

**IN THE HIGH COURT AT CALCUTTA**  
**CIVIL REVISIONAL JURISDICTION**  
**APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Ajoy Kumar Mukherjee.**

**C.O. No. 200 of 2019**

***Asgar Ali being dead his legal representatives (LRs) Syed  
Mahmudul Hasan Akbar Zaidi@S.M.H. Akbar Zaidi & Ors.***

**Vs.**

**Mahmuda Begum (dead), her legal representatives Iqbal  
Hossain & Ors.**

For the petitioners: Mr. Syed Nasim Aejaaz,  
Md. Ejaz Akhtar

For the opposite parties: Mr. Sanjay Mukherjee  
Mr. Dhananjay Nayak  
Md. Ghalib Rizwan

**Heard on: 21.12.2021**

**Judgment on: 25.01.2022**

**Ajoy Kumar Mukherjee, J.**

1. Feeling aggrieved and dissatisfied with the order dated 20.11.2018 passed by The Learned Civil Judge (Sr. Divn), 2<sup>nd</sup> Court at Alipore in Title Suit No.87 of 1995, wherein Learned Trial Judge was pleased to reject ,

defendants/petitioners prayer for DNA test to prove, whether plaintiffs have any blood relation with the defendants in the context of plaintiffs claim of co-heirship, the defendants/petitioners preferred this revisional application before this court under Article 227 of the constitution of India, on the grounds inter alia.

- i)** That the Learned Trial Judge erred in law with material irregularity in rejecting the petition of the petitioners when there is a provision to determine the blood relations between plaintiffs and the defendants through test of Deoxyribonucleic Acid (hereinafter called DNA test)
- ii)** The Learned Trial Judge committed an error in holding that the evidence of the plaintiffs is over and at the stage of the trial, when the cross examination of the defendants is completed in part, the application has been filed only two shift the burden in proving that Mahmuda Begum has no relation with Akbar Ali, into the shoulder of the medical test.
- iii)** The Learned Trial Judge failed to appreciate that the plaintiff is trying to mislead the court by concocted and manufactured story and that when the advanced technology for determining the blood relation between plaintiffs and defendants are available, through DNA test, the same should be taken into consideration before deciding the partition suit, where the plaintiffs' claim is based merely on the ground of alleged blood relationship and specially when the plaintiffs have not produced valid evidence in proof of the claim that original plaintiff Mahmuda Begum was the daughter of Akbar Ali.

**2.** Plaintiffs / respondents case in a nutshell is that the subject matter of the said partition suit No. 87 of 95 is the property at premises No. 6/H,

Shamsul Huda Road, P.S. Karya , Kol-700017 and it belonged to one Akbar Ali since deceased, a Sunni Mohammedan. Said Akbar Ali is the common predecessor in interest of plaintiffs and defendants. Said Akbar Ali died intestate on 27.11.1966, leaving behind his widow Jamila Khatoon, original plaintiff Mahmuda Begum (daughter) and original defendant Asgar Ali (son). Said Jamila Khatoon died intestate in 1980 and according to the Mohammedan Succession Law, Asgar Ali ,i.e. original defendant became owner of 2/3<sup>rd</sup> share and Mahmuda Begum , predecessor of present plaintiffs became owner of 1/3<sup>rd</sup> share. Further case of the plaintiff is that said Asgar Ali, since deceased, was in Bangladesh when his father Akbar Ali expired and he returned to India in or about 1972. As Asgar Ali was disturbing enjoyment of the suit property, so original plaintiff Mahmuda Begum claiming herself as daughter of Akbar Ali filled said partition suit in the year 1995. During pendency of the suit Mahmuda Begum, i.e. original plaintiff died on 12.10.2002 and present plaintiffs/opposite parties were substituted in the suit. Original defendant Asgar Ali also died during pendency of suit and present defendants have been substituted. The suit had been long protracted.

**3.** On 01.08.2016 substituted defendants/petitioners filed an application challenging the maintainability of the suit on the ground that partition suit is not maintainable, since there is no relationship between late Akbar Ali and late Jamila Khatoon with the original plaintiff Mahmuda Begum and plaintiffs/opposite parties filed written objection against that maintainability petition on 30.11.2016 and defendants /petitioners also filed rejoinder to the said written objection and Learned Trial Court after hearing both the parties was pleased to reject the said petition for maintainability filed by the defendants on

27.02.2017 on contest. So far plaintiff's knowledge goes, no appeal/application has been preferred and therefore, said order has reached its finality.

**4.** Further case of the plaintiff is that evidence on behalf of the plaintiff has already been completed and while the evidence of defendants was going on, said application for DNA test was filed by the defendants /petitioners. It has also been submitted that during evidence, plaintiffs proved corporation tax receipt which is marked as Exhibit 1, Death Certificate of Akbar Ali to show that said Akbar Ali was Sunni Muslim, which is marked as Exhibit 2 , Death Certificate of Mahmuda Begum to show that she was Muslim under Sunni category, which is marked as exhibit 3, Plaintiffs have also proved marriage certificate (Kabil-nama) of Mahmuda Begum to show that she was the daughter of Akbar Ali which is marked as exhibit 4 and the translation thereof is marked as exhibit 4A. The marriage invitation card of Mahmuda Begum in Urdu Script has been proved by plaintiff and marked as exhibit 5 to show that she was the daughter of Akbar Ali.

**5.** Per contra defendants' contention is that the suit property admittedly belonged to Akbar Ali since deceased. Said Akbar Ali was a Shia Mohammedan and was never predecessor in interest of the present plaintiffs. Ancestors of said Akbar Ali are from Sadat family (a noble family called syed/sayyad). Akbar Ali was born in Najeeb al Tarafyn Sayyad family, which indicates that both of his parents were syed and his father's name was Syed Gholam Ahmed. Akbar Ali died intestate on 27.11.1966 leaving behind his widow Jamila Khatoon and only son Asgar Ali. In the passport of Akbar Ali his father's name has been clearly mentioned as Syed Gholam Ahmed which is a vital document to prove that Akbar Ali belongs to a Syed family.

**6.** Defendants further case is that during the lifetime and even after the death of Akbar Ali, his wife and his son had ration cards in their names in which the name of Akbar Ali appeared as head of family. Said Mahmuda Begum , predecessor of present plaintiffs was not a part of the family, so she had no ration card. Mahmuda Begum did not submit her Ration Card to prove that she was a part of the family of Akbar Ali. She merely relied upon marriage invitation card sent by one Nabi Bux and her marriage certificate, in which the name of Akbar Ali appeared as her guardian and from which she tried to establish that Akbar Ali was her father. Aforesaid Nabi Bux is not known to the petitioners and said Mahmuda Begum was an orphan and Akbar Ali would have attended her marriage as a guardian, which she tried to take advantages of, and stepped into the shoes of Akbar Ali after his death, claiming to be his daughter. It is pertinent to mention that as family of Akbar Ali was Shia Muslim, so he used to obtain permission from the commissioner of police to head the mourning procession in the month of Muharram for Shia Muslim's Matam Procession from his house to different routes in Kolkata and after his death his widow Jamila Khatoon, being a Shia Muslim, also maintained this tradition till her death and Mir Asgar Ali continued it after her death.

**7.** Said Mahmuda Begum mother of the present plaintiff was a Sunni Muslim and was living in the house of Akbar Ali, since his life time, merely as a licensee. As she was orphan, therefore, Akbar Ali extended all sorts of help to her family members and allowed her to stay in the 3 rooms, given to her upon leave and license but to avoid the fear of being evicted, said Mahmuda Begum filed the partition suit claiming to be the daughter of Akbar Ali. Present plaintiffs crafted new story of Kabil-nama and marriage invitation card to show

that Mahmuda Begum was the daughter of Akbar Ali and by way of modification of plaint present plaintiffs tried to rely upon assumptions and presumptions to decide and/or ascertain the blood relation between the plaintiffs and defendants and to adjudicate the partition suit. Since technology has developed and modern tools are available in ascertaining the blood relation through Genetic genealogy by means of DNA test, so Learned Trial Court was erred in rejecting the said prayer made by the defendants/petitioners for the purpose of determination as to whether there was any relationship in between said Mahmuda Begum with the family of the Akbar Ali. Learned Trial Court should have appreciated that the DNA test will set at rest the dispute between plaintiffs and defendants regarding the partition of the suit property and also to confirm or dispel doubts about biological relationship between the plaintiffs and the defendants.

**8.** It has been argued on behalf of the Learned Counsel for the plaintiffs/respondents that from the death certificate marked as exhibit 2 and 3, it appears that both Akbar Ali and Mahmuda Begum were buried in the Gobra burrial ground which is meant for Sunni Muslims. Furthermore Kabil-nama (marriage certificate) and its english translation which are marked as exhibit 4 and 4A, clearly shows that Mahmuda Begum was the daughter of Akbar Ali and that marriage of Mahmuda Begum was solemnized at the house of her father Akbar Ali. Furthermore marriage invitation card and its english translation, marked as exhibit 5 and 5A go to show that marriage of Akbar Ali's daughter Mahmuda Begum was settled with Abdul Wahed, which is in conformity with the marriage certificate marked as exhibit 4 and 4A. It is

further submitted that all these documents go to prove unequivocally that the original plaintiff is the direct descendent of Akbar Ali. It is further submitted on behalf of the plaintiffs /respondents that evidence of PW1 was closed on 18.04.2018 and DW1 tendered his evidence and was cross examined in part on 26.06.2018, when the suit was fixed for further cross examination of DW1 on 18.07.2018 but the defendants/petitioners, instead of facing cross examination, has come out with the application for DNA test in respect of which, the impugned order was passed . It is further submitted that the suit was filed by Mahmuda Begum in 1995 and during the lifetime of original plaintiff and original defendant this application did not see the light of day, even the maintainability petition was filed by the defendants /petitioners in 2016, i.e. after the death of original defendant Akbar Ali, though said petition was rejected by the court. It is further submitted that it is a dilatory tactics and the defendants are avoiding the conclusion of the trial of the partition suit which was filed, way back in 1995.

**9.** It is further argued on behalf of the plaintiffs/respondents, that DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA test in such matters, can also be answered considering the test of proportionality laid down in the unanimous decision of the court in **K.S. Puttaswamy vs. Union Of India** wherein the right to privacy has been declared a constitutionally protected right in India. Any Court therefore, should examine the proportionality of the legitimate aims being persuaded i.e. where the same are not arbitrary or discriminatory, whether they may have an adverse impact on

the person and that they justify the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA test.

**10.** On the contrary Learned Counsel for the defendants/petitioners argued that after the death of aforesaid Mahmuda Begum and Asgar Ali, present plaintiffs filed revised plaint and manufactured new story, as new cause of action through alleged Kabil-nama and marriage invitation card. Normal blood relation cannot be established upon assumption and presumption to decide and/or to ascertain the blood relation if any between plaintiffs and defendants. Since technology has developed and modern tools are available, in ascertaining blood relation about the direct maternal and paternal line, so the close matches with individuals can only give indication about common ancestors. The defendants/appellants denied all other material allegations including the allegation that Asgar Ali had gone to East Pakistan to embrace Shia Sect or that Akbar Ali was a Sunni Muslim. According to the defendants, the DNA test will set at rest the dispute between plaintiff and defendants, that had arisen in the partition suit and truth can be easily unveiled through comparison of the Genetic Code of the parties through DNA test to establish relationship in between plaintiffs and defendants. Learned Trial Court committed error in rejecting the prayer of an order of DNA test on the pretext that such prayer has been made by the petitioners to shift the burden of proof of blood relation upon the shoulder of the medical test. Learned Counsel for defendants/appellants in support of their contention relied upon a judgment of Delhi High Court reported in **AIR 2012 Delhi 162** and an unreported judgment of Punjab and Haryana High Court passed in **CR No. 1333 of 2013 (Sube Singh vs. Smt. Shanti Devi and others)**.

**11.** Admitted position of the present case in that Akbar Ali was original owner of the suit property. It also appears from the submission made by Learned Counsel for the plaintiffs/respondents, that no suit for eviction has been filed by the defendants as yet, though they have described plaintiffs as licensee in respect of the suit property. It is also apparent that the petition for maintainability of the suit as well as the present petition for DNA test to determine whether Mahmuda Begum was the daughter of Akbar Ali or not, has been filed long after the death of original plaintiff Mahmuda Begum and also after the death of original defendant Asgar Ali.

**12.** The Hon'ble Apex Court in the judgment reported in **1993 (3) SCC 418 (Goutam Kundu vs. State of West Bengal and another)** formulated the guidelines for ordering DNA test. In the said judgment it has been held that the blood test cannot be ordered as a matter of course, it cannot be ordered to have roving inquiry. The husband must establish strong prima facie case and he did not have access to the wife to dispel the presumption arising u/s 112 of evidence Act. It has also been held that the court must carefully examine whether consequence of ordering blood test will have the effect of branding a child as a bastard and the mother as an unchaste woman. The Hon'ble Apex Court has also held that no one can be compelled to give sample of blood for analysis.

**13.** From the aforesaid decision of the Hon'ble Apex Court it is clear that in such cases the court can order blood test only when strong and prima facie case has been made out. In the present case admittedly original plaintiff Mahmuda Begum filed the suit in the year 1995 and she died on 12.10.2002 and it is also admitted position that Asgar Ali (that is original defendant) died

on 23.05.2012. Only after the death of said original plaintiff Mahmuda Begum and said original defendant Asgar Ali, present defendants have come up for the first time with the application for maintainability which was rejected by the court. Subsequently the present application for DNA test with almost same contention has been filed by the present defendants. I am not unmindful to the fact that in the written statement filed by original defendant Asgar Ali, the relationship of plaintiffs with that of Akbar Ali has been denied in the context that defendants and their predecessors belong to Shia Sect while plaintiff belongs to Sunni Sect but the question is whether said defence sufficiently makes out prima facie case in favour of defendants to get an order for DNA test or not.

**14.** On the basis of allegations made in paragraph 5 to paragraph 8 of written statement there is hardly any scope to say that defendants have made out strong and prima facie case, for which DNA test can be ordered, rather the consequence of which might have the effect of branding plaintiff's deceased mother as an unchaste women. In the written statement or in the defence allegation, beside branding plaintiffs predecessor Mahmuda Begum as licensee and forcible occupier of the suit property , (for which no eviction suit appears to have been filed), and that defendant belongs to Shia Sect, whereas plaintiff belongs to Sunni Sect, the defendants have not made out any prima facie case in support of their contention that Mahmuda Begum cannot be the daughter of Akbar Ali. A mere allegation that Mahmuda Begum was not the daughter of Akbar Ali and that Mahmuda Begum belonged to Sunni sect and Akbar Ali belonged to Shia Sect, cannot be described as strong prima facie case for which

the DNA test can be ordered in compliance with the direction made by the Hon'ble Apex Court in **Goutam Kundu's** case. So far, no document has been filed by the defendants/petitioners in order to draw an inference that the original plaintiff was not the daughter of Akbar Ali and on the contrary documents filed by the plaintiffs and marked as exhibit, prima facie is in favour of plaintiff.

**15.** In a very recent judgment in **Ashok Kumar Vs. Raj Gupta & others (2021 SCC online SC 848)** the appellant Ashok Kumar filed C.S. No. 53 of 2013 seeking declaration of ownership of property left behind by late Trilak Chandra Gupta and late Sona Devi. He arrayed the couple's three daughters as defendants in the suit and claimed himself to be the son of Trilak Chandra Gupta and Sona Devi. In their written statement, the defendants denied that the plaintiff is the son of their parents and as such he is disentitled from any share in their parental property. In course of the proceedings before the Learned Additional Civil Judge (Sr.Divn), Kalka, on closure of the plaintiffs evidence, when the suit was slated for the other side's evidence, the defendants filed an application on 19.04.2017, seeking direction from the court to conduct a DNA test of the plaintiff and either of the defendants to establish a biological link of the plaintiff to the defendants' parents. This application was opposed by the plaintiff with the projection that the defendants' application is an abuse of the process of law and that there are adequate evidences placed before the court by the plaintiff to show that he is the son of Trilak and Sona Devi.

**16.** In the said case Learned Trial Court opined that onus is on the plaintiff to prove that he is a coparcener amongst the defendants by way of his birth in

their family and such burden does not shift to the defendants. Since the plaintiff had refused to give the DNA sample, the view taken was that the court cannot force the plaintiff to provide DNA sample and accordingly the defendants' application was dismissed by the Trial Judge on 28.11.2017. Being aggrieved, the defendants moved the High Court by filing a Revision Petition and after hearing the parties, High Court observed that a DNA test is a double-edged weapon and is a vital test to determine the relation of a party and the plaintiff who is claiming to be the son of Late Trilak and Sona Devi, should not shy away from the DNA test suggested by the defendants. The plea for conducting the DNA test on the plaintiff was accordingly allowed by interfering with the contrary view taken by the Trial Court. Feeling aggrieved plaintiff moved before Hon'ble Apex Court and the Hon'ble Apex Court was pleased to observe as follows:

*“14. It was also the view of the Court that normal rule of evidence is that the burden is on the party that asserts the positive. But in instances where that is challenged, the burden is shifted to the party, that pleads the negative. Keeping in mind the issue of burden of proof, it would be safe to conclude that in a case like the present, the court's decision should be rendered only after balancing the interests of the parties, i.e., the quest for truth, and the social and cultural implications involved therein. The possibility of stigmatizing a person as a bastard, the ignominy that attaches to an adult who, in the mature years of his life is shown to be not the biological son of his parents may not only be a heavy cross to bear but would also intrude upon his right of privacy.*

*15. DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court in K.S. Puttaswamy v. Union of India, wherein the right to privacy has been declared a constitutionally protected right in India. The court should therefore examine the proportionality of the legitimate aims being pursued, i.e. whether the same are not arbitrary or discriminatory, whether they may have an adverse impact on the person and that they justify the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA Test. It cannot be*

overlooked that in the present case, the application to subject the plaintiff to a DNA Test is in a declaratory suit and the plaintiff has already adduced evidence and is not interested to produce additional evidence (DNA), to prove his case. It is now the turn of the defendants to adduce their evidence. At this stage, they are asking for subjecting the plaintiff to a DNA test. Questioning the timing of the application the trial Court dismissed the defendants application and we feel that it was the correct order.

16. In the yet to be decided suit, the plaintiff has led evidence through sworn affidavits of the Respondents, his school Leaving Certificates and his Domicile Certificate. Significantly, the respondent No.1, who is one of the 3 siblings (defendants) had declared in her affidavit that the plaintiff was raised as a son by her parents. Therefore, the nature of further evidence to be adduced by the plaintiff (by providing DNA sample), need not be ordered by the Court at the instance of the other side. In such kind of litigation where the interest will have to be balanced and the test of eminent need is not satisfied our considered opinion is that the protection of the right to privacy of the plaintiff should get precedence.

17. Having answered these questions, additional issue to be resolved is whether refusal to undergo DNA Testing amounts to 'other evidence' or in other words, can an adverse inference be drawn in such situation. In *Sharda v. Dharmpal* a three judges bench in the opinion written by justice S.B. Sinha rightly observed in paragraph 79 that "if despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference" can be made out against the person within the ambit of Section 114 of the Evidence Act. The plaintiff here has adduced his documentary evidence and is disinclined to produce further evidence. He is conscious of the adverse consequences of his refusal but is standing firm in refusing to undergo the DNA Test. His suit eventually will be decided on the nature and quality of the evidence adduced. The issue of drawing adverse inference may also arise based on the refusal. The Court is to weigh both side's evidence with all attendant circumstances and then reach a verdict in the Suit and this is not the kind of case where a DNA test of the plaintiff is without exception.

18. The respondent cannot compel the plaintiff to adduce further evidence in support of the defendants' case. In any case, it is the burden on a litigating party to prove his case adducing evidence in support of his plea and the court should not compel the party to prove his case in the manner, suggested by the contesting party." **(emphasis added)**

**17.** In the present case, I am of the view that the petitioners could not make out strong prima facie case warranting DNA test and mere defence taken in the written statement that Mahmuda Begum was a mere licensee and as she was orphan, so Akbar Ali and Asgar Ali had given her shelter in the suit property

upon humanitarian ground or the plea taken that Akbar Ali and Jamila Khatoon belonged to Shia Sect of the Mohammedan Law , whereas Mahmuda Begum belonged to Sunni Sect, can by no stretch of imagination, take the place of strong prima facie case. Accordingly, Learned Trial Judge has properly appreciated the facts of the case and the law in this aspect and was justified in dismissing the application. There is no material irregularity or illegality in the impugned order, warranting interference by this court.

**18.** Learned Counsel for defendants /petitioners submission that since the technology has developed and modern tools are available to be helpful in ascertaining the blood relation through genetic genealogy to infer genetic relationship between individuals, and DNA test can only set at rest , the dispute between plaintiff and defendants, regarding partition of the suit property, does not inspire much confidence because DNA test report is not infallible in nature, and it also finds support in another Apex Court judgment reported in **2019 (4) SCC 771 (Pattu Rajan vs. State of Tamilnadu)**. In paragraph 52 of said judgment, it was observed by the Hon'ble Apex Court:-

*“52. Like all other opinion evidence , the probative value accorded to DNA evidence also varies from case to case, depending on the facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day , thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.”*

**19.** In this context it is also worthy to be mentioned that the present suit was filed in the year 1995 and about 27 years have already been passed but the suit remains undisposed of by the court of lowest grade . The test in respect of which the present parties are fighting had been filed long after filing of the suit. Accordingly it would not be out of context to refer paragraph 16 of the judgment passed by the Hon'ble Apex Court in **Civil Appeal No. 2795-2796 of 2011 (K.K. Velusamy Vs N. Palaanisamy):-**

*“16. we may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering persecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.”*

**20.** In view of aforesaid discussion I hold that learned Trial Judge properly appreciated the facts and circumstances of the case and the law on this aspect and was quite justified in dismissing the application. There is no material irregularity or illegality in the impugned order, warranting interference by this court. The civil revision petition is hereby dismissed confirming the order of Learned Trial Judge. Since the suit is pending from

1995 and I am informed that the evidence of defendants is in progress, so the Learned Trial Court is requested to dispose of the suit within six months from the date of receipt of the order, without granting any unnecessary adjournment to any of the parties, keeping in mind the direction made by the Hon'ble Apex Court as quoted above in **K.K. Velusamy's Case.**

**21.** C.O. No. 200/2019 is dismissed.

There will be no order as to costs .

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

**(AJOY KUMAR MUKHERJEE, J.)**