(2008) 03 RAJ CK 0073

In the Rajasthan High Court

Tas Ram and Others — APPELLANT

Vs

B.O.R. and Others — RESPONDENT

Date of Decision : 27-03-2008

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (2008) 03 RAJ CK 0073

Hon'ble Judges : N.P. Gupta, J;Deo Narayan Thanvi, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.P. Gupta, J.—This appeal is by the defendant writ petitioner appellant, who has lost in all the courts, starting from the Court of learned S.D.O., uptill the learned Single Judge.

2. The necessary facts are, that the plaintiff Thana Ram, whose legal representatives are the private respondents, and who shall hereafter be referred to as the plaintiff, filed the suit in the Court of S.D.O., Churu, in the year 1969, alleging interalia, that in village Mathori Tehsil Churu there is land bearing Khasra No. 143 measuring 134 bigha 18 biswa, in the Khatedari of the plaintiff, according to the settlement of Samvat year 2002. In the subsequent settlement of the year 1968 Khasra numbers were changed to Khasra No. 287, 288, 295, 337, 338 and 339. It was pleaded that the plaintiff is continuing in possession of the land, having been taken from Jagirdar Nathu Singh. It is alleged that notwithstanding this, Nathu Singh took possession of the land, and instructed, that the revenue of the land be paid to the defendant Kishna Ram instead of Nathu Singh. Then, it is alleged that taking advantage of the simplicity, and illiteracy of the plaintiff, defendant got entered certain portion of the land in the Girdawari, in his name, and on coming across the papers of the settlement of the year 1968, the plaintiff learnt about it that he has wrongly got sanctioned mutation from the Gram Panchayat on 24.3.1960, with respect to 90 bigha 8 biswas portion of land, in collusion with Patwari Halka and Sarpanch, purportedly

u/s 19 of the Rajasthan Tenancy Act, while Panchayat has no right to sanction such mutation, nor any notice of it was given to the plaintiff. It was alleged, that this mutation came to his notice on 13.11.68. Then, he applied for certified copy of Girdawari, then he obtained copies from Settlement Department. It was alleged that the defendant denied the title of the plaintiff. It was alleged that in Samvat Year 2022 the plaintiff had kept the land fellow for grazing the cattle. Then, in the year 2023, eastern 20 bighas portion of land was trespassed by the defendant, and then the defendant declined to deliver back the possession. Thus, the suit was filed for declaration of plaintiff''s Khatedari rights, and for possession of 20 bighas of land from the defendant.

3. The defendant contested the suit, contending interalia, that out of 130 bigha 18 biswa of land 90 bigha 8 biswa of land is in the Khatedari of the defendant, and not the plaintiff, which bears Khasra No. 190/143, and that the defendant is cultivating the land. It was pleaded that during the past settlement, and present settlement when the plaintiff did not cultivate the land, he cannot be treated to be Khatedar in the eye of law, nor is he Khatedar. It was pleaded that the defendant has always paid the land revenue, and is in cultivatory possession continuously since Samvat year 1999, which is duly entered in the revenue records, being Girdwari, Fard Khata, and Misal Bandobast etc. The mutation was contended to be validly sanctioned, and that, long silence of the plaintiff is indicative of the fact, that the plaintiff is out and out to harass the defendant, at the instance of some other person, and is raising false dispute. It is unbelievable that the name of the defendant was wrongly entered in the Girdawari in Samvat year 2000, and 2009 onwards, which did not come to the knowledge of the plaintiff. It was denied that in Samvat year 2022, 100 bighas of land was kept fellow, rather the plaintiff was never in possession, in Samvat year 2022 it was famine year. It was pleaded that the defendant had cleared the field, but since it did not rain, sowing was not undertaken. Then, it was declared as famine year. It was maintained that since Samvat year 1999 the defendant is continuously cultivating the land himself, and cannot be said to be a trespasser. Then, plea of limitation was also raised. It was pleaded that the plaintiff is of quarrelsome nature, and is projecting threat of litigation, involving the defendant''s land at the instigation of others. It was pleaded that the defendant had taken the land from Jagirdar in Samvat 1999 for cultivation, and since then he is continuously cultivating, and paying the land revenue. It was then pleaded that in the present settlement, the plaintiff, in collusion with the settlement authorities, taking advantage of the absence of the defendant, tried to have his name recorded, which attempt was foiled up. Thus, it was prayed that the suit be dismissed.

4. The learned trial court framed seven issues. Issue No. 1 was as to whether the plaintiff is Khatedar of the land in question measuring 134 bigha 18 biswa bearing Khasra No. 143, then issue No. 2 was about mutation dt. 24.3.60 having been sanctioned by the Panchayat being without jurisdiction, then issue No. 3 was about the defendant being trespasser over 20 bighas of land and being liable to be evicted, and issue No. 4 was about limitation. While issue No. 5

comprehended the requirement of notice u/s 80 C.P.C. to the defendant No. 2. Then, issue No. 7 was as to whether the plaintiff is entitled to permanent injunction against the defendant, and issue No. 6 was about relief.

5. The learned trial court decided all the issues in favour of the plaintiff, and vide judgment dt. 25.5.79 decreed the plaintiff''s suit for injunction, and despite deciding issue No. 3 in favour of the plaintiff, and against the defendant, did not expressly pass decree for possession in favour of the plaintiff. Be that as it may.

6. At this place we may observe, that facts narrated above, have been collected by us from the judgment of learned trial court, certified copy whereof has been produced by the appellant in Writ Petition, as Ex.1.

7. Aggrieved of this judgment and decree, the defendant filed appeal before the learned Revenue Appellate Authority, and the learned Revenue Appellate Authority discussed the entire material available on record, oral as well as documentary, thread bare, and as appears from the judgment, that before the learned Revenue Appellate Authority, the plaintiff filed an application under Order 41 Rule 27 C.P.C., and as appears from other documents available in the file of writ petition, that that application was allowed by a separate order, against which order the defendant had filed a revision before the learned Board of Revenue, which revision was decided by the learned Member, late Shri O.P. Jain (as he then was) vide order Annexure R 5/1, passed in March, 1987. The learned Revenue Appellate Authority after appreciating the entire evidence on record, oral as well as documentary, found, that it is the plaintiff who is Khatedar of the land, and that the defendant had manipulated the record, in collusion with the Patwari, and got himself shown to be in possession in Samvat 2011, while as a matter of fact, he was never in possession. It was also found, that the amendment in Rajasthan Tenancy Act, introducing Section 19(1-A) was made in the year 1961, while the mutation has been sanctioned by the Gram Panchayat on 24.3.1960, at which time that provision did not exist, and the requirement was of compliance of Sub-section (2), with the result, that the Gram Panchayat had no power to sanction the mutation u/s 19. After these findings, in addition, the learned Revenue Appellate Authority also took into consideration the documents produced by the plaintiff under Order 41 Rule 27, which showed, that the defendant was otherwise holding sizeable amount of land, with the result, that in view of the provisions of Tenancy Act, the defendant could not acquire Khatedari rights u/s 19, with respect to land in question. Interalia with these findings, the learned Revenue Appellate Authority dismissed the appeal, and at the same time expressly passed the decree for dispossession of the defendant from 20 bighas of land as well, vide judgment dt. 7.3.1983.

8. Aggrieved of this the defendant filed second appeal before the learned Revenue Board, contending interalia, that the mutation sanctioned by the Gram Panchayat was valid, that without any cross appeal or cross objection, the learned Revenue Appellate Authority could not pass the decree for dispossession of the plaintiff from 20 bighas of land, that the Revenue Appellate Authority was

in error in allowing the application under Order 41 Rule 27, for the reasons; firstly that requirement of Order 41 Rule 27 did not exist, secondly that the documents were sought to be produced to show certain factual situation with respect to which no foundation was laid in the pleading i.e. that the defendant could not get Khatedari right in view of his having substantial amount of land, thirdly that in any case mere production of documents under Order 41 Rule 27 did not prove them, and without there being any proof they could not be considered by the learned Revenue Appellate Authority, and fourthly that in any case even if the application were to be allowed, the defendant was required to be given opportunity to rebut that evidence, and that having not been given the documents could not be taken on record. The other ground taken before the learned Board of Revenue was that the plaintiff was not in possession of any portion of the land, and notwithstanding that mere decree for injunction was passed, which could not be passed.

9. This appeal was heard by the Division Bench comprising of Shri H.C. Pande, and Shri I.C. Srivastava, Members, who differed in their opinion, inasmuch as Shri H.C. Pande was of the view, that the judgments are required to be set aside, and the suit is required to be dismissed, while Shri Srivastava was of the view, that the judgments do not require any interference, and the appeal is required to be dismissed. These judgments have been produced as Ex. 5/1 and Ex. 5/2. It may be observed at this place, that we are not in a position to find, as to on what date Ex. 5/1 and 5/2 were rendered by the learned Members, as there is no date available on all the judgments, and even in the writ petition, the petitioner has not chosen to disclose its date. Be that as it may. In view of the difference of opinion between the two learned Members, the matter was referred to the third Member, being late Shri O.P. Jain (as he then was), who by an independent judgment dt. 26.8.87, concurred with the learned Member Shri I.C. Srivastava, and the appeal was dismissed. At the cost of repetition, at this stage I may recall, that revision filed by the defendant, against the order of the learned Revenue Appellate Authority, accepting the application under Order 41 Rule 27, was also decided by the same learned Member Shri O.P. Jain in close proximity of time of passing the judgment dt. 26.8.87, vide Annexure R/5, and the revision was disposed of, by observing, that the defendant has also filed an application before the learned Board of Revenue for producing certain documents, obviously by way of rebuttal, about it having bearing on the aspect of maximum land held by the defendant, and there is no harm in taking those documents on record.

10. In the judgment dt. 26.8.87, after quoting the finding of the learned Revenue Appellate Authority in extenso, at page 7 and 8, being finding of fact, he agreed with those findings, and dissented with the finding recorded by Shri H.C. Pande. He has also found, that the Revenue Appellate Authority had given weighty reasons for coming to the conclusion, that the attestation of mutation made in favour of the defendant was against the provisions of law, and that the defendant has failed to prove that he was sub tenant. It was found, that it was not the defendant''s case, that he was sub tenant of the plaintiff, rather claimed to have

taken the land from Jagirdar in the year 1999, which he failed to prove. Then, regarding documents taken on record by the Revenue Appellate Authority, under Order 41 Rule 27, it was considered, that firstly the defendant did not object to the application, secondly that the defendant has also produced the documents before the learned Board of Revenue, and they are read in evidence, therefore, requirement of recording reasons by the Revenue Appellate Authority was not taken to be a ground to exclude the documents from consideration. That apart, a categoric finding was recorded, that from perusal of the judgment of Revenue Appellate Authority, it was clear, that it was one of the reasons given in para-17, that the attestation was wrongly recorded in favour of the defendant, while the learned Member found, that he has already come to the conclusion, that Khasra Girdawari entries in favour of the defendant is neither reliable nor is sufficient, to confer Khatedari rights on defendant, or that the defendant was sub tenant, and therefore, cannot acquire Khatedari rights u/s 19 of the Act. It was also held in para-24 as under:

It is, therefore, not necessary for me to examine the extent of the land with the defendant on the date on which the mutation was attested. Reasons given by me in paras 19, 20, and 21 of this judgment are sufficient to hold that the defendant did not get khatedari rights over 90.8 bighas and mutation was wrongly attested by the Gram Panchayat on 24.3.60.

11. Then, it was found, that it is established that the plaintiff was in possession of the entire land except 20 bighas, and therefore, he was rightly entitled to get decree for permanent injunction in respect thereof, and decree for possession for 20 bighas.

12. Assailing these judgments, the appellant filed writ petition before this Court, which has been dismissed by the impugned order dt. 4.7.1996. The learned Single Judge has found, that the decree for possession of 20 bighas of land was rightly passed by the Revenue Appellate Authority, in view of Order 41 Rule 33. Then, while dealing with the contention about allowing application under Order 41 Rule 27, it was found, that the appellant was allowed additional evidence in second appeal, and the learned Board of Revenue has found it to be just and proper, and it could not be interfered with in writ jurisdiction. Thus, this objection was also rejected. Then, the counsel for the petitioner tried to persuade the Court to appreciate the evidence, which was not found to be permissible in writ jurisdiction. Then, the contention was raised that the matter could not be referred to third member, in view of the provisions of Section 98, which was also rejected on the ground, that there is no prohibition against such reference being made, in the event of difference of opinion. Then, a contention was raised, that u/s 15 of the Land Revenue Act, the defendant acquired the right as Khatedar, and therefore, even if he was not found to be sub tenant, then as Khatedar tenant also, the decree should have been passed in his favour, and not against him, but this point was not allowed to be raised, as it was not raised before the learned courts below. Thus, the writ petition was dismissed.

13. Assailing the impugned judgments and arguing the appeal, learned Counsel submitted, firstly, that the provisions of Order 41 Rule 27 are not available to be invoked for filling up lacunae, secondly that learned Revenue Appellate Authority did not pass any express order on the application under Order 41 Rule 27, nor were those documents proved, nor the appellant was given opportunity to rebut them, still those documents have been taken on record, and considered, which is bad. It was then submitted, that it is established law, that no evidence can be led with respect to a fact which is not pleaded, and since it was never the pleading of the plaintiff, that the defendant could not get Khatedari rights on account of his already having excess land, while the documents under Order 41 Rule 27 were produced to prove this fact only, and therefore, also those documents could not be looked into. The next submission made was, that since the learned trial court did not pass decree for possession of 20 bighas of land, and no appeal was filed by the plaintiff, whether by way of cross appeal, or cross objection, the Revenue Appellate Authority had no jurisdiction to pass the decree for possession of 20 bighas of land, as the provisions of the Order 41 Rule 33 are not permissible to be invoked in this regard. For that purpose learned Counsel relied upon the judgment of Hon''ble the Supreme Court in Banarsi and Others Vs. Ram Phal, and P. Vijaya (Smt) and Another Vs. M. Santhanaraj, . Then, it was submitted, that the learned trial court did not look into the documentary evidence produced by the defendant, whereas it was the duty of the learned trial court to see those documents, and has passed the decree in a wholly casual manner, which if looked into clearly disentitled the plaintiff to any decree, as there is a presumption of correctness of the entries in revenue records, and therefore, also the impugned judgments and decrees are liable to be set aside.

14. Then, relying upon two Division Bench judgments of this Court, in Balveer Singh v. Board of Revenue reported in 1988(2) WLN 256 , and State of Rajsthan and Others Vs. Prem Shankar and Others, it was contended, that the defendant did get Khatedari rights u/s 19, and the mutation was rightly sanctioned. Reliance was also placed on another judgment of judgment of Hon''ble the Supreme Court, in Dilbagrai Punjabi Vs. Sharad Chandra, to contend, that on failure of courts below to consider important and relevant evidence, the matter was required to be remanded.

15. On the other hand, learned Counsel for the plaintiff respondent relied upon judgment of this Court, in Alladin v. Board of Revenue reported in RRT 2002(1)-129, to contend, that in view of the provisions of Section 209 of the Rajasthan Tenancy Act, even in absence of pleading, appropriate relief was required to be granted by the Court. He also relied upon the judgment of Hon''ble the Supreme Court, in Koksingh Vs. Smt. Deokabai, , to support the exercise of power by the Revenue Appellate Authority under Order 41 Rule 33 C.P.C., despite failure of the plaintiff to appeal against trial court?s denial to grant that relief, and supported the impugned judgments.

16. We have considered the submissions, and have gone through the various

judgments cited at the Bar, and have also gone through the material on record.

17. In the first instance, we may deal with the voluminous contentions revolving around the order passed by the learned Revenue Appellate Authority under Order 41 Rule 27 C.P.C. A look at the order of the learned Revenue Appellate Authority shows, that by that application the plaintiff sought to produce certain documents, showing the defendant to be holding sizeable amount of other land, whether in his own name, and in the name of his family members, and in that regard revenue records were produced. The object of producing those documents was to show, that in view of the defendant holding that much of land, he was not entitled to get Khatedari rights u/s 19 of the Act, even if he was fulfilling the other requirements in that regard. As noticed above, the application had been allowed by the learned R.A.A., a revision against that order was filed by the appellant, which was disposed vide order Annexure R 5/1, at a point of time, in a close proximity with passing the order Annexure-6, and by the same learned Member, who passed the order Annuxure-6, and that the defendant appellant was allowed the opportunity by the learned Board of Revenue, to rebut the documents produced by the plaintiff, by taking on record the documents produced by the defendant, before Board of Revenue. All this is cumulatively one aspect of the matter. But then the other more important aspect of the matter is, that all said and done, it cannot be disputed, that this was never the case of the plaintiff, at any stage during trial, that the defendant is having or was holding particular amount of land, which rendered him disentitled to acquire Khatedari rights u/s 19, even if other conditions are fulfilled. The question about the extent of land, held by the defendant cannot be disputed, to be a pure question of fact, which obviously, was required to be pleaded, and proved, and application under Order 41 Rule 27 cannot be allowed to produce evidence, with respect to a new fact which never formed part of the pleadings, at any stage whatever. Therefore, in our view, the learned courts below were in error in allowing the application under Order 41 Rule 27 C.P.C., and therefore, we dismiss the same, and exclude the documents produced by the plaintiff, so also the documents produced by the defendant, by way of rebuttal, before the learned Board of Revenue, from consideration, and hold, that for deciding the question, or the rights of the parties, involved in the suit, the aspect of the extent of land, held by the defendant, is not required to be considered.

18. Then, the question being the primary question, crops up is, as to whether the plaintiff is Khatedar of the land in question, or the defendant acquires the Khatedari rights u/s 19(1), and as to what is the effect of the mutation.

19. So far as the mutation is concerned, it is no more disputable proposition, that the mutation is only a fiscal entry, to determine, as to who shall be liable to pay the land revenue, and does not decide the title and/or Khatedari rights of the person concerned. It is a different story, that as is clear from judgment of this Court, in Balveer Singh''s case, that Section 19(1A) was introduced in 1961, on 5.4.61 to be precise, and the provisions of Section 19 were substituted by

Amendment Act No. 7 of 1959 which came into force w.e.f. 5.4.1959. Sub-section (1) thereof categorised the persons holding the land as subtenant in two categories, being Clause (a) to deal with the category of persons whose names were entered in the annual registers which were then current, and Clause (b) to deal with the persons whose names were not so entered, and provided that the person falling in the first category acquired the Khatedari rights automatically without any step being taken by them, while the persons of second category were required to make application under Sub-section (2) within a period of two years, which period of two years was to expired on 5.4.61, and precisely from that date the provisions of Sub-section (1A) were introduced, which were interpreted by the Division Bench of this Court in Balveer Singh''s case, to be having the effect of doing away the requirement of taking steps under Sub-section (2). Obviously, therefore, as on the date of attestation of mutation by Gram Panchayat, being 24.3.1960, the provisions of Sub-section (1A) were not on the statute book, and mutation was not sanctioned by the Gram Panchayat treating the defendant to be falling with the category (a) of Section 19(1). Obviously, therefore, as on that date, in order to acquire Khatedari rights the defendant was required to take steps as provided by Section 19(2) which admittedly not having been taken, and as on the date the Gram Panchayat attested the mutation, it could not be conceded any jurisdiction to confer any Khatedari rights on the defendant by attesting mutation on 24.3.1960. This is one aspect of the matter. Reiterating the finding recorded above, that attestation of mutation does not confer any right, in view of the above, the precise question required to be gone into, in the suit was, as to whether the plaintiff is the Khatedar, or the defendant has acquired Khatedari right, even by virtue of Section 19(1A) because as on the date of filing of the suit that provision had come into existence, and the requirement of taking steps u/s 19(2) was not required to be adhered to. For deciding this question in favour of the defendant, the precise thing required to be found is, that as on the date of commencement of Rajasthan Tenancy Act, i.e. 15.10.1955, the defendant was sub tenant of the land in question. Admittedly the land belonged to Jagirdar, as the plaintiff claims to have taken land from Jagirdar Nathu Singh, while the defendant also claims to have taken the land from the Jagirdar. It is not the case of the defendant, that he was entered in the annual register as then current (as on 15.10.55) as a tenant of Khudkasht or sub-tenant, rather his case (is that he was a tenant of Khudkasht, but then, there is no reliable evidence on record, about his being tenant of Khudkasht, and it is not his pleading, at any stage, that he was a sub tenant of the plaintiff, as on the date of the commencement of the Rajasthan Tenancy Act. So far revenue records are concerned, of course, presumption of correctness attaches, but that is not a conclusive presumption, and is very much rebuttable. That being the position, the precise question, as to whether that presumption is rebutted satisfactorily, becomes a pure question of fact. Of course from a reading of the judgment of learned S.D.O. it does transpire, that the learned S.D.O. has not taken trouble to read the evidence of the parties, oral as well as documentary, much less to scan and/or marshal it, to arrive at a conclusion about inherent weakness, or inherent strength in the evidence, vis-?-vis the other party''s evidence, and it is also true, that it is the duty of the court to examine and consider the evidence, for arriving at an appropriate conclusion, but then, as the things are, that the learned Revenue Appellate Authority, obviously in view of the language of Order 41 Rule 24, has examined the entire material on record threadbare, the various revenue entries produced by the parties, the oral evidence led on the side of the plaintiff, as well as the defendant, the weaknesses steering on the face of it in the evidence of the parties, and has come to a positive conclusion, to the effect, that the revenue entries produced by the defendant are clearly manipulated ones in collusion with the Patwari, taking all steps to ensure, that the plaintiff is kept aback. Detailed reasons running into two long pages have been given by the learned Revenue Appellate Authority, and those reasons have been quoted in extenso in the judgment of the learned Board of Revenue Annexure-6. The learned R.A.A. has also referred to certain admissions made by the Patwari against the defendant, and about the plaintiff being recorded Khatedar. In our view, those are findings which were precisely required to be recorded by the learned S.D.O., and have rightly been recorded by the learned Revenue Appellate Authority. Then, the learned Revenue Appellate Authority was the final court of fact, and those findings of fact could obviously not be interfered with by the learned Board of Revenue, and have therefore, been rightly affirmed. In view of those findings, in our view, it cannot be said, that the defendant acquired any Khatedari rights over any portion of the land in question, by operation of any of the provisions of Section 19 of the Rajasthan Tenancy Act. At this place we make it clear, that as found by the learned Board of Revenue, and as appears from the judgment of the learned Revenue Appellate Authority, that findings on this aspect have been recorded, independently of the evidence taken on record under Order 41 Rule 27. The evidence under Order 41 Rule 27 was considered as an additional ground, which of course have been excluded by us above, but then, these findings recorded about the revenue entries being manipulated by the Patwari, in collusion with the defendant, and the presumption about entries having been sufficiently rebutted, and about defendant having not acquired any Khatedari rights, are independent findings, and thus, are not in any manner effected by our conclusions about the application under Order 41 Rule 27. Thus, the issue No. 1 stands rightly decided in favour of the plaintiff.

20. In view of the above, many of the judgments cited by the learned Counsel for the appellant need not detain us.

21. Then, the only question survives is, that on the anvil of provisions of Order 41 Rule 33 C.P.C., being passing of the decree for possession by the learned R.A.A., without any cross appeal, or cross-objection, in which regard learned Counsel for the appellants relied upon the judgment of Hon''ble the Supreme Court in P. Vijaya''s case, while the learned Counsel for the respondent has relied upon Kok Singh''s case.

22. So far as the judgment relied upon in Alladin''s case is concerned, that judgment is entirely on different facts, as that judgment proceeds on the principles of Order 7 Rule 7, regarding subsequent events, taking place during pendency of the litigation, and for appropriately moulding the relief on that basis, provisions of Section 209 Tenancy Act have been relied upon. So far as P. Vijaya''s case is concerned, that was a case, where the daughter and son in law raised construction over the father''s property. The father then transferred property, and the transferee filed the suit for injunction, wherein at the belated stage a plea was sought to be raised, about promissory estoppel, and that was not allowed. The Appellate Court however, had granted decree to the effect that the daughter would be entitled to take away the construction, or may be compensated for the construction, if the plaintiff wants to retain it. That part was sought to be challenged by the plaintiff before Hon''ble the Supreme Court, invoking provisions of Order 41 Rule 33, and Hon''ble the Supreme Court held "on the facts and circumstances of the case, we do not find it a fit case to entertain that plea". In our view, this clearly means, that Hon''ble Supreme Court did not purport to lay down, that provisions of Order 41 Rule 33 was not at all applicable, rather it was on facts and circumstances, that it was not found fit case to entertain the plea. As against which, in Kok Singh''s case, it was held, that under Order 41 Rule 33 the High Court was competent to pass a decree for enforcement of charge in favour of the respondent, notwithstanding the fact, that the respondent did not file appeal against trial court''s denial of that relief. In that case the facts were, that one "D" had executed a sale deed on 30.12.1950, in respect of the property in favour of "K", no part of consideration was paid at the time of execution of sale deed, and "K" promised to pay the amount in May, 1951 and covenanted, that in case of non payment, the amount due would be charged upon the property sold. After the execution of the sale deed "K" was put into possession of the property, and he paid Rs. 3100/- in three installments. "D" died in 1955 leaving his widow, the respondent, and son, who subsequently died leaving widow "M". This "M" filed the suit claiming share in the property left by her father in law, "D" which suit was compromised, and the widow of "D" was appointed as receiver of the estate of "D", with a direction to realise his assets, and to pay a certain amount to "M". It was the widow, who filed the suit, from which appeal arose, on the basis, that "K" had defaulted to pay full purchase money, and claim for interest was also laid. "K" contended, that charge could not be enforced against the property, as it forms part of the occupancy holding, and that besides the sum of Rs. 3100/-, he had made other payments totaling Rs. 9500/-. The learned trial court found, that no decree could be passed for enforcing the charge against the property, as it was held in occupancy right by the appellant, but the Court gave a personal decree against the appellant for Rs. 21,375/-, which was appealed to the High Court, and the High Court found, that the respondent was entitled to enforce the charge on the property, and granted a decree on that basis, but negatived the claim of the respondent, for a personal decree against the appellant, on the ground of limitation. It is on this factual background, that the aforesaid proposition was propounded by Hon''ble the

Supreme Court. In our view, this judgment fully applies to the facts of the present case, apart from the fact, that the learned trial court has decided issue No. 3 in favour of the plaintiff, meaning thereby, that it has held the plaintiff entitled to decree for possession, but accidentally in the operative part that part did not come to be incorporated, but then, thereby it cannot be said, that the learned trial court had denied that relief, by not granting the same, and in any case, in our view, the learned R.A.A. rightly granted it, which has rightly been upheld by the learned Board of Revenue, and the learned Single Judge.

23. Thus, in view of the above discussions, in the ultimate conclusion, though setting aside some of the orders of the learned courts below, we do not find any force in the appeal, and the same is, therefore, dismissed. Parties shall bear their own costs.

