HIGH COURT OF MADHYA PRADESH
Civil Revision No. 174/2012
Mahesh Kumar Agarwal vs. State of MP & Others

Gwalior, dtd. 30/01/2019

Shri HK Shukla with Shri DK Agrawal, counsel for the applicant.

Shri BM Patel, Government Advocate for the respondent No.1/ State.

Shri N. K. Gupta, Senior Counsel with Shri Pawan Vijaywargiya and Shri S. D. Singh, counsel for the respondent No.5.

Shri Arman Ali, counsel for the respondent No.6.

This Civil Revision under Section 115 of CPC has been filed against the order dated 07/11/2012 passed by Additional Judge to the Court of First Additional District Judge, Sheopur in Civil Suit No.12-B of 2011 (Original Civil Suit No.4-B of 1997), by which the preliminary issues framed by the trial Court have been decided against the applicant.

The necessary facts for the disposal of the present revision in short are that the respondents No.5 to 8/plaintiffs have filed a suit for recovery of damages to the tune of Rs.12, 64, 300/- against the applicant and other defendants on the ground that the plaintiffs are the owners and in possession of three-stored building situated in Ward No.13, Near Gandhi Park Golmbar, Sheopurkala. It is also known as "Soma Lodge". The back portion of said building is used for residential purpose, whereas the remaining portion is used for lodge, shops and offices. The construction of the building was over in the year 1984 and the plaintiffs is running the said lodge from the said year. The office of respondent No.5 who is an Advocate by profession, is also situated in the said building. The land situated between the front portion of the house and

the culvert is used for visiting the building. It was further pleaded that when the construction was going on, then the Officers of the Municipal Council, Revenue Officers and other officers of the Department were also noticing the construction, but it was never objected by them. In the year 1985, a notice was given by the Municipal Council on the ground of raising construction without obtaining permission and, thereafter, the matter was compounded by order dated 25/08/1986. In the month of January, 1997, the applicant was posted on the post of Additional Collector but he was already transferred, whereas other defendants no.2 and 3 were also posted in Sheopur in their official capacity. On 27th January, 1997, at about 06:00 pm, the applicant as well as the respondents along with police force started demolishing a portion of the building and since the demolition was not stopped, as a result of which the remaining part of building also got damaged. It was also pleaded that when a notice was given to the Municipal Council, then a false reply was given pleading that a notice was issued to the plaintiffs which was refused by the plaintiff No.1, as a result of which the notice of demolition was affixed on the building. It was also mentioned in the plaint that no such notice was either served or affixed on the building.

The defendants filed their written statements and on the basis of written statements, four preliminary issues were framed as under:-

> "(1) Whether the suit is maintainable in the light of provisions of Sections 188 and 318 of MP Municipalities Act, 1961 and whether the plaintiffs are entitled for any compensation ?
>
> (2) Whether the applicant was working on the post of Executive Magistrate and whether he is entitled for protection under the Judicial Officers' Protection Act ?

(3) Whether the action was taken under Section 223 of MP Municipalities Act, 1961 and whether the suit is maintainable in the light of alternative remedy of filing an appeal ?

(4) Whether the suit is maintainable in absence of notice under Section 319 of the MP Municipalities Act, 1961 and Section 80 of the CPC ?

All these preliminary issues have been decided against the applicant by the Trial Court by order dated 07/11/2012 passed in Civil Suit No.12-B of 2011. Hence, this present revision.

Challenging the order passed by the Court below, it is submitted by the counsel for the applicant that undisputedly, the applicant was working on the post of Additional Collector, Sheopur. An anti-encroachment drive was undertaken by the Municipal Council and being an Executive Magistrate, the applicant was allegedly present on the spot. No specific allegations have been made against the applicant. The suit is not maintainable in the light of Section 318 of MP Municipalities Act, 1961 and the Trial Court has wrongly decided the preliminary issues against the applicant.

Per contra, it is submitted by the counsel for the respondents No.5 & 6/plaintiffs that the petitioner was already transferred. He is not entitled for any protection under Section 318 of MP Municipalities Act, 1961 and until and unless it is proved by the applicant that he had acted under the provisions of MP Municipalities Act, 1961, it cannot be said that the suit is not maintainable.

Heard the learned counsel for the parties.

Before considering the other preliminary issues which have been framed by the Trial Court, this Court feels it appropriate consider the provisions of

Section 318 of the MP Municipalities Act, 1961 which reads as under:-

> "**318. Indemnity for acts done in good faith**. No suit shall be maintainable against the Council or any of its committees, or any Municipal officer or servant, or any person acting under or in accordance with the direction of the Council or any of its committees or any Municipal officer or servant, or of a Magistrate, in respect of anything in good faith done or intended to be done under this Act or under any rule or bye-law made there-under.'

The use of words " **intended to be done under this Act**" are of much importance.

So far as the applicant is concerned, admittedly, he is not an employee of Municipal Council but Section 318 of MP Municipalities Act, 1961 also grants indemnity to any person acting under or in accordance with the direction of the Municipal Council or any of its committees or any Municipal Officer or servant, or of a Magistrate. Thus, when the Municipal Council was carrying on the demolition work and even if it is presumed that the applicant was present on the spot, being Executive Magistrate of the area, it is clear that he is covered under Section 318 of MP Municipalities Act, 1961.

The Supreme Court in the case of **Joseph and another vs. State of Kerala and Another,** reported in **(2007) 10 SCC 414** has held as under:-

> "**18.** Several questions arose for consideration before the High Court. The High Court indisputably had a limited role to play. We, as at present advised, are not inclined to accept the submission of Mr Iyer that sub-sections (2) and (3) of Section 3 of the 1971 Act would operate in the same field. In our opinion, both operate in different fields. However, on a plain reading of the impugned order passed by the High Court, we are of the opinion that the High Court was not correct in its view in regard to its construction of Section 3(3) of the 1971 Act. The Tribunal, while exercising its power under Section 8 of the 1971 Act, had taken into consideration the question which arose before it viz. as to whether the appellants herein had intention to cultivate the land on the appointed day. Appointed day having been defined in the 1971 Act, the relevant aspect was the situation as it

existed on that day i.e. on 10-5-1971. For the purpose of attracting sub-section (3) of Section 3 of the 1971 Act, it was not necessary that the entire area should have been cultivated for arriving at a decision as to whether the owner of the land had the intention to cultivate or not. Also, it was required to be considered having regard to the activities carried on by the owner from the day of purchase till the appointed day. For the said purpose, subsequent conduct of the owner of the land was also relevant. Development of the land by plantation of rubber plants is not in dispute. The Explanation appended to Section 3(2) of the 1971 Act clearly suggests that cultivation would include cultivation of trees or plants of any species. Intention to cultivate by the owner of the land, we think, has to be gathered not only in regard to the fact situation obtaining at a particular time but also with regard to the subsequent conduct of the parties. If the activity in regard to cultivation of land or development thereof is systematic and not sporadic, the same also may give an idea as to whether the owner intended to cultivate the land. The words “intend to cultivate” clearly signify that on the date of vesting the land in question had not actually been cultivated in its entirety but the purchaser had the intention of doing so. Such intention on the part of the purchaser can be gathered from his conduct in regard to the development of land for making it fit for cultivation preceding to and subsequent to the date of vesting.

19. The High Court, in our opinion, was not correct in opining that for applying Section 3(3) of the 1971 Act, the cultivation of the property subsequent to the vesting cannot be taken into account. The High Court also was not correct in arriving at a finding that there had been no evidence whatsoever that the owners intended to cultivate the land prior to 10-5-1971. As the provision contained in sub-section (3) of Section 3 of the 1971 Act clearly provides for exclusion of the operation of sub-section (1) thereof, the same has to be construed liberally. So construed, the conduct of the parties was a relevant fact. The High Court, in our opinion, therefore was not correct in ignoring the findings of the Tribunal. Also, the High Court should bestow its attention to the findings arrived at by the Tribunal having regard to the limited nature of the scope and ambit of appeal in terms of Section 8-A of the 1971 Act and, particularly, in view of the fact that the order dated 21-2-1979 had not been appealed against."

While interpreting the words "intended to cultivate" as provided in sub-section (3) of Section 3 of Kerala Private Forests (Vesting and Assignment) Act,1971, it has been held by the Supreme Court that the words "intended to cultivate" clearly signify that on the date of vesting the land in question was not actually being cultivated in its entirety, but the intention of the purchaser, to

cultivate the same can be gathered from his conduct. Therefore, whether the act complained by the plaintiffs would be covered by the phrase **"intended to be done under this Act"** or not, it is necessary to gather the intention of the parties.

In the present case, it is the pleadings of the plaintiffs that when the notices were given to the Municipal Council, then it was replied by them that before starting anti-encroachment drive, a notice under MP Municipalities Act, 1961 was issued to the plaintiffs on 25/01/1997 and actual anti-encroachment drive was started on 27/01/1997. Whether the notice was actually served upon the plaintiffs or not and whether it was affixed on the building of the plaintiffs or not, is a disputed question of fact. However, undisputedly, a specific stand was taken by the Municipal Council, that an anti-encroachment drive was started only after given a notice to the plaintiffs, thus, it is clear that the Municipal Council had pleaded from day one that they had acted under the provisions of M.P. Municipalities Act.

It is submitted by the counsel for the respondents No.5 and 6 that whether any act was done in good faith or not, is a disputed question of fact and until and unless it is proved that the defendants had done anything in good faith, the applicant cannot claim the protection of Section 318 of MP Municipalities Act, 1961. It is further submitted that even if filing of suit is held to be barred against Municipal Council or its officer or any officer working under this Act or in accordance with the direction of the Municipal Council, then Section 319 of MP Municipalities Act, 1961 would become redundant. There is no bar of suit and the only rider is that the suit shall not be maintainable in absence of notice.

When MP Municipalities Act, 1961 itself provides for filing of suit against the activities of Municipal Council, then if it is interpreted that no suit can be filed if the work has been intended to be done under this Act, then Section 319 of MP Municipalities Act, 1961 would become redundant.

Considered the submissions made by the Counsel for the Plaintiffs. The use of words **" intended to be done under this Act"** is of paramount importance. If a person has intention of performing any duty under the Act, then he would be covered under the phrase **"intended to be done under this Act"**. The intention can be gathered from the surrounding circumstances. Even otherwise, for undertaking anti-encroachment drive, if the officers of Municipal Council are required to face civil litigations, then it would frustrate the very purpose of indemnity granted under Section 318 of MP Municipalities Act, 1961 and in order to handle such a situation, so that the officers of Municipal Council may perform their duties fearlessly under this Act, provision of Section 318 of the MP Municipalities Act, 1961 has been made. The protection given under Section 318 of MP Municipalities Act, 1961 is not dependent on the provisions of Section 319 of MP Municipalities Act, 1961. Both these Section are independent to each other dealing with the different situations. There may be certain circumstances where the suit may lie against the Municipal Council like for enforcement of any contract, etc. The basic purpose of provision of Section 319 of MP Municipalities Act, 1961 is to give an opportunity and prior notice to the Municipal Council so that the grievance of the person can be resolved without approaching the Court. In the present case, even according to the plaintiffs when a notice was given to the Municipal Council, then it was

specifically replied that, a notice was given to the plaintiffs for removal of encroachment. Only when the plaintiffs did not remove the encroachment, then anti-encroachment drive was undertaken. Thus, an opportunity was given to the Municipal Council to resolve the dispute, and accordingly, it was specifically pointed out that an action has been taken by the Municipal Council under the provisions of MP Municipalities Act, 1961. For considering the intention, the conduct of the parties would be material. The Municipal Council had taken a clear stand that the action has been taken under the Act, thus, even in absence of any formal proof, the intention of the Municipal Council and its officer "to act under the Act", can be gathered, and thus, the applicant is entitled for protection under Section 318 of MP Municipalities Act, 1961.

It is submitted by the counsel for the applicant that as the Municipal Council had acted under the provisions of MP Municipalities Act, 1961 and it is its statutory due to remove the unauthorized constructions and when the plaintiffs did not remove their encroachment even after issuance of notice for demolition, therefore, the Municipal Council was well within its rights to remove the encroachment and the encroacher is not entitled for damages. To buttress his contention, the counsel for the applicant has relied upon the judgment passed by the Supreme Court in the case of **Municipal Committee, Karnal vs. Nirmala Devi,** reported in **AIR 1996 SCC 892.**

Although the judgment in the case of **Nirmala Devi (supra)** has been passed after conclusion of trial but if the law laid down by the Supreme Court in the case of **Nirmala Devi (supra)** is considered in the light of the provisions of Section 318 of the MP Municipalities Act, 1961, then it is clear that the suit for

damages is not maintainable even in a situation where the Municipal Committee or its officer had intended to perform any act under the Act or Rule or bye-law.

It is next contended by the counsel for the applicant that as the respondents No 5 to 8 had an efficacious remedy of filing an appeal against the notice issued by the Municipal Council and until and unless it is held that the act of Municipal Council in demolishing the building of the applicant was contrary to the provisions of MP Municipalities Act 1961, the civil suit in its present form for grant of compensation because of demolition undertaken by Municipal Council is not maintainable. To buttress his contention, the counsel for the applicant has relied upon the judgment passed by the Supreme Court in the case of **NDMC vs. Satish Chand (Deceased) by LR. Ram Chand,** reported in **(2003) 10 SCC 38.**

The Supreme Court in the case of **Satish Chand (supra)** has held as under:-

> "**5**. The opening words of the section give a very wide jurisdiction to the civil courts to try all suits of a civil nature however, this wide power is qualified by providing an exception i.e. "excepting suits of which their cognizance is either expressly or impliedly barred." Dhulabhai etc. vs. State of Madhya Pradesh & Others [AIR 1969 SC 78] is a celebrated judgment on the point which still holds the field. It lays down the following principles: (AIR pp. 89-90, para 32)
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> "(1) Where the Statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
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> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the

scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

6. It will be noticed from the provisions contained in Section 9 of the Code of Civil Procedure that a bar to file a civil suit may be express or implied. An express bar is where a Statute itself contains a provision that the jurisdiction of a civil court is barred e.g., the bar contained in Section 293 of the Income Tax Act, 1961. An implied bar may arise when a Statute provide a special remedy to an aggrieved party like a right of appeal as contained in the Punjab Municipal Act which is the subject matter of the present case. Section 86 of the Act restrains a party from challenging assessment and levy of tax in any manner other than as provided under the Act. A provision like this is the implied bar envisaged in Section 9 C.P.C. against filing a civil suit. In Raja Ram Kumar Bhargava (dead) by LRs vs. Union of India [AIR 1988 SC 752] this Court observed:(SCC p.689, para 9)

"Generally speaking, the broad guiding considerations are that wherever a right, not pre- existing, in common-law, is created by a statute and that statute itself provided a machinery for the enforcement

of the right, both the right and the remedy having been created uno flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the Civil Courts' jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the Statute and a new statutory remedy for its enforcement provided, without expressly excluding the Civil Court's jurisdiction, then both the common-law and the statutory remedies might become concurrent remedies leaving upon an element of election to the persons of inherence. To what extent, and on what areas and under what circumstances and conditions, the Civil Courts' jurisdiction is preserved even where there is an express clause excluding their jurisdiction, are considered in Dhulabhai's case. AIR 1969 SC 78".

7. Munshi Ram and Others vs. Municipal Committee, Chheharta [1979 (3) SCR 463] was a case under the Punjab Municipal Act itself. The Court was considering the question of bar created under Sections 84 and 86 of the Act regarding hearing and determination of objections to levy of provisional tax under the Act. In this connection it was observed: (SCC pp. 88-89, paras 22-23)

"22. From a conjoint reading of sections 84 and 86, it is plain that the Municipal Act, gives a special and particular remedy for the person aggrieved by an assessment of tax under the Act, irrespective of whether the grievance relates to the rate or quantum of tax or the principle of assessment. The Actfurther provides a particular forum and a specific mode of having this remedy which analogous to that provided in Section 66 (2) of the Indian Income-tax Act, 1922. Section 86 forbids in clear terms the person aggrieved by an assessment from seeking his remedy in any other forum or in any other manner than that provided in the Municipal Act.

23. It is well recognized that where a Revenue Statute provides for a person aggrieved by an assessment there-under, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all other forums and modes of seeking it are excluded. Construed in the light of this principle, it is clear that sections 84 and 86 of the Municipal Act bar, by inevitable implication, the jurisdiction of the Civil Court where the grievance of the party relates to an assessment or the principle of assessment under this Act."

The Court upheld the objection regarding maintainability of the civil suit.

8. A Division Bench of the Delhi High Court in Sobha Singh & sons (P) Ltd. vs. New Delhi Municipal Committee [34 (1988) Delhi Law Times 91] had an occasion to consider the question of maintainability of a civil suit challenging the assessment and levy of property tax by the NDMC. Sections 84 and 86 of the Act came in for consideration. It was held that the provision of appeal contained in Section 84(1) of the Act provided a

complete remedy to a party aggrieved against the assessment and levy of tax. Section 86 provides that the remedy of appeal is the only remedy to a party to challenge assessment for purposes of property tax. No other remedy was available to a party in such circumstances. It follows that the remedy of civil suit is barred."

The Supreme Court in the case of **Nagar Palika Parishad , Mihona and Another vs. Ramnath and Another** reported in **(2014) 6 SCC 394** has held as under:-

"**6.** Section 319 of the 1961 Act bars suits in absence of notice and reads as follows:

" **Section 319-Bar of suit in absence of notice.-**(1) No suit shall be instituted against any Council or any Councilor, officer or servant thereof or any person acting under the direction of any such Council, Councilor, officer or servant for anything done or purporting to be done under this Act, until the expiration of two months next after a notice, in writing, stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims, has been, in the case of a Council delivered or left at its office, and, in the case of any such member, officer, servant or person as aforesaid, delivered to him or left at his office or usual place of abode; and the plaint shall contain a statement that such notice has been delivered or left.

(2)Every suit shall be dismissed unless it is instituted within eight months from the date of the accrual of the alleged cause of action.

(3)Nothing in this section shall be deemed to apply to any suit instituted under Section 54 of the Specific Relief Act, 1877 (I of 1877).

7. Respondent No.1-plaintiff filed the suit for declaration of title and permanent injunction. In view of bar of suit for declaration of title in absence of notice under Section 319 the suit was not maintainable. The Courts below wrongly held that the suit was perpetual injunction though the respondent No.1-plaintiff filed the suit for declaration of title and for permanent injunction.

8 Respondent No.1-plaintiff cannot derive advantage of sub Section (3) of Section 319 which stipulates non-application of the Section 319 when the suit was instituted under Section 54 of the Specific Relief Act, 1877 (old provision) equivalent to Section 38 of the Specific Relief Act, 1963 and reads as follows:

"**38.Perpetual injunction when granted.-**(1)Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent

the breach of an obligation existing in his favour, whether expressly or by implication.

(2)When any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter- II.

(3)When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, namely:

(a)where the defendant is trustee of the property for the plaintiff;

(b)where there exists no standard for ascertaining the actual damage caused, or likely to be causes, by the invasion;

(c)where the invasion in such , that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

The benefit aforesaid cannot derive by Respondent No.1-plaintiff as the suit was filed for declaration of title coupled with permanent injunction. Respondent No.1 having claimed title, the suit cannot be termed to be suit for perpetual injunction alone.

9. Along with the trial court and the appellate court, the High Court also failed to appreciate the aforesaid fact and also overlooked the valuable interest and right of public at large, to use the suit land which is a part of public street. Further, in absence of challenge to the notice of eviction issued by the appellant, it was not open to the trial court to decide the title merely because permanent injunction coupled with declaration of title was also sought for."

It is submitted by the counsel for the applicant that so far as the contention of the plaintiffs that the Municipal Council had regularized the construction by compounding is concerned, the Supreme Court in the case of **Mahendra Baburao Mahadik and Others vs. Subhash Krishna Kanitkar and Others AIR 2005 SC 1794** has deprecated the said practice.

It is next contended by the counsel for the respondents No. 5 and 6 that since the applicant was already transferred from Sheopur, therefore, even his present on the spot was unwarranted and as the plaintiffs are the active supporters of BJP and out of political vendetta, the applicant took personal interest in the matter and without any authority he came on the spot.

So far as the above-mentioned submission is concerned, it is fairly conceded by the counsel for the respondents No. 5 and 6 that although the applicant was already transferred from Sheopur but there is nothing on record to show that he was also actually relieved. If a person has been transferred but so long he is not relieved from the original place of posting, then it cannot be said that merely because of transfer order, the concerned officer would be denuded from his powers. As there is nothing on record to show that the applicant was also relieved from Sheopur, this Court is of the considered opinion that it cannot be said that merely because the applicant was transferred from Sheopur, he had lost all his statutory duties and accordingly, the submission made by the counsel for the applicant is rejected.

Thus, from the plain reading of the averments made in the paragraph 28 of the plaint, it is clear that the plaintiffs themselves have made reference to the reply given by the Municipal Council which was to the effect that a notice was given to the plaintiffs on 25/01/1997 which was refused by them and accordingly the notice was served by affixture and as the plaintiffs did not remove the encroachment on their own, therefore, anti-encroachment drive was undertaken on 27/01/1997. Thus, it is clear that the case of the respondents is

squarely covered under the phrase **" intended to be done under this Act"**. Therefore, in the considered opinion of this Court, the suit against the applicant is barred under Section 318 of MP Municipalities Act, 1961 and the trial Court has wrongly decided the preliminary issue against the applicant. As the aforesaid preliminary issues is being decided by this Court in favour of the applicant and it has been held that the suit filed against the applicant is not maintainable, therefore, this Court is of the considered view that it is not necessary to consider the order passed by the Trial Court with regard to remaining preliminary issues.

Accordingly, the order dated 07/11/2012 passed by Additional Judge to the Court of First Additional District Judge, Sheopur in Civil Suit No. 12-B of 2011 (Original Civil Suit No. 4-B of 1997) is hereby set aside and it is held that the suit filed against the applicant is not maintainable and it is accordingly dismissed qua the applicant.

The record of the trial Court was received and further proceeding before the Trial Court were stayed by this Court by order dated 30/12/2012, therefore, the Registry is directed to return the record back to the Trial Court.

With the aforesaid observation, this Civil Revision succeeds and is hereby **allowed.**

(G. S. Ahluwalia)
Judge

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