IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 3rd OF OCTOBER, 2024

SECOND APPEAL NO. 525 of 2015

MUNICIPAL COUNCIL, KHAJURAHO

Versus

BRAJKISHOR AGRAWAL AND OTHERS

Appearance:

Shri Dileep Kumar Pandey – Advocate for the appellant.

Shri Anuj Agrawal – Advocate for respondents.

ORDER

Heard on the question of admission.

2. The appellant by the instant appeal filed under Section 100 of the Code of Civil Procedure is assailing validity of judgment and decree passed by both the Courts below, dismissing the suit of the plaintiff/appellant.

3. As per facts of the case, a suit was filed by the plaintiff/appellant for declaration and permanent injunction against the respondent/defendant. After filing of the suit, the defendant/respondent moved an application under Order 7 Rule 11 of CPC for rejection of the plaint on the ground that the suit is not maintainable as the same is hit by principle of *res judicata* and also on the ground that the suit is barred

by limitation. It is also mentioned in the application that the fact in regard to judgment and decree already passed in favour of the defendant/respondent in Civil Suit No.192-A/92 vide judgment and decree dated 23.11.1992 was very much in the knowledge of the plaintiff and as such, in view of the Law of Estoppel, a second suit is not maintainable as no cause of action accrued in favour of the appellant/plaintiff and as such, it is claimed in the application that the suit filed by the plaintiff be dismissed on the ground of limitation as barred by law and also as per the principle of constructive *res judicata*.

4. The application was duly replied by the appellant/plaintiff saying that application under Order 7 Rule 11 of CPC cannot be decided at this stage and as such, the application deserves to be dismissed directing the respondent/defendant to file written-statement.

5. The trial Court considered the application and on the basis of the averments made in the plaint itself, arrived at a conclusion that in the suit, i.e. Suit No. 192-A/92, a copy of the said judgment and decree has also been filed by the plaintiff/appellant along with the documents in which the President, Special Area Development Authority (SADA), Khajuraho was one of the parties and after abolition of the said authority, Nagar Palika Parishad has been constituted and all the properties relating to SADA are merged with the Nagar Palika Parishad and, therefore, claiming that the decree passed earlier in 1992 is not binding upon the plaintiff/appellant, is not proper and, therefore, the said suit is not maintainable because it has already been declared that the said land belonged to the defendant/respondent but merely because in the said suit, Nagar Palika Parishad was not the party, therefore, it is not binding upon them, the suit cannot be entertained and as per the relief claimed, it is apparently barred by limitation and no cause of action,

according to the Court accrues in favour of the plaintiff and, as such, the Court allowed the application and dismissed the suit mentioning therein that earlier suit decided and the finding given thereof is binding upon the plaintiff/appellant and, therefore, a second suit for the same cause of action is not maintainable.

6. An appeal was preferred against the said judgment and decree but the same was also dismissed vide judgment and decree dated 06.01.2015 passed in Civil Appeal No.1-A/15; hence this second appeal.

7. Counsel for the appellant has argued this appeal solely on the ground that the application under Order 7 Rule 11 CPC raising a ground of *res judicata* cannot be decided unless issues are framed and evidence is recorded by the trial Court. He has placed reliance upon a judgment reported in **(2021) 9 SCC 99 (Srihari Hanumandas Totala Vs. Hemant Vithal Kamat and Others)** and further in a case reported in **2023 LiveLaw (SC) 799 (Keshav Sood Vs. Kirti Pradeep Sood and Others).**

8. I have perused the record and also the judgments on which counsel for the appellant has placed reliance.

9. There is no quarrel in respect of the fact that if any question of *res judicata* is raised, then the same can be decided by the Court after framing issues and recording evidence of the parties so as to determine whether question of *res judicata* applies or not. Relying on the judgments placed by counsel for the appellant, it was observed by the Court that the basic requirement for deciding the application under Order 7 Rule 11 CPC is the averments made in the plaint only. This analogy is established and no argument is required to accept the said analogy but at the same time, it is also required to see as to in what manner, application under Order 7 Rule 11 CPC has been decided by the

Court below. On perusal of the plaint and the averments made therein, it is seen that the order of the trial Court is based upon the averments made in the plaint and application under Order 7 Rule 11 CPC has been decided on the point that when the suit has already been decided between the parties in respect of the same property then how a second suit for the same cause of action is maintainable.

10. It is not a case that the fact with regard to the judgment and decree passed earlier was not in the knowledge of the plaintiff and it is also not a case that they are disputing about the said fact. The averments made in the plaint, especially paragraphs 3,4,7, 9 and 11 and also the relief claimed in the plaint are relevant, which read as under:-

> "3- यह कि विशेष क्षेत्र प्राधिकरण खजुराहो का दिनांक 22.6.1998 को नगर परिषद खजुराहो में विलय हो गया था और जिससे इसके बाद से उक्त भूमि नगर परिषद खजुराहो के स्वामित्व एवं आधिपत्य की सम्पत्ति है। जिस पर सभी के ज्ञान में तभी से नगर परिषद खजुराहो का वैधानिक रूप से स्वत्व एवं कब्जा रहा है व आज है तथा जिसमे प्रतिवादी नं.-1 अथवा अन्य किसी का कोई हक व हिस्सा कब्जा व उपयोग न कभी रहा है और न आज है।
> 4- यह कि भूमि खसरा न. 1735/11 (सत्रह सौ पैतीस बटा एक अ) स्कवा 1.21 (एक दशमलव इक्कीस) एकड़ की भूमि वादपत्र की कंडिका-3 में वर्णित भूमि खसरा नं. 1735/4अ (सत्रह सौ पैतीस बटा चार अ) रकवा 1.21 (एक दशमलव इक्कीस) से लगी म०प्र०शासन के स्वत्व एवं कब्जा की बजर पड़ती भूमि थी जिसे वाटिका विकास हेतु विशेष क्षेत्र प्राधिकरण खजुराहो को सन् 1984 में कलेक्टर महोदय छतरपुर द्वारा आबंटित किया गया था जिसके पश्चात् इस भूमि की स्वामित्व एवं आधिपत्यधारी विशेष क्षेत्र प्राधिकरण खजुराहो हो गया था तत्पश्चात् सन् 1998 में विशेष क्षेत्र प्राधिकरण खजुराहो का विलय नगर परिषद खजुराहो मे हो जाने के बाद इसका स्वामित्व व आधिपत्यधारी नगर परिषद् खजुराहो का हो गया था और तभी से आज तक इसी प्रकार चला आ रहा है तथा जिसमें प्रतिवादी नं0-1 का न कभी पूर्व में कोई स्वत्व व कब्जा रहा और न ही आज है।
> 7- यह कि प्रतिवादी नं0-1 में अपने उक्त अवैधानिक उद्देश्य से अनुचित रूप से यह लेख कर कि बादी के स्वत्व व आधिपत्य की वादपत्र की कडिका-1 में वर्णित भूमि उसके खसरा न 1735/1/2 (सत्रह सी पैतीस बटा एक बटा दो) रकवा 0.224 (शून्य दशमलव दौ सौ चौबीस) आरे की भूमि है तथा जिसका पूर्व में खसरा नं. 1735/1छ (सत्रह सी पैतीस बटा एक छ) था जिसके संबंध में उसके द्वारा शासन म०प्र० के विरूद्ध प्रस्तुत किये गये व्यवहार वाद क्र० 192/ए/92 में उसके पक्ष में घोषणा एवं स्थायी निषेधाज्ञा की डिक्री दी गई है तथा प्रतिवादी 10-1 को पता चला है कि वादी उसकी उक्त भूमि पर चूना

डालकर ले-आउट करने का प्रयास कर रहे है. एक असत्य सूचना पत्र दिनांक 18.6.12 का वादी को अपने अधिवक्ता जीतेन्द्र सिंह के माध्यम से भिजवाया था ।

9- यह कि जब वादी को पता चला कि प्रतिवादी नं०-1 अपने अनुचित उद्देश्य को पूरा करने के लिये उक्त व्यवहारवाद क्र0-192/ए/92 में अनुचित रूप से तथा असत्य दस्तावेजों तथा तथ्यों के आधार पर प्राप्त की गई दिनांक 23 11.92 की उक्त शून्यवत् डिक्री की आड़ में दाबिया भूमि को अपनी भूमि कहने लगा है और इसकी आढ़ में दाबिया भूमि में वादी के शातिपूर्ण स्वत्व एवं आधिपत्य में नाजायज रूप से बिना किसी अधिकार के अवरोध उत्पन्न करने की कोशिश में है। जबकि प्रतिवादी नं0-1 को ऐसा कोई कार्य करने का कोई अधिकार नहीं है। क्योंकि कथित व्यवहार प्रकरण में वादी पक्षकार भी नहीं रहा है जिससे वादी को इस प्रकरण की कोई जानकारी नहीं है और जिससे कानूनन कथित डिक्री एवं निर्णय दाबिया भूमि में वादी के हितों के प्रति शून्यक्त एवं प्रभावहीन है।

11- यह कि प्रतिवादी क्रं0-1 में उक्त सूचना पत्र की अवधि पूर्ण होने के बाद आज तक वादी को भेजे गये नोटिस के संबंध में लिये गये अपने निर्णय से लिखित रूप में सूचित नहीं किया है तथा प्रतिवादी नं0-1 ने अपने लोगों के माध्यम से एक धमकी देने लगा है कि यदि वह वादी की दाबिया भूमि पर किसी प्रकार से कब्जा करने में सफल नहीं हो सका तो मौका लगते ही अनुचित रूप से प्राप्त की गई उक्त शून्यवत् डिक्री दिनांक 23.12.92 की आड़ में दाबिया भूमि को उक्त व्यवहारवाद क्रमांक 192/ए/92 की भूमि बताकर किसी आपराधिक किस्म के दंबग व्यक्ति को अंतरित कर देगा जो अपने धनबल एंव बाहुबल से वादी की दाबिया भूमि पर बने वादी के वाहन विश्राम स्थल पर जबरन नाजायज रूप से कब्जा कर लेगा ।

प्रार्थना

1. यह कि वादी के पक्ष में प्रतिवादी क्रं0-1 के विरूद्ध इस प्रकार की घोषणात्मक डिक्री प्रदान की जाये की दाबिया भूमि 1735/4अ एवं 1735/1अ जिसका उल्लेख वादपत्र की कंडिका एक मे किया गया है वादी के स्वत्व एवं कब्जा की सम्पत्ति है तथा व्यवहारवाद क्रं0- 1192/ए/92 में तृतीय व्यवहार न्यायाधीश वर्ग-1 छतरपुर से अनुचित रूप से प्रतिवादी क्रं0-1 द्वारा प्राप्त की गई डिक्री दिनांक 23.11.92 वादी के हितों के प्रति शून्यवत् होने से वादी पर बंधनकारी नहीं है।

2. यह कि वादी के पक्ष में इस प्रकार की स्थायी निषेधाज्ञा जारी की जाये कि प्रतिवादी नं0-1 भविष्य में स्वयं अथवा अन्य किसी के माध्यम से दाबिया भूमि तथा उस पर निर्मित वाहन विश्राम स्थल में वादी के शांतिपूर्ण स्वत्व एवं आधिपत्य में कोई हस्तक्षेप न करे और किसी प्रकार से इसे किसी अन्य को न अंतरित करे और न अंतरण हेतु कोई करार करें।

3. यह कि खर्चा मुकदमा वादी को प्रतिवादी नं.-1 से दिलाया जाये।

4. यह कि अन्य सहायता जो न्यायालय वादी के हक में उचित समझे दिलायी जाये।"

11. From perusal of the averments made in the plaint itself and the application filed under Order 7 Rule 11 of CPC, it reveals that the

defendant/respondent has claimed that one suit has already been decided in which the original owner, i.e. SADA was the party and, therefore, a second suit that too after such a long time is not maintainable. I find that there is nothing wrong committed by the trial Court and the legal position as has been laid down by the Supreme Court in the cases on which counsel for the appellant has placed reliance in the facts and circumstances of the case, is not applicable because it is a case in which Section 11 of CPC comes into operation. Section 11 is relevant, which reads as under:-

> "**11**. ***Res Judicata.-*** No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
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> *Explanation I*.-- The expression former suit shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.
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> *Explanation II*.-- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.
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> *Explanation III*.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
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> *Explanation IV*.-- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
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> *Explanation V*.-- Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.
>
> *Explanation VI*.-- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.
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> [*Explanation VII*.-- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution

> of that decree.
> *Explanation VIII*.-- An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]”

The aforesaid section very categorically provides and it starts with *non obstante* clause that ‘no Court shall try any suit’, meaning thereby that there is a clear binding upon the Court for not trying any suit which has already been decided and the Court cannot shut its eyes when the facts were very much clear before the Court and the Court was fully aware of the fact that the suit has already been decided and the issue involved in the case has already been dealt with earlier and the decree has been passed in that regard. Only because the SADA merged in the Nagar Palika Parishad, the subsequent civil suit cannot be entertained at the instance of Nagar Palika Parishad and if it is entertained then it would be a mockery of justice because the said civil suit is absolutely vexatious and meritless and result of the same is known to everybody. The Karnataka High Court in case of **Smt. Sofyamma K. J. Vs. Sri. Chandy Abraham** passed in **R.F.A. No. 722 of 2008** has dealt with the situation and decided the said issue observing therein the scope of Section 11 as well as Order 7 Rule 11 of CPC. The observations made by the Karnataka High Court in paras 11 to 23 are as under:-

> “11. In view of the above contentions, the question that arises for consideration of this Court is:
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> “Whether the rejection of the plaint under the impugned order is sustainable in law?”
>
> 12. The certified copies of the Judgments in O.S. No. 5693/1992, RFA No. 714/1994, C.A. No. 36/1999 and R.P. No. 1434/2004 in C.A. No. 36/1999 are produced before the trial Court and they are available in the records. They show that plaintiff claimed permanent injunction on the ground that she is the absolute owner and in possession of plaint schedule “A” and “B” properties as purchaser and in respect of plaint schedule “C” property as prospective purchaser. She claimed that when the sale deeds and

agreement of sale were executed in her favour the power of attorney executed by her mother in law in favour of her husband was in force and therefore, her sale deeds are valid. She further contended that in view of the registered sale deeds and agreement of sale in her favour, the subsequent sale deeds in favour of the defendant executed by her brother in law are invalid. Thus, it is clear that in the said proceedings the Court was called upon to decide not the issue of possession of the property simpliciter, but it was called upon to decide the plaintiff's lawful possession of the suit properties. Issue No. 1 was, “Whether the plaintiff is in lawful possession of the suit properties?”

13. To legitimize her possession, she traced her right through the sale deeds and agreement of sale. Therefore, in those proceedings the trial Court, the First Appellate Court and the Apex Court were required to adjudicate on the merits/legality of the sale deeds and the sale agreement. In fact the reading of the judgments show that the Courts considered the question of title to consider the lawful possession.

14. Section 11, CPC says, “No Court shall try any suit or issue in which the matter directly arid substantially in issue has been directly arid substantially in issue in a former suit between the same parties…….. has been heard arid finally decided by such Courts”. The plaintiff does not dispute the judgments in the earlier proceedings referred to supra. In those cases, though she had not filed that suit for declaration of title and that was a suit for bare injunction, the Courts decided the legality of the sale deed/title of plaintiff because the claim of possession was based on the title.

15. In this context it is necessary and relevant to refer to paragraph 16 of the judgment in RFA No. 714/1994.

> “16. It is contended by Sri. Raghavachar, learned advocate for the plaintiff relying upon certain decisions that it is necessary for this court to give finding on title of the plaintiff since the plaintiff seeks the relief prayed for in the suit basing the same on her title. On the other hand, learned counsel appearing for the plaintiff submitted that a separate suit is pending filed by the defendant for declaration and the question of title could be gone into in that proceedings. I am not inclined to accept the said submission made on behalf of the plaintiff. Plaintiff has filed this suit based on title. It is her definite case that she is the owner of the property and the defendant is interfering with her possession. On the other hand the defendant asserts that he is the owner having purchased the same from the true owner and since the purchase, he is in possession and it is the plaintiff, who is causing obstacles in his possession and enjoyment.
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> 17. The Hon'ble Supreme Court in Corporation City of Bangalore v. M. Papaish, (1989) 3 SCC 612 : AIR 1989 SC 1809, has held that when the foundation of claim of plaintiff was title, the court has to consider the question of tide and see whether the plaintiff has

> established her title in order to get an order of injunction. That was also a case for perpetual injunction. In Nagarapalike v. Jagatsingh (1995) 3 SCC 426 : (AIR 1995 SC 1377), the Hon'ble Supreme Court has observed while considering similar facts that "there is no substance in the stand taken by the respondent that even if he had failed to prove his title, the suit filed on behalf of the respondents should be treated as a suit based on possession and dispossession in terms of section 6 of the Specific Relief Act. Once a suit has been filed by the respondent claiming to be the owner arid being in possession of the land in question, the suit cannot be treated as a suit based on possession and dispossession without reference to title". The Hon'ble Supreme Court held that in such case, the Court is to record its finding on the question of title. This court in B.P. Sadashivaiah v. Parvathamma ILR 1994 Kar 2671 has held that the court trying a suit for permanent injunction based on title has to consider the said question before it decides to decree or dismiss the suit. In this case, the plaintiff has filed the suit stating that she is the owner of the property by virtue of the sale deed and agreement and the defendant is interfering with her possession and the case of the defendant is that he is the owner by virtue of the sale deeds in his favour executed by the true owner and that he is in possession. In, view of these, it is necessary for this court to go into the title of the parties"

16. The Courts in the above said proceedings held that the power of attorney executed in favour of the plaintiff's husband by her mother-in-law did not include a clause to empower him/agent to alienate the properties. Therefore, the Courts held that the sale deeds and agreement of sale in favour of the plaintiff are null and void as the vendor had no competency to sell them. Therefore, in O.S.5693/1992 plaintiff was very clear on the point that her, right to possession is decided on the basis of her title deeds and they are so adjudicated. Therefore, it is clear that though the suit was not for declaration of title of the plaintiff on the basis of the sale deeds and agreement of sale, legality/merit of those documents was substantially an issue in the said case. Therefore, the suit is clearly hit by the principles of res judicata.

17. So far as the contention that the trial Court ought to have framed an issue and given an opportunity to the plaintiff to adduce evidence on that issue of res judicata and trial Court should have gone through the pleadings in those cases etc., it is to be seen that Section 11, CPC creates a total bar to entertain a suit. The words employed in Section 11 are that "No court shall try any suit". That means once if it comes to the notice of the Court that the issue in the suit was directly and substantially in issue in former suit between the same parties and such issue had been raised, heard and finally decided, Court cannot proceed with the matter. When the reading of the admitted documents viz., Judgments in the former suit, Regular First Appeal, Civil Appeal and Review Petition clearly showed that the issue in the present suit is already decided finally in the former suit, there is no question of framing an issue and trying the same as a preliminary issue. There is a total bar for trial of such suit.

18. In *Hardesh Ores Private Limited* referred to supra invoking Order VII, Rule 11 CPC the plaints were sought to be rejected on the ground of bar of limitation. There it was argued that to invoke Order VII, Rule 11 CPC defendant's case need not be considered and the matter must be decided on the basis of the averments of the plaint alone. In those cases the plea of limitation was raised in the written statement. The Trial Court rejected the plaints and the High Court upheld such rejection. The Apex Court also upheld the rejection. Therefore, the said judgment in no way advances the case of the plaintiff.

19. A reading of para 17 in *Vaish Aggarwal Panchayat's*'case shows that in that matter the former suit and the later suit were riot between the same parties and there it was alleged that the judgment in the former suit was an outcome of fraud and collusion between the parties to the said. suit. Therefore, it was held that, the finding on the issue of res judicata ought to have been given on recording the evidence. Therefore, the said judgment is not applicable.

20. Paragraph 42 of the Judgment in Ramachandra Dagdu Sonavane (Dead) by L.Rs.'s case, shows that though the, appellants contended that the question of res judicata ought to have been decided only on the production of the pleadings and the judgments in both the suits, the same was not accepted. It was held that in the judgment of the earlier suit, the Judge in extenso had referred to the pleadings of the parties in the earlier suit and the finding on the question of res judicata is given on appreciating the copy of the judgment of the earlier suit. In this case the earlier suit viz., O.S.5693/1992 was admittedly between the same parties and it was her own suit. The copies of the Judgment in the said case right from the suit till the C.A. and Review Petition are produced before the Court and based on them the trial Court has rejected the plaint. Therefore, the judgments relied upon by the appellant are not applicable to the facts of this case.

21. In Sulochana Amma v. Narayanan Nair ((1994) 2 SCC 14 : AIR 1994 SC 152) it was held:

> “The decree passed in injunction suit wherein issue regarding title of the party was directly and substantially in issue and decided and attained finality would operate as res judicata in a subsequent suit based on title, where the same issue directly and substantially arises between the parties.”

22. The T. Aravindam v. T.V. Sathyapal ((1977) 4 SCC 467 : AIR 1977 SC 2421) case the Supreme Court held:

> “Where the plaint is manifestly vexatious and meritless in the sense of not disclosing the right to sue, the trial court should exercise its powers u/O. 7, Rule 11, CPC and bogus litigation should not be permitted to go on”.

23. The plaint averments themselves show that the defendant claimed title

> to the property by virtue of the sale deed executed by her brother-in-law as the power of attorney holder of her mother-in-law. Still, she filed O.S.5693/1992 for bare injunction. She fought that matter for more than two decades up to the Supreme Court. It was open to her to claim the relief of declaration of title. But, she omitted to do that. Therefore, such omission on her part to include the claim for declaration of title bars the later suit by operation of Order II, Rules (2 and 3), CPC. Looked at from any angle, the impugned order of rejection of plaint does not call for interference by this Court. Therefore, appeal dismissed with costs."

12. Thus, it is clear that in the present case also when the civil suit has already been decided and the judgment and decree of the said case were before the Court at the time of deciding the application and the Court was of the opinion that the plaint filed by the plaintiff/appellant is apparently barred by limitation and also that a second suit as per Rule 11 of CPC is not maintainable, the Court without taking any other fact outside the pleadings of the plaint has decided the application filed under Order 7 Rule 11 of CPC.

13. From perusal of the record, I am also of the opinion that the trial Court did nothing wrong while allowing the application and rejecting the plaint restraining the plaintiff /appellant to proceed further or to prosecute any matter for the same issue which has already been decided long back. Thus, in my opinion, no substantial question of law is involved in the appeal and it merits dismissal.

14. *Ex consequntia*, the appeal is without any substance, is hereby **dismissed.**

(SANJAY DWIVEDI)
JUDGE

rao