

Kesar Singh

Vs

Balwant Singh

Civil Appeal No. 34 of 1954

(P. B. Gajendragadkar, K. N. Wanchoo, K. C. Das Gupta, JJ)

03.11.1961

JUDGMENT

WANCHOO, J. –

The suit out of which the present appeal arises has had a chequered history. It was filed as far back as June 1943, the plaintiff being S. Balwant Singh (hereinafter referred to as the respondent). The main defendants were Kesar Singh and Jaswant Singh, of whom Kesar Singh will be referred to as the appellant hereinafter. The suit was with respect to a house known as bunga Maharaja Sher Singh which is situate outside the tank around Sri Harmandir Saheb (hereinafter referred to as the Golden Temple) in Amritsar. The case of the respondent was that he and this uncle who was made a defendant to the suit were managers of this bunga which was wakf property and that they and their ancestors had been in possession of it throughout. There were proceedings before the Sikh Gurdwaras Tribunal established under the Sikh Gurdwaras Act, No. VIII of 1925, (hereinafter referred to as the Act) in 1933 with respect to this bunga. The proceedings arose because a claim was put forward that the bunga was the property of the Golden Temple. In those proceedings the appellant and the other defendant claimed the bunga. The respondent also made a claim to the bunga. The proceedings were all consolidated and it was decided that the bunga was not the property of the Golden Temple; the claims of the appellant and the other defendant were also dismissed and the Tribunal held that the respondent and his uncle had the right to manage and supervise the bunga and were its managers. There were appeals to the High Court from that decision by the appellant and the other defendant which were dismissed with the result that the status of the respondent and his uncle as determined by the Tribunal was upheld. Thereafter the respondent along with his uncle filed a declaratory suit against the appellant and the other defendant. In that suit they were ordered to file a suit for possession. Consequently the present suit was filed for possession and ejectment of the appellant and the other defendant.

The case for ejectment was based on the ground that the appellant and the other defendant were in possession of the bunga without any right. They had been asked to deliver possession to the respondent but refused to do so and continued to treat the bunga, which was wakf property as their personal property. The respondent therefore did not desire to keep the appellant and the other defendant as servitors to look after the bunga as they were claiming rights adverse to the wakf and consequently prayed for their ejectment and delivery of possession of the bunga to him and his uncle.

The suit was resisted by the appellant and the other defendant and it was contended that the respondent was not a descendant of Maharaja Sher Singh and was therefore not entitled to the management of the bunga. It was denied that the bunga was wakf property. It was also denied that

the respondent and his uncle had ever anything to do with the bunga or were ever in possession of it as managers. It was further alleged that any decision of the tribunal against the appellant had no effect as the tribunal had no jurisdiction to give any decision and in any case the tribunal had given no decision in favour of the respondent and his uncle. Further even if any decision was given in favour of the respondent and his uncle by the tribunal, it was not binding on the appellant as he was no party to those proceedings. It was also claimed that the appellant was the owner of the bunga and in any case even if the bunga was wakf property the appellant was its hereditary manager and was entitled to its possession and could not be ejected by the respondent. Finally, adverse possession was claimed against the respondent who was alleged to have never been in possession within 12 years before the suit was filed and in any case as the respondent's application under s. 25A of the Act had been dismissed in July 1935 he had no right to file a suit for possession thereafter.

On these pleadings, eight issues were framed by the trial court, which are as below :-

1. Whether the bunga in dispute is a wakf property founded by Maharaja Sher Singh, or any descendant of Maharaja Sher Singh ?
2. Is the plaintiff a descendant of Maharaja Sher Singh, and is therefore entitled to get possession of the bunga in dispute as a manager ?
3. Is the plaintiff entitled to bring this suit alone ?
4. Is the suit within time ?
5. Is the suit barred under s. 92 Civil Procedure Code ?
6. Are the defendants debarred from denying the plaintiff's title in view of the judgment of the Lahore High Court and the decision of the Sikh Gurdwaras Tribunal ?
7. Has the plaintiff relinquished his right and what is its effect ?
8. Relief ?

In the trial court, the parties agreed that the decision might be given only on issues 3 to 7 and issues Nos. 1 and 2 might be left undecided. Consequently, the trial court proceeded to decide issues 3 to 7 only. It held on issue No. 3 that the respondent was entitled to bring the suit alone. On issue No. 4, the trial court held that the suit was bared by time. Issue No. 5 was not pressed and was therefore decided against the appellant. On issue No. 6 the trial court was of the view that it was not necessary to give any finding on it in view of the finding on the question of limitation; even so it held that the defendants were debarred from denying the plaintiffs title in view of the judgment of the Lahore High Court and the decision of the Tribunal. On issue No. 7 it held that in view of the decision of the tribunal and judgment of the High Court it could not be said that the respondent had relinquished his rights. In the result, the suit was dismissed on the ground of limitation.

The respondent then went in appeal to the Punjab High Court. The High Court held on the question of limitation that the suit was not barred by time. It then referred to the decision of the tribunal which had held that the bunga was wakf property founded by Maharaja Sher Singh and held that this decision of the tribunal was binding and conclusive. It was of the view that the question whether the respondent was the descendant of Maharaja Sher Singh and therefore entitled to obtain

possession of the bunga which was the subject-matter of issue No. 2 should have been decided. It therefore accepted the appeal and set aside the order of the trial court on the question of limitation and remanded the case for the decision of issue No. 2 as framed by the trial court and further framed two additional issues and directed the trial court to decide them also. These additional issues were :-

1. Was Jaswant Singh a bungai or a servitor of the plaintiff and defendant No. 3 or their ancestors?
2. Can the plaintiff dispossess the defendants on any of the grounds specified in paragraph 4 of the plaint ?

On remand the trial court held against the respondent on issue No. 2. Its finding was that it had not been proved that the respondent was the descendant of Maharaja Sher Singh and therefore entitled to get possession of the bunga in dispute as manager. On the first additional issue, the trial court found that the appellant and the other defendant were servitors of bungais. On the second additional issue it was found that bungai or servitor if he denies the title of the rightful owner on whose behalf he manages the property forfeits his rights to retain the property or to continue as servitor, and as the appellant and the other defendant had set up a title adverse to the respondent, they would be liable to ejection on the ground specified in para 4 of the plaint, if the respondent is the rightful owner, whether as trustees or otherwise, of the bunga.

On receipt of these findings, the appeal was heard again, this time by another Bench of the High Court. The High Court pointed out that issue No. 6 had not been decided on the earlier occasion and took the view that if issue No. 6 were decided in favour of the respondent it would not be necessary to go into the question whether the respondent was the descendant of Maharaja Sher Singh and therefore entitled to sue for ejection. The High Court therefore addressed itself to the decision of issue No. 6 and held that in view of the judgment of the Lahore High Court and the decision of the tribunal, the appellant and the other defendant were debarred from denying the respondent's title as a descendant of Maharaja Sher Singh. In that view of the matter it held that the suit must succeed as the question of limitation had been decided against the appellant and the other defendant and it was not open to go into the question whether the respondent was a descendant of Maharaja Sher Singh and therefore entitled to maintain the suit. The appeal was therefore allowed and the suit was decreed. The appellant then applied for leave to appeal to this Court, which was granted; and that is how the matter has come up before us.

The appeal came up for hearing before this Court in 1958. This Court then took the view that it was difficult to decide the appeal satisfactorily without having a finding on the essential issue, namely whether the plaintiff was a descendant of Maharaja Sher Singh and therefore entitled to get possession of the bunga in dispute as a manager. This Court therefore directed the High Court to record a finding on issue No. 2 and also on the two additional issues framed by the High Court when the remand was made on an earlier occasion. The appeal has now come up for hearing again after the findings of the High Court, which are that the respondent has not been proved to be the descendant of Maharaja Sher Singh and that the appellant and the other defendant were in possession of the bunga as bungais or sewadars and that they were liable to ejection because they had denied the title of the rightful owner on whose behalf they were managing the property. In effect the High Court confirmed the findings of the trial court on remand.

Before we go into the effect of the findings now submitted by the High Court on the direction of this court, it is in our opinion necessary to decide issue No. 6, for if that issue is decided in favour of

the respondent it will not be open to the appellant or the other defendant to question that the respondent was the descendant of Maharaja Sher Singh and consequently had the right of maintain the suit. That brings us to the consideration of the effect of the decision of the tribunal and the judgment of the Lahore High Court in appeal therefrom, which in its turn requires a consideration of the provisions of the Act.

The Act was passed to provide for the better administration of certain Sikh Gurdwaras and for inquiries into matters and settlement of disputes connected therewith. Section 3(1) of the Act provides for forwarding by any Sikh or any present office-holder of a Gurdwara, specified in Sch. I, of a list of all rights, titles or interests in immovable properties situate in Punjab and in all monetary endowments yielding recurring income or profit received in Punjab which he claims to belong, within his knowledge, to the gurdwara along with the name of the person in possession of any such right, title or interest. On receiving such lists, the State Government has to publish, inter alia, under s. 3(2) a consolidated list in which all rights, titles and interests in such properties as are described in sub-s. (1) are included and also to send by registered post a notice of the claim to each of the persons named therein as being in possession of such right, title or interest. Section 5(1) then provides that any person may forward to the State Government a petition claiming a right, title or interest in any such property included in such consolidated list within a certain time of its publication. Sub-section (3) then lays down that if no claim is made under s. 5(1) within the time limited thereby, the State Government shall publish a notification declaring that no such claim has been made with respect to the property notified under s. 3(1). Sections 7 and 10 make similar provisions with respect to gurdwaras which are not included in Sch. I to the Act; but we are not concerned with them in the present appeal for the Golden Temple is included in Sch. I and ss. 3 and 5 apply to it. Section 12 then provides for setting up of a tribunal. Section 14 gives power to the State Government to forward to the tribunal all petitions received by it under the provisions of s. 5 and other sections and the tribunal has to dispose of such petitions in accordance with the provisions of the Act. Section 15 is important and may be read in extenso -

"(1) In disposing of any matter in which it has jurisdiction a tribunal may order any dispute arising therefrom to be dealt within one proceeding separately or more such disputes than one to be dealt with in one proceeding, and may, be public advertisement or otherwise, enquire if any person desires to be made a party to any proceeding, and may join in any proceeding any person who it considers ought to be made a party thereto.

(2) The tribunal may order any person to submit within a fixed time a statement in writing setting forth the nature of his claim or objection and the grounds thereof.

(3) If any person fails to comply with an order passed under the provisions of sub-section (2) and duly notified to him, the tribunal may decide the matter in dispute against him, provided that the tribunal may at any time extend the time fixed by its order for the submission of the statement if the person satisfies it that he had sufficient cause for not submitting the statement within the time fixed.

(4) A tribunal may pass any such order as to costs of a proceeding as a court might pass under the provisions of the Code of Civil Procedure, 1908."

Then comes s. 25A which lays down that when it has been decided under the provisions of the Act that a right, title or interest in immovable property belongs to a notified Sikh Gurdwara, or any

person, the Committee of the Gurdwara concerned or the person in whose favour a declaration has been made may, within a period of one year from the date of the decision or the date of the constitution of the Committee, whichever is later, institute a suit before a tribunal claiming to be awarded possession of the right, title or interest in the immovable property in question as against the parties to the previous petition, and the tribunal shall, if satisfied that the claim relates to the right, title or interest in the immovable property which has been held to belong to the Gurdwara, or to the person in whose favour the declaration has been made, pass a decree for possession accordingly. Section 26 then inter alia lays down that when it has been decided, under the provisions of the Act, that a right, title or interest in immovable property belongs to a Notified Sikh Gurdwara or when a right, title or interest in such property has been included in a list published under the provisions of s. 5(3), the Collector of the district in which the property is situated shall, on application being made to him on this behalf and after making such enquiry as he may deem proper into the fact of such decision or inclusion, cause an entry to be made in the records-of-rights, if any, of the estate in which the property is situated recording the gurdwara as the owner of the right, title or interest in accordance with the provisions of the Punjab Land Revenue Act, 1887. Section 28 then provides for a suit for possession in respect of properties in which no claim has been made under s. 5 or s. 10. Section 34(1) gives a right of appeal to the High Court to any party aggrieved by a final order passed by the tribunal determining any matter decided by it under the provisions of the Act. Sections 36 and 37 are important and may be read in extenso.

"36. No suit shall lie in any court to question anything purporting to be done by the State Government or by a tribunal in exercise of any powers vested in it by or under this Act."

"37. Except as provided in this Act no court shall pass any order or grant any decree or execute wholly or partly, any order or decree, if the effect of such order, decree or execution would be inconsistent with any decision of a tribunal, or any order passed on appeal therefrom, under the provisions of this Part."

It is clear therefore from the scheme of the Act that it gives jurisdiction to the tribunal to decide all claims to properties which are claimed to be the properties of a Sikh Gurdwara mentioned in Sch. I to the Act. It is true that where a property is notified in the list under s. 3 each person who has a claim to that property has to make a separate claim on his own behalf which is forwarded to the tribunal for decision. It is clear however from the provisions of s. 15 that where a tribunal is dealing with a property which is claimed to belong to a Sikh Gurdwara and in respect of which counter claims have been made by other persons, it has jurisdiction to decide to whom that property belongs, whether to the Sikh Gurdwara or to any other person claiming it and for that purpose it can consolidate the proceedings resulting from different claim to the same property so that all disputes with regard to that property can be decided in one consolidated proceeding. Further it has the power under s. 15 to inquire by public advertisement or otherwise if any person desires to be made a party to any proceeding and may join in any proceeding any person who it considers ought to be made a party thereto. Where therefore a number of claims have been made under s. 5 to the same property which is claimed under s. 3 to belong to a Sikh Gurdwara the tribunal can consolidate all such claims under s. 15 and treat all the claims as one proceeding. Where therefore the tribunal consolidates the claims in one proceeding each claimant even though he had made a claim for himself as against the Sikh Gurdwara would be entitled under s. 15 to contest the claim not only of the Sikh Gurdwara but of any other person who is making a rival claim to the property as against the Sikh Gurdwara. It is also clear from s. 25A that in deciding the claims made under s. 5 it is open to the tribunal not only to decide whether the property to which claims have been made belongs to

the Gurdwara but also to decide whether it belongs to any of the claimants. It seems therefore that the Act has given full power to the tribunal to decide between the rival claims of the Sikh Gurdwara and other claimants under s. 5 and empowers it not only to give a decision as to the rights of the Sikh Gurdwara but also of other claimants. Further there is provision in s. 34 of the Act for appeal to the High Court by any party aggrieved by a final order passed by a tribunal in matters decided by it under the provisions of the Act. The words in s. 34(1) are very wide and where claims are consolidated in one proceeding under s. 15 and the claim of the Gurdwara and the rival claims of various claimants under s. 5 with respect to one property are decided in a consolidated proceeding, it is clear that any party who was party to the consolidated proceeding would be entitled to appeal against the order of the tribunal if it went against it and was in favour of the Sikh Gurdwara or of any other claimant in the consolidated proceeding. Section 36 thereafter bars a suit in any court to question any decision of a tribunal in exercise of any powers vested in it by or under the Act. Section 37 bars any court from passing any order or granting any decree or executing wholly or partly any order or decree, if the effect of such order, or decree or execution would be inconsistent with any decision of a tribunal or any order passed on appeal therefrom under the provisions of the Act.

It is on this scheme of the Act that we have to see whether it is open to the appellant and the other defendant to raise the question in the present suit that Balwant Singh was not the descendant of Maharaja Sher Singh and therefore not entitled to maintain the present suit. It is necessary for this purpose to examine the order of the tribunal which was made on June 22, 1933, by a majority of two to one. It is not in dispute that this bunga was notified under s. 3 of the Act as property claimed by the Golden Temple. This notification led to four claims with respect to this bunga, namely, by Jaswant Singh who was a party to the suit from which the present appeal has arisen, Darbara Singh and others with whom we are not concerned, Kesar Singh appellant and Balwant Singh respondent. The tribunal consolidated all the four claims under s. 15 of the Act and dealt with the matter in one proceeding. The case of Jaswant Singh was that he was in possession of the first storey of the bunga by virtue of his perpetual rights of possession and management in the bunga as bungai. Kesar Singh's case was that he was in possession of two rooms on the first and second floors of the bunga. He did not define what his right was but denied that the bunga was wakf. Balwant Singh's case was that the bunga was built by his ancestors for spiritual and worldly benefit of their offspring and was in his possession and that of his ancestors and should be declared to be the property of his family. All these three claimants denied that the Golden Temple had any kind of right in the bunga.

In the consolidated proceeding therefore the tribunal had to decide firstly whether the bunga was the property of the Golden Temple. If it decided that, all the claims would necessarily fall through. But if it held that the bunga was not the property of the Golden Temple it had to adjudicate on the respective claims of Jaswant Singh, Kesar Singh and Balwant Singh. By majority, the tribunal held that the bunga was not the property of the Golden Temple. It therefore had to decide to which of the three claimants under s. 5, if any, the bunga could be held to belong. It negatived the claims of Kesar Singh and Jaswant Singh. As to Balwant Singh's claim it held by a majority that Balwant Singh had no personal or private right in the bunga. It further held that the bunga was wakf property dedicated to the pilgrims to the Golden Temple and that the descendants of Maharaja Sher Singh were the managers of the bunga. It is clear from the decision of the majority of the tribunal that the descent of Balwant Singh from Maharaja Sher Singh was not disputed before the tribunal either by the Golden Temple or by any other party. It is clear therefore that the tribunal had jurisdiction to decide the rights to the bunga, as it was one of the properties notified under s. 3. It had also the jurisdiction to determine all claims made under s. 5 and it consolidated all the claims into one proceeding and decided the rights of the claimants and the Golden Temple in that Proceeding. Now

the respondent was claiming in those proceedings that he was the owner of the bunga as the descendant of Maharaja Sher Singh. Neither the Golden Temple nor the other claimants seem to have challenged the claim of the respondent before the tribunal on the ground that he was not a descendant of Maharaja Sher Singh and therefore had no right to maintain the claim. The whole proceeding before the tribunal was conducted on the basis that the respondent was a descendant of Maharaja Sher Singh and the only question was whether as such descendant he had a right to the property. The tribunal negated his claim of ownership of the bunga and held that it was wakf property under the management of the descendants of Maharaja Sher Singh. It has been urged that the order of the tribunal does not mention in the operative part that Balwant Singh was entitled to manage the property as the descendant of Maharaja Sher Singh and this shows that though the tribunal was of opinion that the descendants of Maharaja Sher Singh were entitled to manage the bunga it was not accepting Balwant Singh's claim as such descendant and there was thus no decision in favour of Balwant Singh. We cannot accept this contention, for if Balwant Singh was not a descendant at all of Maharaja Sher Singh and if this point was raised by anybody before the tribunal his claim would have failed on the simple ground that he was nobody to put forward the claim of the descendants of Maharaja Sher Singh. The reason why the tribunal used the words "that the descendants of Maharaja Sher Singh are managers of the bunga" appears to be that at that time the father of Balwant Singh was alive and in the presence of his father Balwant Singh could not claim a right to manage the bunga. Therefore the tribunal used neutral words, namely, "the descendants of Maharaja Sher Singh are managers of the bunga", instead of mentioning Balwant Singh as the manager of the bunga. This is clear from an earlier part of the decision of the tribunal where in dealing with the question of ownership of Balwant Singh, it has remarked that "it is hard to see that Balwant Singh has any personal or private rights over the bunga in the presence of his father Raghbir Singh". Though therefore the respondent was held by the majority of the tribunal, not to have right in himself because his father was alive the tribunal nevertheless went into the question of the rights of Maharaja Sher Singh's descendants at the instance of Balwant Singh treating him as a representative of the descendants. This is also clear from the form in which the issue No. 3 was framed, namely, "was the bunga in dispute built by Maharaja Sher Singh, ancestor of Balwant Singh petitioner in 1629, and has been in his possession? What rights as he been exercising over it?" It is clear therefore that before the tribunal Balwant Singh's claim as a descendant of Maharaja Sher Singh was not challenged by the appellant or the other defendant; and the tribunal found in favour of the descendants of Maharaja Sher Singh at the instance of Balwant Singh. It was in our opinion open to the appellant and the other defendant to challenge this finding in favour of the descendants of Maharaja Sher Singh at the instance of Balwant Singh under s. 34 of the Act as all the claims were consolidated under s. 15 and treated as one case relating to one property. But though the appellant and the other defendant went in appeal to the High Court they do not seem to have challenged the finding of the tribunal in favour of the descendants of Maharaja Sher Singh. Further the Golden Temple also went in appeal; but it also did not challenge the decision in favour of the descendants of Maharaja Sher Singh. That decision has therefore become final and according to that decision the descendants of Maharaja Sher Singh are the managers of this bunga. That decision was given at the instance of the respondent whose claim in those proceedings based on his being a descendant of Maharaja Sher Singh was never challenged on the ground that he was not the descendant of Maharaja Sher Singh.

The question therefore that arises is whether in view of ss. 36 and 37 of the Act it would be open to any court now to give a decision which will go against what has been held in that decision of the Tribunal. If a court cannot give a decision which would go against the decision of the Tribunal in 1933, it would obviously be not open to a party to those proceedings to raise any question which

would have the effect of questioning the decision of the Tribunal. Section 36 bars any court from questioning anything done by a Tribunal in exercise of the powers vested in it by or under the Act. Section 37 bars any court from passing any order or granting any decree or executing wholly or partly any order or decree if the effect of such order, decree or execution would be inconsistent with any decision of the tribunal or any order passed on appeal therefrom under the provisions of the Act. Now the decision of the tribunal which became final as it was not appealed from either by the Golden Temple or by the appellant or the other defendant was that the bunga was wakf property under the management of the descendants of Maharaja Sher Singh and this decision was given at the instance of the respondent who claimed in those proceedings to be a descendant of Maharaja Sher Singh and this claim of his to be a descendant of Maharaja Sher Singh was never disputed. If therefore the Court now holds at the instance of the appellant or the other defendant that the respondent is not the descendant of Maharaja Sher Singh it will be questioning the decision of the tribunal and passing an order or granting a decree which would be inconsistent with the decision of the tribunal. Section 36 and 37 bar any such order or decree by the court and therefore the appellant and the other defendant are naturally debarred from raising a point the decision of which is barred under ss. 36 and 37 of the Act. We are therefore of opinion that the view taken by the High Court in its judgment after remand on issue No. 6 is correct and it is not open to the appellant to raise the question whether the respondent is a descendant of Maharaja Sher Singh and as such entitled to maintain the present suit.

This brings us to the question of limitation, which was decided by the High Court on the earlier occasion when the remand was made. The case of the appellant in that connection is that he was in adverse possession and the respondent had been out of possession for over 12 years before the suit was filed in 1943 and therefore the suit should be dismissed as barred under Art. 144 as well as Art. 142 of the Limitation Act. The appellant contends that the plaint itself shows that the respondent had been dispossessed more than 12 years before the present suit was filed and therefore the suit must fail on the ground of limitation. We agree with the High Court however that a careful reading of paras. 3 and 4 of the plaint shows that the respondent's case was that he and his uncle were managers of the bunga as descendants of Maharaja Sher Singh and that the appellant and the other defendant were in possession as their servants or servitors. But these servants had started denying the title of the respondent and his uncle they do not want to keep them any longer in their service. They therefore filed the suit for ejection of these servants and for possession of the property. The High Court therefore was right in the view it took that it was a case of permissive possession arising in favour of the appellant and the other defendant. Whatever may be the position about the actual possession, it appears from the decision of the tribunal that the claim of the appellant and other defendant before the tribunal in 1933 was that they were bungais i.e. servitors; and this was also the view of the High Court in the appeal from the decision of the tribunal where the High Court said that "no doubt Kesar Singh, his father and grandfather have been Bungais of the bunga, but there is no reliable evidence of their having set up a title adverse to the institution of that the nature of this bunga is exceptional." Similarly Jaswant Singh also claimed to be a mere bungai before the tribunal by virtue of his father being adopted by Natha Singh who was undoubtedly a bungai. In these circumstances from the decision of the tribunal in favour of the respondent in 1933, it appears that no hostile title adverse to the respondent was ever set up by the appellant and the other defendant before that decision. In consequence it cannot be said that adverse possession over 12 years has been established before June 1, 1943 when the present suit was filed. As originally the possession of the appellant and the other defendant was clearly permissive, there can be no question of the application of Art. 142 in the present case and the appellant could only succeed if he could prove adverse possession under Art. 144 for over 12 years. The decision of the High Court on the question of

limitation is correct.

Lastly, it is urged that the respondent had applied under s. 25A to the tribunal but allowed that suit to be dismissed for default and therefore it was not open to him to file the present suit for possession. It is enough to say that though this point was raised in the written statement no issue was framed with respect to it by the trial court. When the matter was raised in the High Court on the first occasion it held that as no issue had been framed and no evidence had been led by the parties as to whether the cause of action was or was not the same and no copy of the plaint in the earlier proceeding had been filed the question whether the present suit was barred by virtue of O. IX. r. 9. of the Code of Civil Procedure could not be gone into and it must be held that it was not barred under O. IX. r. 9. In view of what the High Court has said we are of opinion that it is not open to the appellant to raise this apppoint before us when he had failed to get an issue framed on it and no evidence was led in that behalf.

As the appellant cannot challenge that the respondent is the descendant of Maharaja Sher Singh the respondent would have a right to maintain the suit. Further as the appellant and the other defendant are servitors and they have undoubtedly set up a title after the decision of the tribunal adverse to the respondent's right as found by the tribunal, the respondent is entitled to eject the appellant and the other defendant, for servitors cannot claim to remain in possession after they set up an adverse title with respect to the property of which they are servitors. In view of our decision on issue No. 6, it is unnecessary to consider issue No. 2 on which a finding was called for by this Court by its interlocutory judgment in 1958.

The appeal therefore fails; there could be no order to costs.

Appeal dismissed.

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