
(2012) 09 AHC CK 0203
In the Allahabad High Court
Case No : First Appeal No. 789 of 1992

State of U.P. and Another

APPELLANT

Vs

Vijay Kumar Talwar

RESPONDENT

Date of Decision : 06-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Partnership Act, 1932 — Section 41, 69

Citation : (2012) 9 ADJ 669

Hon'ble Judges : Prakash Krishna, J;Arvind Kumar Tripathi, J

Bench : Division Bench

Advocate : Dinesh Kakkar, A.S. Kapoor, Anoop Trivedi, Mukesh Kumar, Mukesh Prasad, Murlidhar, Pradeep Kumar and U.N. Sharma, for the Respondent

Final Decision : Allowed

Judgement

Hon"ble Prakash Krishna, J.—The above appeal has been preferred by the defendants of the O.S. No. 255 of 1984 against the original judgment and decree dated 31st March, 1990 passed by the 3rd Additional Civil Judge (Sri V.K. Srivastava). The Court below has decreed the suit for recovery of Rs. 18,18,728-88 by providing that out of the said sum, a sum of Rs. 7,10,282/- be adjusted which is due to the defendants towards the balance licence fee.

2. Vijai Kumar Talwar instituted the above suit as an indigent person for recovery of the amount mentioned in the relief clause with the allegations that he alongwith three persons namely Sunder Lal Yadav, Bhagwati Prasad Mishra and Ratan Lal Talwar was licensee of 18 country liquor shops known as "Bareilly Group of Country Liquor Shops" for the Excise Year 1977-78 commencing from 24th April, 1977 to 31st March, 1978. Under the license, the plaintiff asserts that the licensees were entitled to open the shops from 10:00 a.m. to 10:00 p.m. On 18th September, 1977 the Commissioner of Excise has issued a general order restricting the business hours to 8:00 p.m. The said order of the Commissioner was challenged by the plaintiff as well as by the other excise licensees by various

writ petitions before the High Court. The plaintiffs group filed writ petition No. 4046 of 1977 wherein on 16.12.1977 an interim order to the effect that the defendants would not interfere in the plaintiffs' carrying on the business of selling country liquor subject to deposit of licence fee, was passed. The plaintiff could not deposit the licence fee and therefore, could not take the advantage of the interim order and had to close their shop at 8:00 p.m. in the night as per notification dated 18th of September, 1977. The plaintiff has suffered loss and is entitled for refund of proportionate auction money which according to the calculation as given in para 18 of the plaint comes to Rs. 16,70,271.88. The further case of the plaintiff is that the plaintiff is entitled to get the remission. The shops were also ordered to be closed for seven days. Certain other pleas were raised that the shops were ordered to be closed on 12, 13 and 14th June, 1977 on account of Vidhan Sabha election for which the plaintiff is entitled for remission, was also claimed. In para 29 of the plaint, it was stated that the writ petition filed by the plaintiffs group was allowed on 20th February, 1978 but the plaintiff could get the knowledge of the above fact only in the first week of April, 1978.

3. The suit was contested by raising various pleas. It was stated that the order of the Commissioner dated 18th September, 1977 restricting the working hours of the shops up to 8:00 p.m. is perfectly justified and was in accordance with the provisions of section 41 of the Excise Act. The entitlement of the plaintiffs to claim remission with regard to the period during which the Commissioner put restrictions on the opening of shops was denied. The allegation that the plaintiff has suffered any loss or damages was also disputed. It was stated that the writ petition filed by the plaintiffs group namely writ petition No. 4046 of 1977 was dismissed by the High Court. The pleas that the suit is not maintainable, the suit is bad for want of notice u/s 80 CPC, the suit is barred by limitation, the suit is barred by provisions of section 78 of the Excise Act and that the suit is barred by the provisions of Section 69 of the Partnership Act, were raised.

4. The trial Court framed as many as ten issues on the basis of the pleadings of the parties. They are as follows:

1. Whether the Excise Commissioner was competent to reduce the working hours by its order dated 18th September, 1977 and the said order is illegal and without jurisdiction?
2. Whether the U.P. Government was authorised to order the closure of six shops and if not so, its effect?
3. Whether the plaintiff is entitled to recover as remission/compensation a sum of Rs. 40,848/- for the closure of six shops?
4. Whether the plaintiff is entitled to recover Rs. 64,243/- for the shop at Jawahar Park?
5. Whether the defendants could have legally ordered the closure of the shops on

account of election on 12th of June, 1977, 13th of June, 1977 and 14th of June, 1977 and if so, whether the plaintiff is entitled to get remission of Rs. 43,366/- for the closure of the shop on the aforesaid dates?

6. Whether the suit is defective for want of notice u/s 80 CPC?

7. Whether the suit is barred by time?

8. Whether the suit is barred u/s 78 of the U.P. Excise Act?

9. Whether the suit is barred u/s 69 of the Partnership Act?

10. To what relief the plaintiff is entitled?

5. The parties led evidence in support of their respective cases. The Court below has held that the plaintiff is entitled for damages and decreed the suit on the finding that the order of the Excise Commissioner dated 18th September, 1977 will not apply to the existing licensee. The said order will be applicable to only such licensees whose licences commence on or after 18th September, 1977. On the question of damages, the Court held that the plaintiff has suffered loss and therefore, is entitled to receive the damages. The other issues were also decided in favour of the plaintiff holding that the suit is not barred by time or u/s 69 of the Partnership Act or u/s 78 of the U.P. Excise Act.

6. Heard Sri R.K. Singh, learned standing counsel, in support of the appeal and S/ S Anup Trivedi and Mukesh Prasad, learned counsel for the plaintiff respondents. The learned standing counsel has mainly confined his argument with regard to the maintainability of the suit before the Civil Court. Elaborating the argument, he submits that besides the fact that the suit is barred u/s 78 of the U.P. Excise Act is also barred u/s 69 of the Partnership Act. He submits that the cause of action for the suit was the order dated 18th September, 1977 passed by the Excise Commissioner. Noticeably, the said order was challenged unsuccessfully by the plaintiff in the writ petition No. 4046 of 1977. Elaborating the argument, he submits that the present suit is barred otherwise also barred on the principle of constructive res judicata. The further submission is that even if in the case of some other licensees, the High Court may have taken different view of matter, but the fact remains that the judgment delivered by the High Court which attained finality against the plaintiff will make the suit non maintainable and barred by principles of res judicata. He further submits that besides the above writ petition, Ratan Lal Talwar a co-licensee also filed a writ petition No. 7174 of 1978 which was dismissed on 6th of May, 1980 by a Division Bench of this Court.

7. In reply, the learned counsel for the plaintiff respondent submitted that the argument of the learned standing counsel that the writ petition No. 4046 of 1977 was dismissed and the subsequent suit is barred is based on the misconstruction and not on the correct reading of the judgment of this Court delivered in the aforesaid writ petition. The further submission is that the suit is neither barred u/s 69 of the Partnership Act or u/s 78 of the U.P. Excise Act. They have placed strong reliance upon a subsequent judgment of this Court in the case of GC

Jaiswal v. Excise Commissioner, U.P., 1978 ALJ 802.

8. Considered the respective submissions of the learned counsel for the parties and perused the record. The following points fall for determination in the appeal:

1. Whether the suit No. 255 of 1984 giving rise to the present appeal was maintainable in view of the fact that the plaintiffs' writ petition No. 4046 of 1977 filed before this Court was dismissed?
2. Whether the suit is time barred by section 78(2) of the U.P. Excise Act?
3. Whether the suit is barred by section 69 of the Partnership Act?

POINT NO. 1

9. The filing of writ petition No. 4046 of 1977 is not in dispute. Before proceeding further, we may note that the trial Court has completely overlooked the Division Bench judgment of this Court inter-parties covering the same issue. S/S Madhur Prasad and Sri Anup Trivedi did not dispute the filing of the aforesaid writ petition by the plaintiffs group and its dismissal by the judgment dated 4th December, 1978. However, their contention is that the said judgment will not come in their way in view of another decision which too is by Division Bench in GC Jaiswal and others v. Excise Commissioner, U.P. and another, 1978 ALJ 802. To resolve the controversy it is apt to consider the judgment inter-parties first.

10. The High Court by the Judgment dated 4th December, 1978 decided a group of writ petitions filed by the excise licensees carrying on the business of retail vend of country liquor or foreign liquor. The grievances of the petitioners therein were manifold. One of them was the direction given by the Excise authorities to close their shops for two hours from 8:00 p.m. to 10:00 p.m. each day like in the present suit. In some cases the shops were ordered to be closed for the period when Assembly elections were held and in some other cases when a riot was on in the town. All these three controversies were taken up together and the Court noticed that "In fact, the principal grounds on the petitions were pressed related to grant of remission or compensation for the period of closure caused by such orders of the respondents." After noticing the principal ground of submission of the petitioners, the Court has proceeded to consider its earlier decision given in Shyam Kishore Chhotelal v. State of U.P., 1971 ALJ 1262. Taking it into consideration, it was found that under paragraph 190 of the Excise Manual, it did not imply any right in the licensee to claim any remission. All the writ petitions were dismissed by providing that the only remedy of the petitioners is to approach the Collector who may or may not grant remission in individual cases. For the sake of convenience, the ultimate paragraph from the judgment is reproduced below:

In this view, it cannot be said that the petitioners have any right recognized by any Act or Rules for remission or compensation in respect of such eventuality. The matter does rest in the discretion of the Collector who may or may not grant remission in individual cases, but the petitioners cannot be granted relief by this

Court because they have no statutory right to claim remission or compensation. Of course, it is expected that when an application for remission is made, the Collector or the other excise authorities will apply their mind and pass suitable orders in accordance with reason and the law.

In the result, the writ petition fails and is accordingly dismissed but we make no order as to costs. The stay order is discharged.

11. In view of the above, the argument of the learned counsel for the plaintiff respondent that the decision was not confined to the reduction of the working hours by two hours and was confined to only such cases where the shops were ordered to be closed due to election or riot is not based on the correct and proper reading of the judgment as a whole. All the petitions involving the question of remission for closure of shops either for restricting the working hours or for total closure due to election or riot in the town, were in issue before the writ Court and the writ Court categorically held that "In such fact situation, it cannot be held that the petitioners have any right recognized by any Act or Rule for remission or compensation in respect of such eventuality."

12. The other limb of the argument of the plaintiff respondent is that in case of GC Jaiswal (supra), it was held that the order dated 18th September, 1977 will not apply to the existing licensees and therefore, the judgment and decree of the Court below is right, needs consideration. Noticeably, the judgment given in the case of GC Jaiswal (supra) dated 20th February, 1978, is a decision prior to the judgment given by the Division Bench in the case of plaintiff. It was open to the plaintiff to raise the plea on the basis of G.C. Jaiswal case in his earlier writ petition now sought to be raised in the suit that the order dated 18th September, 1977 will not apply to the existing licensees. The said plea having not been raised in the writ petition, cannot be raised subsequently by means of a suit. The learned standing counsel in support of his submission has placed reliance on the following cases:

13. Union of India (UOI) Vs. Nanak Singh, , is an authority for the proposition that in such fact situation, the order of writ Court will be constructive res judicata in suit. It has placed reliance upon its earlier judgment in Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat), , wherein it has been observed that the provisions of Section 11 of CPC are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the matter in controversy in a subsequent regular suit and on the general principles of res judicata, in a previous decision on the matter in controversy decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. In the case of Union of India v. Nanak Singh (supra), the plaintiff earlier filed a writ petition before the High Court seeking a declaration that the order terminating his services was void, illegal and unconstitutional on two grounds. The writ petition was dismissed in appeal, without any decision on competency of the officer issuing termination order. Thereafter, a suit for declaration that his

services were terminated by an authority lower in rank than the competent authority was filed. It was held that the suit was barred by res judicata.

14. The aforesaid principle of law has been reiterated and relied upon in the State of Punjab Vs. Bua Das Kaushal, of the report.

15. Then, reliance was placed on Premier Cable Co. Ltd. v. Government of India and others, 2001 (2) AWC 1446 (SC). Paragraph 2 is relevant which reads as follows:

The learned counsel appearing for the appellant urged that the view taken by the High Court that the suit was barred by time is erroneous. After we heard the matter, we find that the suit filed by the appellant was barred by principle of res judicata. As stated above, the appellant challenged the assessment order by means of an appeal before the appellate authority. The appeal was dismissed on the ground of delay and the revision against the said order was also rejected. The writ petition filed against the revisional order was also dismissed. Once the writ petition was dismissed and the said judgment was not challenged before the superior Court, the assessment order passed against the appellant attained finality. The assessment order having attained finality, the levy could not have been challenged by means of a separate suit in the civil Court. Yet there is another ground on which the suit ought to have been dismissed. We have seen the plaint and find that the assessment order was not challenged in the plaint. It is true that in narration of the fact, the orders of assessing officer, the appellate authority and the revisional authority were mentioned in the plaint but no relief was sought for setting aside those orders. So long those orders are allowed to stand, no relief could have been granted to the appellant in the suit.

16. Lastly, reliance was placed upon a Division Bench judgment of this Court of Krishna Murari Dadu v. Nagar Mahapalika, Kanpur, 1988 AWC 740. The relevant paragraph is 11 which is reproduced below:

11. As regards the last point about the effect of the dismissal of the writ petition No. 3601 of 1965 on 2nd December 1970 we have summoned the record from the office and perused the same and are satisfied that the writ petition was actually dismissed on merits by this Court and the judgment in that writ petition would operate as res judicata and plaintiff appellant was bound by the same. It is too late in the day, now to challenge the legality or otherwise of the acquisition proceedings by filing a civil suit.

The argument of the appellant is well founded and deserves acceptance.

17. Viewed as above, we find substance and sufficient force in the argument of the learned standing counsel that the pleas sought to be raised that the order dated 18th September, 1977 passed by the Excise Commissioner will not apply to the existing licensee is barred by principles of res judicata in view of the fact that the said plea might and ought to have been taken by the plaintiff in the writ petition No. 4046 of 1977. The said writ petition having been dismissed, the

plaintiffs" plea is barred by principle of constructive res judicata.

18. There is another aspect of the case also. Noticeably, the judgment in the case of GC Jaiswal strongly relied upon by the learned counsel for the plaintiff is earlier in point of time. It is dated 20th February, 1978. Meaning thereby, the law as pronounced in the case of GC Jaiswal (supra) was very much available to the plaintiff at the time of hearing of the writ petition No. 4046 of 1977 which came up for consideration subsequently and was decided on December 4, 1978. It is an acknowledged legal position that even a wrong decision on the question of fact or law binds a party and subsequent decision taking a different view of the matter will not wipe off or take away the effect of a judgment inter-parties which has attained finality. The argument of the plaintiff that the law was clarified finally by a Full Bench of this Court in Jawahar Lal Jaiswal v. State of U.P., AIR 1981 All 291, with regard to the ambit and scope of the power of Excise Commissioner u/s 41 of the U.P. Excise Act requiring the licensees to keep the shops closed on Friday, is of no avail. The Full Bench was considering the legality and validity of notification dated 20th December, 1980, amending Rule 13-B requiring the licensees to keep the shops closed on Friday.

19. The learned standing counsel also invited our attention to a judgment of Division Bench given in Writ Petition No. 7174 of 1978 filed by Ratan Lal Talwar, a co-licensee alongwith the plaintiff dated May 6, 1980 dismissing the writ petition involving the same controversy and was decided in the light of the judgment dated 4th December, 1978 passed in the writ petition No. 1385 of 1978.

20. Strong reliance was placed by the" learned standing counsel upon a judgment of the Apex Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , to buttress his argument that any subsequent decision interpreting the law in a different manner will not affect the finality of the judgment inter-parties. This decision provides complete answer to the submission of the learned counsel for the plaintiff-respondents.

21. Viewed as above, we are of the considered opinion that the suit giving rise to the present appeal was barred by the principles of constructive res judicata and it is held so.

POINT NO. 2

22. Section 78 of the U.P. Excise Act provides bar on certain suits in any civil Court. Its sub-section (1) provides that no suit shall lie in any Civil Court against the Government or any Officer or person for damages for any act in good faith done, or ordered to be done, in pursuance of the Act or of any other law for the time in force relating to the excise revenue. Its subsection (2) is material for the present purposes and is therefore, reproduced below:

(2) Limitation of suits.-No Civil Court shall try any suit which may lawfully be brought against (Government) in respect of anything done, or alleged to have been done, in pursuance of this Act, unless the suit is instituted within six

months after the date of the act complained of.

The sub-section (2) of section 78 provides a different period of limitation of six months in respect of any suit which may lawfully be brought against the Government in respect of anything done or alleged to have been done in pursuance of the U.P. Excise Act. The contention of learned standing counsel is that this sub-section provides a different period of limitation and therefore, even if such a suit is maintainable before the Civil Court, the suit will be barred by time unless it is instituted within six months after the date of the act complained of.

23. The submission is that the plaintiff felt aggrieved by the order dated 18th September, 1977 passed by the Excise Commissioner. The suit should have been instituted within six months therefrom. The license came to end on 31.3.1978, meaning thereby the suit should have been filed not later than six months from 31.3.1978. The case on hand was instituted on 20th April, 1981 in forma pauperis. In reply, the plaintiff submitted that the excise year came to an end on 31st March, 1978. After giving notice u/s 80 CPC the suit was filed which is within three years, the time as prescribed under Article 55 of the Limitation Act. He submitted that after the settlement of account etc., the suit was filed. The trial Court has considered the matter under issue No. 8. It has decided the issue on the footing that section 78 of the Excise Act is not applicable to the present suit as it is for recovery of damages for the breach of the contract and will be governed by the Contract Act. It is difficult to agree with the finding of trial Court. The plaintiff's allegations have been noticed in brief. The plaintiff was granted licence under the provisions of Excise Act. The contract was subject to the provisions of the Excise Act, Rules and the notifications issued thereunder from time to time. It was in the nature of statutory contract. The liability to pay the licence fee etc. and the obligations under the contract were statutorily governed by the provisions of the U.P. Excise Act. The nature of such contract as has been held from time to time is parting of privilege by the State Government in favour of the licensee. The act complained of by the plaintiff was of the Commissioner Excise who exercised the statutory power under the U.P. Excise Act. The learned counsel for the plaintiff has placed reliance upon a decision of the Apex Court in the case of *Bombay Housing Board v. Karbhase Naik and Co.*, AIR 1977 SC 763, on the following paragraph:

Section 19 provides that the Board may enter into all such contracts as it may consider necessary for carrying out the purposes of the Act. Section 23 (1) states that the Board may incur expenditure and undertake works for framing and execution of housing schemes. Section 23(2) says that the Government may entrust to the Board the framing and execution of any housing scheme. Therefore, the Board has statutory duty to frame schemes for construction of houses and execute them. Section 24(f) would also indicate that the purpose of a scheme is construction of house. In these circumstances, we think that the contract entered into the Board for construction of buildings might be an act

done in pursuance to the provisions of the Act. We will also assume that it makes no difference whether it was deemed to be entered the contract was or whether it was deemed to be entered 54 of the Act. But the question is whether the act complained of, namely the non-payment of a claim for money based on breach of contract, was an act done or purporting to have been done in pursuance of the Act. There can be no doubt that the act complained of by the respondent was the non-payment of money as damages or compensation resulting from an alleged breach of contract. In *The Municipal Borough of Ahmedabad v. Jayantilal Chhotlal Patel* (1) the Court held that when a municipality has power to enter into a contract under the Municipal Boroughs Act and the municipality purports to exercise its power to enforce such contract, any act done in the exercise of its power to enforce the contract is not in pursuance of the Act but in pursuance to the contract and, therefore, a suit brought against the municipality for return of deposit under a contract to clean the streets was not a suit of the type described in Section 206 of the Bombay Municipal Boroughs Act, 1925 which is in pari materia with Section 64 of the Act. In the course of the judgment, Chagla, J. (as he then was) observed that what the plaintiff sought to enforce was, the right which came into existence as a result of the contract entered into between the plaintiff and the municipality and not a public duty cast upon the municipality by the statute, that in forfeiting the deposit, the municipality was not acting in pursuance to the power given to it under statute but was doing so in pursuance of a power given to it under the contract and, therefore, the suit to enforce rights under the contract entered into with the municipality which the municipality was not under any obligation to enter into, cannot fall within the ambit of the section. We think that the decision lays down the law correctly, and that the principle deducible from it is applicable to the facts here. Mr. S.T. Desai referred to the decision of the Madras High Court in *Athimannil Muhammad v. The Malabar District Board*(2) and said that the decision therein would govern the instant case. That was a case where a suit was filed against the District Board more than six months after the date of the accrual of the cause of action, claiming damages on the ground that its President improperly cancelled a contract of lease for one year of the tolls in certain places, which was stated to have been entered into by the plaintiff with the Board through its Vice-President. The President in performance of what he thought was his duty under the Madras Local Boards Act accepted a higher offer by another person and the necessary consequence of it was cancellation of the acceptance of the plaintiff's offer. It was held that though the distinction between actions on contract and actions independent of contract may be convenient enough as a working rule, the real test to be applied was whether what was complained of was some act done in pursuance of a statute. Varadachariar, J. in delivering the judgment of the Court said that the cancellation of the acceptance of the offer was the necessary result of what the President thought was his duty in accordance with the terms of the Act as he interpreted them namely to accept the highest tender and that he did this on the footing that the Vice President's acceptance of the plaintiff's tender was not in compliance with the Act. He further said that the right to collect tolls was a

special privilege conferred upon local bodies by statute and that they were authorized either to manage the collection of the tolls themselves or through their own agency or to lease them out, and that in any case what the President as representing the Board did in connection with the leasing out of the right to levy tolls was undoubtedly an act done in execution of his powers or duties under the Act.

We need not consider the correctness of this decision as, even on the assumption that it is correct, it has no application to the facts here. There the Court found that the act complained of had reasonable connection with the discharge of his statutory duty as President or at any rate, he thought that it was his statutory duty as President to accept the highest bid. The distinction between an act done with some semblance of authority or show of right and a prima facie illegal act in this context has been clearly pointed out in the decision in *Jalgaon Borough Municipality v. The Khandesh Spinning and Weaving Mills Co. Ltd.* (1) where the question was whether-notice u/s 206, of the Bombay Municipal Boroughs Act, 1925, was necessary before filing a suit to recover a sum of money on the basis of a contract. The Court held that an act which is Prima facie illegal is not within the category of acts done or purported to have been done in pursuance of that Act, and that it is only an act done under a vestige or semblance of authority or with some show of a right that would fall within the category. Bhagwati, J. in the course of his judgment said that the acts which would fall within the category of those done or purported to have been done in pursuance of the Act could only be those which were done under a vestige or semblance of authority, or with some show of a right and that the distinction between ultra vires and illegal acts on the one hand and wrongful acts on the other wrongful in the sense that they purport to have been done in pursuance of the Act is that they are intended to have been done in pursuance of the Act and are done with a vestige or, semblance of authority or sort of- a right invested in the party doing those acts.

24. We hardly see relevancy of the above quoted paragraph to the controversy in hand. If at all it applies, it supports the contention of the learned standing counsel. It was a case of non-payment of a claim for money based on breach of contract. The appellant Housing Board came out with the case that for such a claim the suit is barred u/s 206 of the Bombay Municipal Boroughs Act, 1921. Repelling the said objection the Court held that a simple contract for work done does not fall within the category of acts done or purported to have done in pursuance of that Act. It logically follows that if the act done or purported to have been done was an act under the Act will fall within the ambit and scope of the act done or purported to have been done. Be that as it may, a different expression has been used in subsection (2) of Section 78. The expression used is "in respect of anything done or alleged to have been done, in pursuance of this Act." We are of the considered opinion that the order dated 18th of September, 1977 was an act done by the Excise Commissioner in exercise of the statutory power conferred on him and therefore, the action should have been brought within a period of six months from 18th September, 1977 and not thereafter. The

order dated 18th September, 1977 was issued by the Excise Commissioner in exercise of statutory power, therefore, obviously this action was done under the Act.

25. Section 29(2) of the Limitation Act, 1962 provides that where any special or local law provides for a different period of limitation for any suit, appeal or application than the one prescribed by the Schedule of the Limitation Act, the period of limitation so prescribed by special or local law will prevail. Any consequence by operation of Section 29(2) of the Limitation Act, the limitation prescribed by Section 78(2) of the Limitation Act for filing suit will be attracted.

26. The learned counsel for the respondents invited attention of the Court towards a judgment of this Court in Union of India (UOI) Vs. Ghasi Ram Laxmi Narain, , a case under Central Excise and Salt Act wherein provisions of Sections 35 and 40 of the said Act were under consideration. The relied upon judgment is not applicable to the facts of the present case as the question of limitation was not in issue there. The judgment is, therefore, distinguishable and cannot be relied upon. It was delivered under different factual background.

27. In view of the above discussion, we are of the opinion that the finding recorded by the trial Court under issue No. 8 is legally incorrect and cannot be allowed to stand. It is held that the suit is barred by time as it was filed after the time prescribed u/s 78(2) of the U.P. Excise Act.

28. At this juncture, we may notice the one argument of the respondents that the period of limitation shall apply only to such suits which will be governed by subsection (1) of Section 78. The said argument is fallacious. Sub-section (1) of Section 78 bars certain suits and there is no question of providing any period of limitation for filing such suits. The suits which can be filed and are not barred under subsection (1) shall be governed by the period of limitation prescribed under sub-section (2) of Section 78 of the Act. The U.P. Excise Act is a special law dealing with the rights and obligations, under the Act and it prescribes a different period of limitation for filing a suit, will prevail over Limitation Act.
POINT NO. 3

29. The learned standing counsel submitted that the suit being on behalf of one of the partners is not maintainable as there is neither any plea nor evidence to show that the said partnership was a registered partnership as required u/s 69 of the Partnership Act. In para 2 of the plaint it has been set out that the plaintiff alongwith three other persons namely Sunder Lal Yadav, Bhagwati Prasad Mishra and Ratan Lal Talwar was licensee of eighteen shops. In para 22 it has been pleaded that as per dissolution agreement the amount realizable from the defendant has been allotted to the plaintiff who is solely and fully entitled to realise the same. The learned standing counsel submitted that it is a case of partnership. The learned counsel for the respondents submitted that it is not a case of partner-ship. The submission is that four persons jointly took a licence for running eighteen country liquor shops in district Bareilly. All of them were co-

licensees within the meaning of the U.P. Excise Act. Nonetheless the fact remains that all the persons carried on the business of selling country liquor after obtaining the permission that is licence with a view to earn profit. They would be partners. Section 69 of the Partnership Act deals with the effect of non registration of a partnership firm with the Registrar of Firms. The learned counsel for the respondents could not explain the status of the plaintiff otherwise than a partner of a partnership firm. All of them i.e. the plaintiff and three persons named by them jointly carried on the business and as such the firm being unregistered one, the suit is hit by Section 69 of the Partnership Act. The finding recorded by the trial Court in this regard is incorrect and the same is hereby set aside.

30. The upshot of the above discussion is that the plaintiff was not entitled to get any relief in the suit and the suit is barred by the principles of constructive res judicata, u/s 78(2) of the U.P. Excise Act as also Section 69 of the Partnership Act.

31. In view of these findings, it is not necessary for us to examine as to whether the suit should have been filed at all for the act complained of before Civil Court. The learned standing counsel's argument that the suit is not maintainable in view of Section 78(1) of the U.P. Excise Act requires no adjudication and is left open.

32. On the question of compensation none of the parties advanced any argument. However, we feel that the said question has not been properly considered and decided by the trial Court. A bare perusal of the judgment of trial Court in respect of issue No. 10 would show that the plaintiff could not produce the account books. He has examined the PW/8 Deshraj Patel. He has deposed that he was maintaining the account books and he retained them. After the termination of his employment, the account books have been eaten away by white ants. In absence of account books, the trial Court was not justified in believing the ipse dixit of the plaintiff.

33. The trial Court was also not justified in granting remission of the licence fee in view of the judgment of the High Court inter-parties holding that there is no such legal right to get compensation/ damages, it is in the discretion of the Commissioner to grant remission in the licence fee.

34. In view of the above discussion, the appeal is on terra firma and deserves to be allowed with cost throughout. The judgment and decree passed by the Court below is set aside and the suit No. 255 of 1984 stands dismissed. The suit was filed in forma pauperis without payment of Court fees. It shall be open to the State to recover the Court fees from the plaintiff in accordance with law.

The appeal is allowed with cost throughout.