IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA Nos.222 of 2000 alongwith RSA No.106 of 2001

Reserved on: 28.05.2014
Date of Decision: 31.05.2014

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1. RSA No. 222/2000

Mast Ram (since deceased) through LRs & others
..Appellants

Versus

Shankar Dass and others ..Respondents

2. RSA No.106/2001

Mast Ram (since deceased) through LRs & others
..Appellants

Versus

Shankar Dass and others ..Respondents

Coram:

The Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.

Whether approved for reporting?[1] **Yes**

For the Appellants: **Mr. Bhupinder Gupta, Senior Advocate with Ms. Charu Gupta and Mr. Ajeet Singh Jaswal, Advocates for the appellants in both the appeals.**

For the Respondents: **Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate for respondents No.1, 3(b), 4(a) to 4(e), 9 10 and for respondents No. 7 to 9 and 11(a) to 11(d) in RSA No.106 of 2001.**

Mr. Rajnish K. Lall, Advocate for respondents No.2, 5(a) to 5(c) in RSA No.222 of 2000 and for respondents No.2 to 4, 5(a) to 5(c), 6 and 10 in RSA No.106 of 2001.

Whether reporters of the local papers may be allowed to see the judgment? Yes

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Dharam Chand Chaudhary, Judge

The above two appeals having arisen between the same parties and relate to same subject matter of dispute, i.e. land entered in Khata Khatauni No.1/1Min., Khasra/Kitas 76, measuring 194 bighas 3 biswas, situate at village Tukeri, Pargana Haripur, Tehsil and District Solan, are taken up and heard together. The parties are joint owners in possession of the suit land. The appellants, herein, had approached the Assistant Collector, 1st Grade, Solan, for partition of the suit land, by moving an application, registered as case No.23/9 of 1980. During the course of partition proceedings, the parties entered into a compromise Ext. PW1/B qua partition of the suit land on 30.9.1984. It was mutually agreed that the suit land will be partitioned by maintaining and protecting the respective possession of each and every co-sharer in the suit land on the spot and also by making the shortfall, if any in anyone's share, good by allotting him more land during the partition so that his share is also equal to that of the other co-sharers. The parties on both sides, produced the compromise Ext. PW1/B before the Assistant Collector, 1st Grade, Solan, on 15.10.1984, who vide order Ext. PW1/D passed on that day, marked the file to the Assistant Collector, 2nd Grade. Solan.

Accordingly, the Assistant Collector, 2nd Grade, Solan, vide order dated 23.10.1984 Ext. PW1/E, directed the Patwari/Girdawar concerned to partition the land as per the mode of partition prepared and the parties were directed to appear before Assistant Collector, 1st Grade, Solan, on 30.10.1984 for further proceedings in the matter. The Assistant Collector 1st Grade, Solan, vide order dated 30.10.1984, which is a part of Ext.PW1/E, ordered to send the file to Girdawar concerned for demarcation of the land on the spot, in terms of the mode of partition, prepared by the Assistant Collector, 2nd Grade, Solan. He also recorded the statements Exts. PW1/F, PW1/G and PW1/H of the parties qua their agreement to the mode of partition, prepared by the Assistant Collector, 2nd Grade, Solan. The parties, as per their joint statements Ext. PW1/K and PW1/L, made after partition of the suit land on the spot, expressed their satisfaction to the partition of the suit land and further stated that they have received the Khataunis qua the land fell to their share in the partition. The Girdawar accordingly made report Ext. PW1/J and sent the matter to Assistant collector, 1st Grade, Solan for further proceedings. Subsequently, the mutations on the basis of the partition of the suit land so effected were also attested in the year 1988.

2. It is thereafter, the respondents in these appeals filed Civil suit No. 208/1 of 1989 in the Court of learned Senior Sub Judge, Solan, against the appellants herein for declaration to the effect that the Khataunis prepared during the partition proceedings are illegal, null and void, with consequential relief qua re-preparation of Khataunis, on the ground that the partition of the suit land has not been effected on the spot in accordance with the compromise.

3. The respondents herein, when started interference in the possession of the appellants herein over the suit and, they (appellants herein) also filed Civil Suit No.261/1 of 1989 in the Court of learned Senior Sub Judge, Solan, for permanent prohibitory injunction, seeking a direction to the respondents herein not to cause any interference in the suit land, on the ground that the partition has been effected strictly in accordance with the deed of compromise and also taking into consideration the earlier possession of each and every co-sharer in the suit land, Also that they are now in possession of the suit land, which fell to their share in partition proceedings and as such are legally entitled to remain in possession thereof and that the respondents herein have no right, title or interest in the suit land in their share.

4. The plaint in Civil Suit No.208/1 of 1989 was written statement on behalf of the respondents herein in Civil Suit No.261/1 of 1989; whereas the plaint in Civil Suit No.261/1 of 1989 is written statement in Civil Suit No.208/1 of 1989 on behalf of the appellants herein.

5. On the pleadings of the parties, the trial Court framed the following issues in Civil Suit No. 208/1 of 1989:

1. Whether the suit in the present form is not maintainable? OPD

2. Whether this Court has no jurisdiction to entertain the suit, as alleged? OPD

3. Whether the plaintiffs are estopped from filing the suit by their own act, conduct and acquiescence? OPD

4. Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPP.

5. Whether the Khataunis prepared in partition proceedings are illegal, null and void and not in accordance with the partition order dated 15.10.1984 of Assistant Collector, 1st Grade, Solan, passed on the bass of compromise dated 30.9.1984 between the parties? OPP

6. Whether the possession of the respective land stand delivered to the parties in consequence of partition and if so, its effect?

7. Relief.

6. Similarly, following issues were framed in Civil Ssuit No.261/1 of 1989:

1. Whether the suit in the present form is not maintainable? OPD

2. Whether this Court has no jurisdiction to entertain the suit, as alleged? OPD

3. Whether the plaintiffs are estopped from filing the suit by their own act, conduct and acquiescence? OPD

4. Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPP.

5. Whether the Khataunis prepared in partition proceedings are illegal, null and void and not in accordance with the partition order dated 15.10.1984 of Assistant Collector, 1st Grade, Solan, passed on the bass of compromise dated 30.9.1984 between the parties? OPP

6. Whether the possession of the respective land stand delivered to the parties in consequence of partition and if so, its effect?

7. Relief.

7. Learned trial Judge, after holding the full trial, had arrived at a conclusion that the suit land stands partitioned pursuant to the compromise arrived at between the parties and they, therefore, are bound by the partition. Hence, Civil Suit No. 208/1 of 1989 was dismissed and Civil Suit No.261/1 of 1989 was decreed. Consequently, the respondents herein were restrained from causing any interference over the land, fell in the share of the appellants in the partition.

8. Aggrieved by the aforesaid judgments and decrees, the respondents herein, preferred Civil Appeal Nos.64-S/13 of 1992 against the judgment and decree passed in Civil Suit No.208/1 of 1989 and Civil Appeal No. 65-S/13 of 1992 against the judgment and decree passed in Civil Suit No.261/1 of 1989.

9. Respondents Balbir and his sister Sheela (defendants No.8 and 9 in Civil Suit No.261/1 of 1989), had preferred an application under Order 6 rule 17 CPC in Civil Appeal No.64-S/13 of 1992 for amendment in the written statement, on the ground that they being rustic and innocent villagers put their signatures on certain papers at the instance of respondent Deep Ram, who failed to plead proper facts in the written statement being not conversant with full facts of the case. Therefore, by way of proposed amendment, they sought to explain the factual position of the case.

10. Similarly, aforesaid Balbir and Sheela, respondents herein, had preferred another application under Order 1 Rule 10 CPC in Civil Appeal No.65-S/13 of 1992 for their transposition from the array of the plaintiffs to the array of defendants. Both the applications were contested by the appellants herein. Learned Additional District Judge, Solan, vide judgment dated 26.2.1996,

passed in Civil Appeal No.64-S/13 of 1992, however, allowed the application for amendment in the written statement and remanded the case to the trial Court for disposal afresh, after allowing respondents Balbir and Sheela to amend the written statement; whereas vide judgment of the same date passed in Civil Appeal No. 65-S/13 of 1996, allowed the application under Order 1 rule 10 CPC and remanded the case to the trial Court for disposal afresh.

11. Aggrieved by the aforesaid judgments/decrees dated 26.2.1996 passed by learned Additional District Judge, Solan, the appellants herein preferred two appeals registered as FAO(Ord.) Nos. 40 and 41 of 1996. Respondents herein also preferred cross-objections, registered as Cross Objections No.212 of 1996. A Division Bench of this Court, while examining the legality and validity of the order passed by learned Additional District Judge, Solan, in the application under Order 6 Rule 17 CPC, with the help of law laid down by the Apex Court, has held as under:

> "…….The compromise was held to be valid and binding on the parties by the trial Court and the first Appellate Court has allowed the amendment without applying its mind in proper manner. The only reason given by the First Appellate court in para-13 of the

impugned judgment was that the detailed written statement has not been filed and by virtue of the present amendment the pleadings in that regard were sought to be elaborated and this reasoning of the First Appellate Court is perfunctory and vague. What would be the effect of the proposed amendment on the merits of the suit of the present appellants, has to be considered by the Court and in the present case the proposed amendment will drastically change the nature of the suit and in the teeth of the overwhelming admitted factual position discussed above, the judgment of the First Appellate Court allowing the amendment is not sustainable and shall stand set aside.

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…….. In the present case by way of amendment the defendants No.8 and 9 sought to raise fresh cause of action about the validity of correctness of the compromise which was found to be legal and valid by the trial Court in the suit filed by the appellants and, therefore, the amendment sought for was not permissible under law. Here, it is pertinent to point out that similar type of application 14.11.1995 was moved by other defendants baring defendants No.8 and 9 and their mother Smt. Devku Devi seeking the same relief for amendment of their plaint and from the perusal of the zimni orders, arguments were heard on the said

> application on 23.2.1996 and the application filed for amendment of the plaint was rejected by the First Appellate court vide impugned judgment whereas on the similar grounds the application of defendants No.8 and 9 for amendment of the written statement was allowed. Once the application of the plaintiffs Deep Ram and others was rejected seeking the amendment of their plaint challenging the compromise and on the same and similar grounds it is not permissible to the First Appellate Court to have allowed the application of defendants No.8 and 9 for amendment of their written statement.

12. As regards the order passed in the application, under Order 1 Rule 10 CPC by learned Additional District Judge, the same was also held to be illegal, null and void with the following observations:

> "…….The only ground taken by these two plaintiffs that they did not sign the compromise cannot be taken as a legal ground permitting them to transpose as defendants once they have accepted the compromise as revealed from their plaint. What was their distinctive and different claim in the plaint filed by them against other plaintiffs has not been explained by them in their application for transposition and in what manner they wanted to defend the suit filed

by their co-plaintiffs has not been spelled out by them seeking their transposition as defendants in the suit filed by Deep Ram and others including their mother. We find no cogent reason given by the first Appellate Court in the impugned judgment allowing the application and transposing these two plaintiffs defendants in Civil Suit No.208/1 of 1989 and the judgment of the First Appellate Court is therefore unsustainable and shall stand set aside on this ground as well.

13. Consequently, the judgments dated 26.2.1996, passed by learned Additional District Judge, Solan in Civil Appeal No.64-S.13 of 1992 and in Civil Appeal No.65-S/13 of 1992 were quashed and set aside and the cross-objections filed by the respondents herein in FAO (Ord.) No.41/1996 dismissed. The first Appellate Court was directed to restore the appeals to their original numbers and decide the same on merits, after hearing the parties on both sides.

14. Consequent upon the judgment passed by this Court in FAO (Ord.) Nos. 40 and 41 of 1996, the matter landed again in the lower Appellate Court for disposal afresh. Both the appeals have since been decided vide common judgment dated 5.1.2000, impugned before this Court in these appeals.

15. Learned lower appellate Court while taking note of the case law cited at the bar and also the provisions contained under Sections 134 and 135 and 171 of the H.P. Land Revenue Act, 1954, has observed as under:

> "41. Respondents namely Shri Mast Ram etc. have no where stated that warrant of possession was issued to them under Section 134 of the Himachal Pradesh Land Revenue Act and respondents have not placed on record copy of warrant of possession and copy of Rapat Rojnamcha whereby it is proved that the possession was delivered to the parties under the provisions of Section 134 of the Himachal Pradesh Land Revenue Act,. Onus to prove issue No.6 such as: whether the possession of the respective land stand delivered to the parties in consequence of partition and if so to its effect OPD, was upon the respondents and respondents did not produce any oral or documentary evidence on record to prove issue No.6. Respondents did not examine filed Kanoongo and Patwari to prove that possession was delivered under Section 134 of Himachal Pradesh Land Revenue Act and respondents did not summon partition file in order to prove the delivery of possession under Section 134 of H.P. Land Revenue Act. Hence, the adverse inference under Section 114(g) of the Indian Evidence Act is drawn against the

respondents Section 114(g) of the Indian Evidence Act is quoted as under:

> "The evidence which could be and is not produced would if produced be unfavaourable to the person who withholds it."

42. Hence, I hold that warrant of possession under Section 134 of the Himachal Pradesh Land Revenue Act was not issued as per the requirements of the law and the judgments and decree of the learned trial Court warrants interference and the point No.1 is answered in partly yes and partly no."

16. It is thus seen that as per the conclusion drawn by learned lower Appellate Court the appellants herein have failed to prove the delivery of possession after effecting the partition of the suit land, as required under Section 134 of the Act, therefore, while drawing an adverse inference under Section 114 of the Indian Evidence Act has modified the judgment and decree passed by learned trial Court accordingly.

17. Aggrieved by the impugned judgment and decree, the appellants have assailed the legality and validity thereof on the grounds, inter alia, that the findings recorded by the learned lower Appellate Court are highly unjust, illegal, arbitrary and without any jurisdiction and that by drawing adverse inference against the appellants, it has

committed great irregularity and illegality, for the reason that it was not the case of either party that after effecting partition, they were not put in possession of the suit land nor any such issue was framed. Therefore, learned lower Appellate Court is stated to have travelled beyond the record and acted without any jurisdiction, while holding that the appellants herein have failed to prove the issuance of warrant of possession as required under Section 134 of the Act, during the course of partition. The partition was challenged by the respondents on different grounds and delivery of possession was never in controversy between the parties. The admission on the part of the respondents that the partition was effected on the spot taking into consideration the respective possession of all the co-sharers itself demonstrates that the possession of each and every co-sharer in the suit land was delivered as per their respective shares and they were already in possession thereof. The challenge to the partition was on the ground that it was not effected on the spot in accordance with the compromise. The Civil Court, therefore, had no jurisdiction to try and entertain the suit and to go into the question of validity of the order of partition or the implementation thereof being barred under Section 171 of the H.P. Land Revenue Act. Above all, there is no iota of evidence to

show that the revenue officials while effecting the partition had exceeded their jurisdiction. Therefore, the Civil Court had no jurisdiction to determine the legality of the order of partition and also the implementation thereof. No jurisdiction was vested in the learned lower Appellate Court to modify the judgment and decree passed by learned trial Court in the manner, as has been done in the impugned judgment and decree nor the provisions of the Indian Evidence Act were applicable. The findings recorded by learned lower Appellate Court have, therefore, been stated to be not supported from the evidence available on record and being not only erroneous, but perverse also, deserve to be quashed and set aside.

18. This appeal has been admitted on the following substantial questions of law:

1. Whether the learned first appellate Court has erred in drawing an inference under Section 114 of the Evidence Act against the plaintiff-appellant?
2. Whether or not the civil court had the jurisdiction to go into the questions involved in the case in view of Section 176y1 of the H.P. Land Revenue Act?

19. Similarly, the connected appeal RSA No.106/2001 has been admitted on the following substantial questions of law:

1. Whether or not the civil Court had the jurisdiction to go into the questions involved in the case in view of Section 171 of the H.P. Land Revenue Act?

2. Whether the learned first appellate Court has erred in invoking the provisions of Sections 134 and 135 of the H.P. Land Revenue Act.

20. Shri Bhupender Gupta, learned Senior Advocate, has vehemently argued that the Civil Court has no jurisdiction to go into the questions involved in the present appeals, being barred under Section 171 of the H.P. Land Revenue Act. In this behalf, it has been submitted that the respondents herein are not denying the partition of the suit land having been effected on the basis of compromise, but according to them, it is the Khataunis of the suit land prepared after the partition of the suit land, which are illegal, null and void and have been sought to be re-prepared. The dispute of this nature, if any, according to Mr. Gupta, should have been agitated before competent Revenue Officer, having jurisdiction over the matter. It has, therefore, been submitted that the suit filed by the respondents was rightly dismissed by the trial Court.

21. Shri G.D. Verma, learned Senior Advocate, representing respondents Balbir and Sheela, has tried to

make out a case that Shri Deep Ram, though obtained the signatures of these respondents, however, he being not well conversant with the facts of the case failed to plead the same in the pleadings. Also that under Section 134 of the Land Revenue Act the parties were required to be put in possession of the suit land on the spot at the time of partition. The Civil Court, according to Mr. Verma, has jurisdiction in a case where partition effected by the revenue agency is under challenge. Shri Rajnish K. Lall, learned counsel, representing the remaining respondents has adopted the arguments addressed by Shri G.D. Verma, learned Senior Advocate.

22. Having gone through the entire record and also taking into consideration the rival submissions, admittedly, the parties during the course of proceedings in the application for partition of the suit land registered as case No.2319 of 1980 before the Assistant Collector, 1st Grade, Solan, have arrived at compromise Ext. PW1/B and thereby agreed mutually to effect partition of the suit land by maintaining their respective possession over the same already with them. It was further agreed that the shortage of land, if any, in anyone's share, will be made good during the course of partition. Not only this, but the mode of partition Ext.PW1/E was also prepared by the Assistant

Collector, 2nd Grade, Solan qua their consent. Their statement Exts. PW1/F, PW1/G and PW1/H were also recorded in this behalf. Not only this, but respondent Deep Ram while in the witness box as PW-1 in Civil Suit No.261/1 of 1989 has admitted the entire case i.e. the compromise having arrived at between the parties and also the preparation of mode of partition and subsequently partition of the suit land on the spot by the Girdawar Kanungo. However, according to him, the partition was not effected on the spot strictly in accordance with the compromise deed nor were the Khataunis prepared properly. In his cross-examination, he has categorically stated that during the course of partition effected on the spot, he remained present on all the three days. According to him, the partition was effected by measuring the land with the ***Jareb*** (chain) and ropes and at the time of partition, the prior possession of the co-sharers over the suit land was protected and the shortage, if any in any one's share, was also made good.

23. In view of the own statement of respondent Deep Ram, all the co-sharers were already in possession of the suit land to the extent of their shares, may be for the convenience of cultivation thereof. Their possession was not disturbed at all and rather taken into consideration while

effecting the partition. The co-sharers, therefore, when already were in possession of the suit land to the extent of their respective shares and the shortage, if any, was also made good during the course of partition, the question of issuance of warrant of possession as envisaged under Section 134 of the H.P. Land Revenue Act, 1954, does not arise.

24. True it is that in terms of Section 134 of the Act, a co-sharer is entitled to the possession of the land allotted to him in the proceedings for partition against other co-sharer, however, in the case in hand, since the partition has been effected after taking into consideration the old possession of all the co-sharers, therefore, they were not required to be put in possession of the land allotted to them and rather instrument of partition (Khataunis), as per the land allotted to them in partition proceedings, was to be prepared. A perusal of the plaint in Civil Suit No.208/1 of 1989 amply demonstrates that it is not the case of the respondents that the instrument of partition (Khataunis) was not prepared. Their case, however, is that the Khataunis have not been prepared as per the partition having taken place on the spot, hence being illegal, null and void have been sought to be quashed with a direction mandatory in nature to the revenue agency to re-prepare the same.

25. Otherwise also, the dispute, if any, with regard to the delivery of possession of the land consequent upon the partition, can only be agitated before the revenue officer, as envisaged under Section 134 of the Land Revenue Act. The aggrieved party cannot approach the Civil Court for the relief of possession. Support in this behalf has been drawn from the law laid down by a coordinate Bench of this Court in ***Gopi Chand and another*** *Vs*. ***Sonam Dass and others***, ***1998(2) SLJ 1058***, which reads as follows:

> "20. The matter with regard to delivery of possession of the land in dispute consequent upon partition ordered by the Revenue Officer falls within the exclusive jurisdiction of such Revenue Officer within the ambit of Section 134 of the Revenue Act. Therefore, if the plaintiffs have failed to obtain possession under Section 134 of the Revenue Act, they cannot approach the Civil Court for such relief of possession. The Civil Court has no jurisdiction in view of the provisions contained in Section 171(1) and Section 171(2)(xvii) of the Revenue Act."

26. Learned lower Appellate Court though has taken note of Section 134 of the Act in the impugned judgment, however, did not discuss the law laid down on the subject and to the contrary held that the appellants herein have

failed to prove that the possession has been delivered to the parties on the spot and raised an adverse inference under Section 114 of the Evidence Act. Such an approach on the part of the learned lower Appellate Court is not correct.

27. The present, as a matter of fact, is a case where under Section 171 of the Act, the jurisdiction of the Civil Court is excluded. The law laid down by a coordinate Bench of this Court in ***Smt. Bhekhalu Devi*** Vs. ***Smt. Ram Ditti and others***, ***2008(2) Shim. L.C. 412***, pressed into service on behalf of the respondents is distinguishable on facts, hence not applicable for the reason that the present is not a case where the question of title of any party in the suit land was in issue. Similarly, the ratio of the judgment of this Court in ***Khem Dutt and others*** Vs. ***Palkia and another***, ***1988 SLJ (HP) 172***, has also no application in the given facts and circumstances of this case, for the reason that present is not a case where instrument of partition has not been drawn. As per the own case of the respondents, the instrument of partition has been prepared, however, allegedly it is not as per the partition having taken place on the spot. Such dispute, therefore, could have been taken by them for redressal before the Revenue Officer having jurisdiction over the matter.

28. The judgment of this Court in ***Kashi Ram*** *Vs.* ***Harbhajan Singh Bhajji***, ***AIR 2002 HP 154,*** is also of no help to the case of the respondents because in that case the dispute was with regard to the entries qua the land in dispute, allegedly changed unauthorizedly and it is in that back drop, learned Single Judge has held that the Civil Court had no jurisdiction to entertain the suit. This, however, is not the position here, as discussed hereinabove.

29. Therefore, the present is a case where jurisdiction of the Civil Court is barred. Substantial questions of law framed in this behalf in both these appeals are answered accordingly.

30. If coming to the substantial question of law framed in these appeals that an adverse inference as envisaged under Section 114 of the Evidence Act should have been drawn in the given facts and circumstances of the case or not, the answer would be pure and simple, no. Therefore, on this score also, learned lower appellate Court has committed illegality while drawing such inference.

31. Since Sections 134 and 135 of the H.P. Land Revenue Act, 1954 are not attracted in the given facts and circumstances of this case, therefore, on this score also, learned lower Appellate Court was not justified in arriving at a conclusion that there is no evidence qua putting all the co-sharers in possession of the suit land during the course of partition proceedings for the reason that they were already in possession of the suit land to the extent of their shares and the shortage, if any, was made good during the course of partition. Therefore, the substantial question of law framed in this behalf in connected appeal No.106 of 2001 also stands answered accordingly.

32. The re-appraisal of the evidence as also the legal provisions discussed hereinabove, lead to the only conclusion that learned lower Appellate Court has committed illegality in holding that the appellants have failed to prove the factum of all the co-sharers having been put in possession of the suit land and modifying the judgment and decree passed by learned trial Court in both the suites by raising an adverse inference under Section 114 of the Evidence Act.

33. The impugned judgment and decree under challenge in these appeals, therefore, being contrary to the legal as well as factual position discussed hereinabove, is perverse and deserves to be quashed and set aside; whereas that passed by learned trial Court in both the suites are upheld.

34. In view of what has been stated hereinabove, both the appeals succeed and the same are accordingly allowed. Consequently, the impugned judgment and decree under challenge in these appeals are quashed and set aside and that of the trial Court in both the civil suites affirmed. The parties are, however, left to bear their own costs.

Both the appeals stand accordingly disposed of.

May 31, 2014 **(Dharam Chand Chaudhary),**
(ss) **Judge**