the territorial jurisdiction of the trial Court and they are deemed to have acquiesced and submitted to such jurisdiction, there is ample jurisdiction in according the necessary leave to the Plaintiffs as prayed for by them.

28. There is yet Anr. significant aspect of the case. No leave as contemplated by Section 20(b), CPC is required, if the case falls u/s 20(c) of the Code of Civil Procedure, when the cause of action, wholly or in part, is shown to have arisen within the territorial jurisdiction of the Court where the suit has been instituted.

29. "Cause of action" has been compendiously defined to mean every fact which it would be necessary for the Plaintiff to prove, if traversed in order to support his right to the judgment of the Court. It does not compromise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. The term "cause of action" is sometimes used in a restricted sense and some times in wider sense. In restricted sense, it means the circumstances forming the infringement of right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit including not only the infraction of the right, but the infraction coupled with the right itself. Where the right and an infringement thereof are both necessary to be proved before the relief can be granted, the cause of action partly arises where the right was created and partly where it was infringed.

30. In the present case, admittedly, the gas agency was to be allotted at Kangra. The dispute between the parties is thus pertaining to a gas agency at Kangra and as such a part of cause of action can be said to have arisen in District Kangra.

The trial court thus had the territorial jurisdiction in the matter. The question is accordingly decided and C.M.P. No. 161 of 2000, stands disposed of as such.

31. It is also pertinent to note that even if it be assumed that the learned trial court had no jurisdiction, nothing has come on the record to show that consequent upon the want of territorial jurisdiction, there has been failure of justice. The Hon''ble Supreme Court in Pathumma and Others Vs. Kuntalan Kutty Dead by Lrs. and Others, has held:

In order that an objection to the place of suing may be entertained by an appellate or revisional court, the fulfillment of the following three conditions is essential:

- (1) The objection was taken in the Court of first instance.
- (2) It was taken at the earliest possible opportunity and in cases where by issues are settled, at or before such settlement.
- (3) There has been a consequent failure of justice. All these three conditions must co-exist.

32. In the present case, like the case before the Hon''ble Supreme Court, the first two conditions are satisfied. The third condition is lacking in as much as no case has been made out by Defendant No. 4/Appellant that there has been failure of justice on account of place of suing having been wrongly selected. Therefore, on this account also the objection of Defendant No. 4 cannot be sustained.

Question Nos. 3 and 9.

33. The Plaintiffs have claimed a mandatory injunction for directing If Defendants No. 1 to 3 to grant the L.P.G. dealership in their favour. The case put forth by the Plaintiffs is that Defendant No. 2 had prepared a select list of three candidates after interviewing the .candidates, the names of the Plaintiffs were placed at serial No. 3, the name of Defendant No. 4 was placed at serial No. 1 and that of Defendant No. 5 at serial No. 2. Since Defendants No. 4 and 5 were not eligible, the Plaintiffs being the only eligible candidates on the select list are entitled to allotment of L.P.G. dealership.

34. It has been contended on behalf of Defendants that grant of license/ dealership of L.P.G. is only a privilege and not a civil right which can be enforced and that the learned first appellate Court has gravely erred in granting the mandatory injunction in favour of the Plaintiffs.

35. Admittedly, there is no contract between the Plaintiffs and Defendants No. 1 to 3. Therefore, there is no question of specific performance of a contract or enforcement thereof. The names of the Plaintiffs were only recommended by Defendant No. 2 by placing their preference at serial No. 3 on the select list. The mere fact that the names of the Plaintiffs have been brought on the select list would not confer them a right for being allotted the L.P.G. dealership at Kangra.

36. In *Chingleput Bottlers Vs. Majestic Bottling Company*, the Commissioner of Prohibition and Excise, Madras invited applications from intending parties for the grant of license for the manufacture and supply of bottled Arrack for Chingleput District. Two applications were received, that is, one from "M" company and the other from "C" company. The Commissioner, after calling for the report from the Collector and after hearing both the parties rejected both the applications. The Commissioner though found the application of "M" company in order, found such company to be not suitable. The application of "C" company was rejected since it was not found in order and that no potable water was available at the proposed site. The order of the Commissioner were assailed by the two companies. A learned Single Judge of the Madras High Court dismissed the writ petition of "C" company. Insofar as the writ petition of "M" company is concerned, the learned Single Judge issued a writ of certiorari and quashed the order of the Commissioner insofar as he rejected the application made by "M" company. However instead of remitting back the matter to the Commissioner to reconsider the question of grant of such privilege, the learned Judge issued a writ of mandamus ordaining the Commissioner to grant licence to "M" company. The Division Bench of Madras High Court in appeal, upheld the order of the learned Single Judge. On further appeal before the Hon'ble Supreme Court, it was held that no mandamus will lie where the duty sought to be enforced is of a discretionary nature nor will a mandamus issue to compel the performance by a public body or authority to act contrary to law. It was further held:

The Commissioner of Prohibition and Excise was under no legal duty to grant a license to Messrs Majestic Bottling Company till it received the prior approval of the State Government under Rule 7. Even assuming that the Commissioner recommended the grant of a license to them under Rule 7, the State Government were under no compulsion to grant such prior approval. The grant or refusal of such licence was entirely in the discretion of the State Government. The High Court had no jurisdiction to issue a writ of mandamus to the Commissioner to grant a licence to Messrs Majestic Bottling Company contrary to the provisions of Rule 7 of the Rules.

37. In the present case as well, Defendant No. 2 was only a recommendatory body. Defendant No. 3 was under no legal obligation to accept the recommendations. Therefore, no mandate could have been issued by the learned first appellate court directing Defendants No. 1 to 3 to grant dealership to the Plaintiffs. The suit for mandatory injunction was not maintainable.

38. The above rule was followed by a Division Bench of Allahabad High Court in *Vishnupuri Upbhokta Sahkari Samiti Ltd., Khattali v. Divisional Manager, Indian Oil Corporation Ltd., New Delhi and Ors.*, AIR 1986 Allahabad 211, wherein following their earlier decision in *Ajai Kishore v. Union of India*, Writ Petition No. 9791 of 1984, decided on 22.5.1985, it was held that the selection of a dealer for the out-let would be discretionary or at best a privilege and in such case there is no question of any enforceable right.

39. A Division Bench of this Court also in *Ashutosh Kapil v. Bharat Petroleum Corporation Ltd. and Ors.*, 1996(2) Shim.L.C. 309, after setting aside the allotments of dealership made in favour of various persons did not grant the relief of mandamus in favour of the Petitioners and left the matter to the Selection Board (Defendant No. 2 in the present case) to reconsider the applications received.

40. In view of the settled law it is held that suit for mandatory injunction was not competent and the learned first appellate Court erred in issuing the mandate directing Defendants No. 1 to 3 to allot dealership in favour of the Plaintiffs. Such findings are liable to be set aside. The two questions are accordingly answered.

Question No. 4.

41. Admittedly, there are no allegations either as to mala fide or as to arbitrariness on the part of Defendants No. 1 to 3. The only question involved is as to whether the Defendants No. 4 and 5 fulfilled the eligibility conditions laid down in the notice inviting the applications for L.P.G. dealership. The findings of the Courts below are to be examined in this context. In *Ashutosh Kapil v. Bharat Petroleum Corporation Ltd.* (supra) wherein also there were no allegations of mala fide and arbitrariness as against the petroleum company and the Selection Board, a Division Bench set aside the allotments by holding the allottees therein to be guilty of suppression of material facts. Therefore, even in the absence of allegations as to mala fide and arbitrariness on the part of Defendants No. 1 to 3, the correctness or otherwise of the findings of the two Courts below can be looked into on the basis of the question of eligibility of Defendants No. 4 and 5. The question is accordingly decided.

Question No. 8.

42. During the course of hearing, this question was not pressed by the learned Counsel for the Appellant/Defendant No. 4. The question, therefore, is answered against Appellant/Defendant No. 4.

Question No. 7.

43. The Plaintiffs have averred in para 3 of their plaint as under:

That applications were invited from amongst the category of:

- (a) un-employed graduates
- (b) who were residents of Kangra District
- (c) with not more than Rs. 24,000/- family income per annum
- (d) having no close relative (as defined in the application form) as a dealer or distributor of any oil Co.
- (e) also should not be partner of any dealership/distributorship/Agency of any Petroleum Corporation/Company.

The Photo-copy of "Eligibility criteria" for allotment of Dealership/ Distributorship and also photo copy of application form are attached herewith and contents of the same may be read as part of the plaint.

44. Defendants No. 2 and 3 vide their respective written statements have admitted the correctness of the averments made in para 3 of the plaint. Defendant No. 4 also vide her written statement not denied the contents of para 3 of the plaint.

45. It has been contended on behalf of the Appellant-Defendant No. 4 that there is no proof as to eligibility criteria laid down by Defendant No. 3 and as such the Courts below have erred in relying upon the eligibility criteria laid down in the photocopy of the alleged notice inviting applications. It was further contended that there is nothing on record to suggest that condition as to the applicant being a resident of Kangra was mandatory in nature.

46. There is no denying that the Plaintiffs along with their plaint have only annexed a photo-copy of the notice issued to Defendant No. 3 inviting applications for allotment of L.P.G. dealership at Kangra, containing the eligibility criteria. Such photo-copy has not been proved in evidence nor the same has been received and marked in evidence. However, on the facts of the present case, it cannot be said that the same cannot be looked into. It is well settled principle of law that admitted facts need not be proved and can be looked into and relied upon.

47. The Plaintiffs, as pointed out above in para 3 of their plaint while annexing a photo-copy of the notice inviting application containing the eligibility criteria, have specifically pleaded and averred that the contents of such notice, photo copy of which has been annexed, be read as part of the plaint. In view thereof the contents of such copy of notice has to be treated as pleadings in the plaint.

48. As stated above, the Defendants No. 2 to 4 have not denied this para 3 of the plaint including the contents of the copy of notice containing the eligibility criteria. In view of such admission, the Plaintiffs were not required to prove the eligibility criteria. Therefore, the copy of notice containing the eligibility criteria can be looked into and relied upon.

49. Such notice as to condition of residency provides:

Resident of concerned District. However, if a candidate has studied at a place other than his house District, the residence eligibility will be determined on the basis of the stay of his parents or legal guardian in the concerned District.

50. It is further provided in the application that an attested copy of the certificate of residence signed by a Revenue Officer not below the rank of Tehsildar or a Deputy Tehsildar in charge of an independent Sub-Taluk stating that the applicant has been a resident of the District, should be attached to the application.

51. The terms contained in the notice and the application give sufficient indication that the condition as to residence was mandatory. The question is decided accordingly.

Questions No. 5 and 6.

52. The Plaintiffs have averred in para 8 of the plaint as under:

That the Defendant No. 4 submitted a "Residency certificate" dated 25.2.1988 which was got issued after misrepresentation of true facts, to the concerned Magistrate and the same was cancelled on 5.8.1988 by the same Executive Magistrate after due verification of facts.

53. Defendant No. 4 in her written statement in reply to para 10 of the plaint has averred:

That the submissions made in para 10 of the plaint are wrong and hence denied, the Plaintiff should have clearly stated that to whom this certificate was submitted by the answering Defendant. Moreover, the certificate dated 25.2.1988 is irrelevant for the selection of L.R.G. Kangra distributor for which the applications were called in 1985. Interview and Field Investigations held in 1987. Even against which the representations were made by the Plaintiffs to the Hon"ble Petroleum Minister on 6.1.1988. Perhaps the Plaintiffs calendar moves in a descending order. As per them first comes 1988 then 1987 and last of all 1985. It is further submitted that neither any other Resident Certificate (except one which was submitted with application form dated 9.9.1985) was called for nor it was tendered to the Oil Selection Board in response to its interview call dated 12.8.1987 by the answering Defendant.

54. The two Courts below have concurrently held that Defendant No. 4 is not a resident of District Kangra. Rather she is a resident of District Mandi. In coming to such conclusions, the two Courts below have been greatly influenced by the fact that the Residency certificate dated 25.2.1988 (Ex.DA) was subsequently cancelled by the authority issuing the same on 5.8.1989 vide Ex.PW 9/A.

55. It was contended by the learned Counsel for the Plaintiffs that the concurrent findings of the two Courts below as to the Defendant No. 4 not being a resident of District Kangra, being purely on a question of fact, are not open to interference in the present second appeal.

56. The question as to what is the meaning of the word "resident" is not a pure question of fact. Such question is a mixed question of facts and law.

57. Dealing with the meaning of the word "resides" as it occurs in Section 33, Registration Act, 1908, the Privy Council in AIR 1937 46 (Privy Council) has observed:

The expression "resides" as used in Section 33, is not defined in the statute, but there is no reason for assuming that it contemplates only permanent residence and excludes temporary residence.

58. The above observations were quoted with approval and followed by the Hon''ble Supreme Court in Sri Sri Sri Kishore Chandra Singh Deo Vs. Babu Ganesh Prasad Bhagat and Others,

59. The meaning of the word "resides" again came up for consideration before the Hon''ble Supreme Court in Jagir Kaur and Another Vs. Jaswant Singh, in the context of Section 488(8) Code of Criminal Procedure, 1898, and it was held:

The said word has been subject to conflicting judicial opinion in the Oxford Dictionary it is defined as "dwell permanently or for a considerable time; to have one's settled or usual abode; to live in or at a particular place." The said meaning, therefore, takes in both a permanent dwelling as well as a temporary living in a place. It is, therefore, capable of different meanings including domicile in the strictest and the most technical sense and a temporary residence. Whichever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in, or a flying visit to a particular place. In short, the meaning of the word would in the ultimate analysis, depend upon the context and the purpose of a particular statute. In this case the context and purpose of the present statute certainly do not compel the importation of the concept of domicile in its technical sense. The purpose of the statute would be better served if the word "resides" was understood to include temporary residence.

Their Lordships then defined the word "resides" thus:

A person resides in a place if he through choice makes it his abode permanently or even temporarily.

60. In Smt. Satya Vs. Shri Teja Singh, the Hon''ble Supreme Court had the occasion of dealing with the difference between "domicile" and "residence". It was held that the concept of domicile is not uniform throughout the world and just as long residence does not by itself establish domicile, brief residence may not negate it. Residence for a particular purpose fails to answer the qualitative test for, the purpose being accomplished the residence must answer "a qualitative as well as a quantitative test", that is, the two elements of factum at animus must concur.

61. Again dealing with the meaning of the word "residence" in the context of Clause (ii) of Section 19, Hindu Marriage Act, 1955, the Hon''ble Supreme Court in Smt. Jeewanti Pandey Vs. Kishan Chandra Pandey, has held:

The word "reside" is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense "residence" is more or less of a permanent character. The expression "resides" means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. In Webster's

Dictionary, "to reside" has been defined as meaning to dwell permanently or for any length of time, and words like "dwelling place" or "abode" are held to be synonymous.

62. The eligibility criteria laid down in the notice inviting application stipulates only that the applicants should be a resident of District Kangra. The term "resident" has not been defined. Nor any minimum period of stay in the district has been prescribed. Therefore, "resident" would mean persons having permanent or temporary residence in the district. The two courts below have proceeded on the assumption as if the applicants must be permanent residents of district Kangra.

63. As stated above, the two courts were gravely influenced by the fact that the residency certificate dated 25.2.1988 (Ex.DA) was cancelled on 5.8.1998 vide order EX.PW9/A. The two courts below have erred in placing reliance on this fact. Firstly, there is nothing on the record to show that the Defendant No. 4 had based her claim to be a resident of district Kangra on this certificate Ex.DA. Admittedly, applications for allotment of dealership were made by the parties in the year 1985. The certificate Ex.DA was not even in existence then. The Defendant No. 4 as such could not be said to have annexed such certificate along with her application. According to Defendant No. 4 certificate dated 9.9.1985 (Ex.DB) was annexed by her with her application. It is not the case of the Plaintiffs that certificate Ex.DB is false or that the same was cancelled.

64. Secondly, it has come in evidence that certificate Ex.DA was cancelled by the issuing authority only on the basis of the complaint of the Plaintiffs without holding any enquiry and affording an opportunity to the Defendant No. 4 of being heard.

65. In *Bhagwant Singh v. The State of Punjab*, 1984 Curr.L.J.445, the Petitioner therein applied for admission to MBBS under Sports Category. On the date of interview, he was informed that no Sports Certificate issued in his favour by the Director of Sports stood cancelled and as such he could not be granted admission under such category. A question arose before a Division Bench of the Punjab and Haryana High Court whether the certificate issued by the Director of Sports could be cancelled without affording an opportunity of hearing to the affected person. It was held that canceling the certificate without affording an opportunity of hearing was wholly illegal and void.

66. The Hon'ble Supreme Court in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, has held that even in an administrative proceedings which involve civil consequence, the doctrine of natural justice is applicable. The same principle was re-interated in *R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another*,

67. In the present case in view of the fact that no enquiry was held and no opportunity of hearing was given to Defendant No. 4 before cancelling the certificate Ex. DA vide Ex.PW 9/A, such cancellation is illegal and void and does

not effect the rights of Defendant No. 4.

68. The Plaintiff Bhagwan Dass while appearing as his own witness has admitted that the husband of the Defendant No. 4 owns landed and other immovable property in District Kangra. He also has a parental residential house in village Bir in District Kangra. During the course of cross-examination he has also admitted that his statement as to Defendant No. 4 being a resident of Mandi is based on hearsay and that he had not seen any record in this regard.

69. Evidence in the form of voter lists and record of ration card has been led by the Plaintiffs to show that Defendant No. 4 is a resident of District Mandi since her name appears in the voter list of Mandi and that she has been drawing her ration also at Mandi. May be that the parents-in-laws of the Defendant No. 4 are permanently residing at Mandi and for the purpose of permanent address Defendant No. 4 is being shown as resident of Mandi but the same would not mean that she is not having a residence in District Kangra so as to make her a temporary resident of that place. There is nothing on the record to show that the name of Defendant No. 4 came to be incorporated in the voters list or in the ration card of her father-in-law at her behest. Since the term residence includes both permanent and temporary residence (except a short or casual stay), Defendant No. 4 cannot be held to be not a resident of District Kangra. Admittedly, Defendant No. 4 is married. Her husband owns land and ancestral property in Kangra. Nothing has come on record to show that husband of Defendant No. 4 is not residing in District Kangra. Nor the two courts below have held to this effect. Nor there is anything to show that Defendant No. 4 has separated from her husband. Therefore in view of the fact that husband of Defendant No. 4 is a resident of District Kangra, she will be deemed to be a resident of the said District since her marriage. The two Courts below have thus erred in holding Defendant No. 4 to be not a resident of District Kangra. The two questions are accordingly answered.

Relief.

70. As a result, all the three appeals are allowed. The judgments and decrees of the two Courts below are set aside and the suit of the Plaintiffs is dismissed leaving the parties to bear their own costs.