LAHORE HIGH COURT

Baru

Vs

Niadar

(Dalip Singh, J.)

20.05.1942

JUDGMENT

Dalip Singh, J.

1. The facts of this case are stated in the referring order, dated 6th February 1942, and may be briefly recapitulated here for clearness. The present defendants, the landlords of the land in dispute, were sued in the revenue Courts by the present plaintiffs, who alleged themselves to be occupancy tenants, on the ground that the occupancy tenants, the plaintiffs, had put the defendants, the landlords, into possession of the land as. tenants-at-will but they had refused to pay rent and. therefore should be ejected. The present defendants, the landlords, took the plea that they never have been tenants and they had entered upon the land because the plaintiffs had abandoned their rights of occupancy which had become extinguished by reason, of this abandonment. This plea was upheld by the revenue Court which decided that the plaintiffs' rights of occupancy, which otherwise had been established and would have existed, had been extinguished by abandonment. Thereafter the plaintiffs brought the present suit in a civil Court for possession of the: land on the ground that they were its occupancy tenants and the landlords who were in possession, were merely trespassers thereon. The trial Court, held that the plaintiffs were the occupancy tenants originally, that it was not proved that they had ever abandoned their occupancy tenancy and that, therefore, the same had not been extinguished but it upheld the plea of the defendants that the civil Court shad no jurisdiction In the matter and returned the plaint for presentation to the revenue Court. On appeal, the learned Senior Sub-Judge upheld the findings of the trial Court on the merits but upset the decision as regards jurisdiction and, therefore, accepted the appeal and decreed the suit for possession. On appeal to this Court, the learned Judge in Single Bench held that the civil Courts had jurisdiction to try this suit. He gave no decision on the question whether the decision of the revenue Court was res judicata or not. He, therefore, dismissed the appeal. From that order the matter went to the Letters Patent Bench which refused, for reasons given in the referring order, to allow the defendant-appellants to raise the question of res judicata. On the question of jurisdiction, however, it referred two questions to a Pull Bench which are formulated as follows:

(1) Is a suit by a dispossessed occupancy tenant to recover possession from his landlord of the land to which he claims the occupancy rights initially with in the jurisdiction of the civil Court or not?

(2) Even if the first question be answered in the affirmative, is the civil Court precluded from trying the question whether the occupancy right has been extinguished by abandonment by reason of proviso (1) to Section 77(3), Punjab Tenancy Act?

2. The referring order pointed out that the first question involved a reconsideration of the Full Bench ruling reported in *Cheta v. Baija*[1] and, therefore, the Judges to constitute the present Full Bench should be at least five, if not more. The present Full Bench was constituted for the purpose of trying the two questions referred. Before proceeding-to deal with the questions I may point out two things: The learned Counsel for the appellants now wished to raise another point, namely, that such a suit was not competent after the decision of the revenue Courts on the subject. This point was never raised by him at any stage previously, neither before the Single Bench nor before the Letters Patent Bench, nor does it appear to have been raised in the trial Court or in the lower appellate Court. For this reason, the Full Bench decided that he should not be allowed to raise this point. I shall however have occasion to refer to the point really involved, though not in the form in which it was sought to be put by the learned Counsel for the appellants. Secondly, I have to point out that the word "dispossessed" in the first question formulated was merely used in its general sense of "out of possession." There was no endeavour to make any distinction between dispossession which was unlawful and dispossession which was lawful or made in due course of law. The question was intended to cover both classes of cases, it being assumed merely that the plaintiffs seeking to recover possession were out of possession, whether actual or constructive. The reason for referring the second question was that the reasoning given in the Full Bench decision, *Cheta v. Baija A.I.R. 1927 Lah. 452(Supra)*, proceeded on different lines in the various judgments in that case arid it was not clear whether the reasoning of all the Judges was equally reconcilable and what the decision was on the second question. Speaking for myself, as I also was one of the Judges in *Cheta v. Baija A.I.R. 1927 Lah. 452*,(supra) I may say with all respect to the other Judges that my judgment clearly involved by its reasoning the decision that the civil Court was not precluded from trying the question of the existence of the occupancy rights by reason of proviso (1) to Section 77(3). On the other hand, the reasoning of the other learned' Judges seems to imply that the civil Court might be precluded from trying this question though all that was held generally was that if a question arose which by reason of the proviso had to be decided by a revenue Court, then the whole case would have to be sent to the revenue Court. Having thus cleared the ground, I now pass on to consider the points actually referred and I shall consider the first question formulated first. The question was really considered for the first time, so far as I am aware, in a Full Bench decision reported in *Nihal Singh v. Kaman*[2] but the proviso to Sub-section (3) of Section 77 was inserted later and there have been other changes also in the Act. In that case it was held by the Full Bench:

> A suit in which the plaintiff asks to be placed in possession of land on the ground that he is entitled to hold such land as a tenant with a right of occupancy, is not one 'by a' tenant to establish a claim to a right of occupancy'

[1] A.I.R. 1927 Lah. 452

[2](88) 9 P.R. 1888

> within the meaning of Section 45(a) of Act 18 of 1884, and so cognizable by
> the revenue Courts only, but is a suit, the jurisdiction to hear which rests with the civil Courts.

3. The reasoning was that though it is essential to the obtaining of the relief asked for in such a case that plaintiff should establish his claim to a right of occupancy, this question of title is only raised incidentally, while the cause of action alleged by plaintiff is being wrongfully deprived of, or kept out of the cultivating possession of certain lands, and the relief he asks for is a restoration to such possession, a relief which only the civil Courts can give him. In those days the exclusive jurisdiction conferred on the revenue Courts was not embodied, as it is now, in Section 77, Punjab Tenancy Act of 1887, but words to the same effect as in the present Tenancy Act were used in Section 45, Punjab Courts Act (18 of 1884) of those days. Nevertheless, in the main the situation is not different under the present Act and it must be taken that if this decision is correct, then the same result would follow to-day. But it is contended that certain other changes have taken place, in particular the definition of the word "tenant" in the Punjab. Tenanoy Act, in Section 4(5) and the addition in the present Act by which successors-in-interest or predecessors-in-interest of a tenant and landlord are included in the definition of "tenant" and "landlord." Now the definition of "tenant" in Section 4(5) reads as follows:

> Tenant' means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that other person.

4. Landlord" is defined in Section 4(6) as follows:

> Landlord means a person under whom a tenant holds land, and to whom the tenant is, or but for a special contract would be, liable to pay rent for that' land.

5. "Tenancy" is defined in Section 4(8) as follows: " 'Tenancy' means a parcel of land held by a tenant of a landlord under one lease or one set of conditions." The next case where these definitions were authoritatively considered is *Joti v. Maya*[3] also a Full Bench case. The facts of that case were that possession of land was sought against the proprietors of the land by the alleged heirs of the deceased occupancy tenant and the question was whether such a suit was cognizable by a civil Court or by a revenue Court. A Full Bench held that such a suit did not fall either under Clause (d) or Clause (i) of Section 77, Sub-section (3), Punjab Tenancy Act, and the reasoning was that in order to establish the relation of landlord and tenant between two persons in respect of and it was essential that two things shall contour, namely, (1) a right to enter upon and

possess the land and (2) an entry into possession. It wag only upon entry and not before that the person having the right to be a tenant becomes a "tenant" and "holds" the land under the person called the landlord. It is true that in the course of the judgment certain observations are made that once the relationship was established, dispossession of the person would not necessarily end the relationship of landlord and tenant originally established between them; but this question and when and how the relationship would be determined was left open as it followed from the reasoning that

[3](91) 44 P.R. 1891

the person in question never having entered into possession would not by any means be a tenant, whatever might be the meaning that should be attached to the word "holds" in the definition.

6. The next case is *Kesar Singh v. Nihal (91) 45 P.R. 1891(Supra)*, also another Pull Bench case, where the point which had been left open in the previous Full Bench decision arose directly. The Pull Bench held that once it had been decided by the previous Pull Bench that in order to establish the relationship of landlord and tenant between two persons in respect of land there must not only exist the right to enter upon and hold the land but also an actual entry into possession, it would follow logically that continuance of possession was essential for the maintenance of the relationship between the parties and that the dispossession of the tenant would ordinarily in the absence of any indication to the contrary in the Tenancy Act itself sever this relationship. Such an indication to the contrary they found in Section 50 and Section 77(3)(g) of the Act which refers to Section 50. They were of opinion, therefore, that a tenant who had been dispossessed would normally speaking cease to be a tenant under the Punjab Tenancy Act but that under Section 50 for a period of one year from the date of dispossession his suit for recovery of possession was cognizable only by a revenue Court. Subsequent to that period, namely of one year, his remedy, if any, must be sought in the civil and not in the revenue Court. They gave no opinion on the question as to whether the remedy still existed, but they stated that they concurred generally with the reasoning of Sir Meredyth Plowden in the referring order. In that reasoning the following words occur:

> I am inclined to think that it is only for the purposes of this suit that the dispossessed tenant is regarded by the Act as continuing to hold the land of his tenancy after dispossession. He does not in fact hold the land after he has been dispossessed, though he has the right to hold it.

7. There also occur the following sentences:

> To a rule, that a tenant on being dispossessed ceases to be a tenant, the Court must, following the Legislature make the exception made in Section 50. If we look at the converse case, namely when a tenant wrongfully relinquishes his land, without notice, we find that he is not described in the Act as a tenant after such relinquishment. He is liable under Section 36(3) for rent, under prescribed conditions: and he is liable to be sued for

arrears of rent in a revenue Court under Section 77(3)(n), but the word tenant is excluded in that clause.

Ordinarily, then a tenant is a person who has a right to hold, and does hold, and the person described in Section 50 is a tenant only by an exceptional use of the term tenant, and only as it seems to me, during the period prescribed for bringing this special suit granted to him by S, 50, and for the purpose of exercising this right to sue.

8. Now the reasoning of the Full Bench amounts to this: The words "holds land under" might have been held to mean either "actually holds" or both "actually holds or has the right to hold" but the Pull Bench in *Joti v. Maya (91) 44 P.R. 1891(Supra)*has pointed out that even under the general law a tenant does not become a tenant until he has entered into possession and that, therefore, the word "holds" in Section 4(5), Tenancy Act, would not include a person merely with a fight to hold for if it did so, then obviously an entry into possession was not necessary. The Full Bench in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(supra)* held that it followed logically from this definition that a person who was not actually holding a land was not a tenant within the meaning of Section 4(5), Punjab Tenancy Act, but they pointed out that for the purposes of Section 50 and for the space of one year under that section from the date of dispossession the person, though not holding land, continued to be described in the Act as a tenant. In other places he was not so described. Put shortly then, the two Pull Benches together came to the conclusion that the word "holds" does not mean or include merely the "right to hold" but means "actually holds." By "actually" I take it they meant not necessarily "actual physical possession" bat both "actual" and "constructive possession." But if the tenant were ousted both from actual or constructive possession, then he ceased to be a tenant under the Act, except where there was a clear indication to the contrary as was found in Section 50. Whether Section 50 meant that the right to bring a suit by a person falling within its purview was limited to the revenue Courts and the limitation for a suit for possession was cut down from the normal twelve years to one year or whether it meant that for the period of one year the suit could be brought only in the revenue Courts but thereafter the suit could be brought in the civil Courts upto the period of twelve years was left open by the Pull Bench in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(Supra)*. This point was next considered in *Imam Din v. Feroz Khan*[5] There, a Division Bench held that Section 50, Punjab Tenancy Act, did not restrict the period of limitation allowed to a dispossessed occupancy tenant when suing for possession in the civil Courts and, therefore, that a plaintiff who had been ejected from his occupancy holding more than one year previous to the date of the suit but within the period of twelve years could do so and the suit was not barred by Section 50 of the said Act. This ruling followed the reasoning of Plowden, J. in the referring order in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(Supra).* It accepted that reasoning and based its decision on it.

9. This ruling was considered and overruled in *Akbar Hussain v. Karm Dad*[6] where Shah Din, Chevis and LeRossignol JJ. were the Judge. In that case the plaintiff sued the defendants the landlords, who had dispossessed him in 1915 for recovery of possession and obtained a decree

on 8th May 1916. The dispossession had taken place in 1915. More than a year after his dispossession, he brought a suit for compensation for the period of dispossession. It is thus dear that in this case the person bringing the suit was a tenant at the time he brought the suit for he had recovered possession under a decree. It was held that the suit was cognizable only by a revenue Court and not by a civil Court, even though it was not brought within one year of the date of plaintiff's dispossession because of Section 50 and Section 77(3)(g), Punjab Tenancy Act. The cases in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891* and *Imam Din v. Feroz Khan (98) 64 P.R. 1898(supra)* were held distinguishable from the present suit. In the main judgment of Chevis, J. the learned Judge, however, went on to express an opinion that in Section 60 "we must regard the word 'tenant' as meaning a person who formerly held land under another, in other words, an ex-tenant." In his opinion, therefore,

[5](98) 64 P.R. 1898

[6] A.I.R. 1919 Lah. 475

Section 50 had cut down limitation fora suit for possession to one year and that the powers of the civil Court to hear such a suit at all had been definitely excluded. In other words, the learned Judge was of opinion that the meaning of Section 50 was not as suggested by Plowden J. that for the purposes of Section 50 the ex-tenant should be regarded as a tenant for one year and could sue in the revenue Courts in that period, thereafter being compelled to resort to the civil Courts for the usual remedy for dispossession but that in oases under Section 50 the jurisdiction of the civil Courts had been ousted permanently and the limitation for the suit had been out down to one year. So far as Le-Rossignol J. was concerned he held that Section 77(3)(g) and (i) appeared to cover all conceivable cases of litigation between a landlord and his tenant qua tenant. He, therefore, concluded that an ex-tenant in that capacity could look for no relief outside the revenue Courts and that the civil Courts could only hear his plaint if he claimed relief in a capacity other than that of an ex-tenant. Shah Din J. was of opinion that he had lost his remedy altogether if he failed to bring a suit within the one year prescribed by Section 50. In other words, though this was not always clearly stated in the various judgments except by Shah Din J. the civil Courts had no jurisdiction to hear a suit brought by an ex-tenant after the period of limitation prescribed by Section 50 for a suit in the revenue Courts.

10. This question is a totally different one to the one raised by counsel for the appellants before the Pull Bench, namely, as to the competency of the suit because whether a suit is competent or not is a question which must be decided by somebody or other and can only be decided properly by a Court having jurisdiction to decide the point. Therefore, the question really is not one of competency of the suit but the question of the meaning of Section 50. I do not express any opinion on this point as no such point was ever raised before the Letters Patent Bench or at any time during the course of the trial of this suit. Had this question been raised before the Letters Patent Bench which referred these points to the Full Bench, I should also have referred this point to the Full Bench for a decision, for though in terms *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(Supra)* left the question open, yet, as pointed out that Full Bench accepted and based its reasons for decision on the reasoning of Plowden, J. which expressly held that the meaning of Section 50 was different from the meaning given to it by the Full Bench in *Akbar Hussain v.*

Karm Dad A.I.R. 1919 Lah. 475(Supra). Shah Din J. in this latter ruling was the only one who definitely stated that *Imam Din v. Feroz Khan (98) 64 P.R. 1898(supra)* was wrongly decided and should be overruled though there were expressions of opinion by Chevis and LeBossignol JJ. to the same effect. Moreover, strictly speaking the opinions of the Full Bench in *Akbar Hussain v. Karm Dad A.I.R. 1919 Lah. 475(supra)* were obiter in the sense that as pointed out in the judgment of Chevis J. the facts of the case were distinguishable both from *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(supra)* and *Imam Din v. Feroz Khan (98) 64 P.R. 1898(Supra)* in that the person dispossessed had recovered possession before he brought the suit and it might well be held that being a tenant when he brought the suit, his suit fell within Section 77(g), Tenancy Act. Be that as it may, it seems to me that the reasoning of the next Full Bench reported in *Cheta v. Baija*[7] would appear not to have accepted the reasoning of *Akbar Hussain v Karm Dad A.I.R. 1919 Lah. 475(supra)* at least in the judgment of the majority of the Judges. The judgment of Addison J. no doubt appears to rely on *Akbar*

[7] A.I.R. 1927 Lah. 452

Hussain v Karm Dad A.I.R. 1919 Lah. 475(Supra) but I do not read the judgment of Broadway J. as relying on *Akbar Hussain v Karm Dad A.I.R. 1919 Lah. 475(Supra)* or even as considering that ruling as being correctly decided for it was definitely held by Broadway J. that the initial jurisdiction, at any rate, for such a suit lay in the civil Court, whereas, if I have rightly understood the decision in *Akbar Hussain v Karm Dad A.I.R. 1919 Lah. 475(supra)*, the civil Court would have no jurisdiction whatsoever whether initial or plenary. It is, however, unnecessary to go more deeply into this matter for, as I say, the point was not raised in this form by the learned Counsel for the appellants and in the form that he did raise it, it was not a question of jurisdiction and was not allowed to be raised by the Full Bench.

11. I now pass on to consider the next ruling, namely. *Cheta v. Baija A.I.R. 1927 Lah. 452(supra)*. In that ruling the question submitted to the Full Bench was whether a civil Court has jurisdiction to try a suit brought by a person who has been dispossessed from his tenancy after a notice issued to him under Section 43, Tenancy Act, and who has been unsuccessful in a suit under Section 45 to contest his liability to ejectment, for possession of the land from which he has been ejected on the ground that he has a right of occupancy therein, and whether Section 77(3)(d) of the Act bars such a suit or not. It was held that the civil Court has jurisdiction to try such a suit and it is not barred by Section 77(3)(d), Punjab Tenancy Act. As an obiter it was also stated that the civil Court would have to deal with such a suit in accordance with the procedure prescribed by proviso (1) to Section 77(3)(d) and its jurisdiction would continue unless and until it becomes necessary to decide a matter which can under this Sub-section be heard and determined only by a revenue Court. I do not propose to plunge into the mass of rulings which followed this Full Bench. It is sufficient for me to state shortly that various Judges came to opposite conclusions and sometimes even the same Judge came to opposite conclusions in these rulings which profess to follow the Full Bench decisions. It is this conflict that has led to the present Full Bench in which the proviso and the meaning of Section 77(3) have got to be considered. According to my own view, as given in *Cheta v. Baija A.I.R. 1927 Lah. 452(supra)*

the suit was not barred by Section 77(3)(d) as held by the majority of the Full Bench nor could the proviso bar a suit from being tried by the civil Court. As I read Section 77, Sub-section (3)(d), which is the Sub-section involved, the suits contemplated by that clause are suits either by a tenant, that is, a person, who claims to be a tenant and is a tenant, to establish a claim to a right of occupancy, or by a landlord, that is, a person, who claims, or is admitted to be, or is found to be the landlord, to prove that a person admitted to be a tenant has not a right of occupancy. In the present case the suit is by the persons who allege that they have a right of occupancy but they do not allege themselves to be tenants within the meaning of Section 4(5), Tenancy Act, because their cause of action is that they no longer hold the land which they are entitled to hold. Hence their suit is clearly not within Section 77(3)(d) because it is not a suit by a "tenant" to establish a claim to a right of occupancy.

12. The decision of this point, therefore dearly turns on the meaning to be assigned to the word "holds" in Section 4(5), Tenancy Act. Now the way I look at the matter is this: I consider that *Joti v. Maya (91) 44 P.R. 1891(supra)* was rightly decided because even under the general law a person does not become a tenant unless he has entered into possession. I am unable to see anything in the Act or in the scheme of the Act whereby a person who has never entered into possession could be held to be a tenant by reason of the definition. This could only happen if "holds" was construed to mean or to include "the right to hold." The result would be curious. If a landlord executed a lease in favour of a tenant and thereafter refused to let him into possession, then if "holds" includes the right to hold, the person claiming under the lease would be a tenant and a suit brought by him to recover damages for breach of contract or for specific performance of the contract would be in the revenue Courts. I cannot see anything to justify so startling a change in the whole system of law, nor do I know of any case where it has been held that such a suit would lie only in the revenue Courts. Even if it was a question of doubt whether the word "holds" should be construed as "actually holds" or including "the right to hold," then I would say that since it is a general principle of law that the Act restricting the powers of Courts of ordinary jurisdiction must be strictly construed, it would follow that the narrower interpretation must be preferred to the wider interpretation. For both these reasons, I am clearly of opinion that *Joti v. Maya (91) 44 P.R. 1891(supra)* was rightly decided and if this was rightly decided, it follows that *Kesar Singh v. Nihal Singh (91) 45 P.R. 189(suupra)1* was also rightly decided because as rightly pointed out by the learned Judges in that case, if "holds" does not include "the right to hold," it follows that a person who does not actually hold the land is not a tenant within the meaning of Section 4(5). If this is so, then it follows that the present suit is not within the purview of Section 77(3)(d) and I need say no more upon this point. So far as Section 77(3) is concerned, the question is what meaning is to be given to the words "dispute or matter" in that Sub-section. The Sub-section reads as follows:

> The following suits shall be instituted in and heard and determined by Revenue Courts, and no other Courts shall take cognizance of any dispute or matter with respect to which any such suit might be instituted.

13. I pause a moment here for a slight digression rendered necessary by the fact that in some copies the word "such" is omitted. I have looked up the original Gazette and in the Gazette the word 'such' does occur. However in the Punjab Record, where the Acts are printed, the word "such" has been omitted. Some copies, therefore, have preferred the Punjab Record and some copies have followed the Gazette but I take it that the Gazette must have precedence since that deals with an Act of the Central Legislature and must be presumed to be correct under the Evidence Act and I, therefore, consider that the section must be read as if the word "such" existed. This makes the matter perfectly clear though even if the word "such" did not exist, I do not think it would make any difference to the result. The words "dispute or matter" must be read as qualified by the words "with respect to which any such suit might be instituted." But it is obvious that with respect to the dispute or matter between the parties now no such suit could be instituted by either party within the meaning of Section 77(3)(d). If the suit was brought, as it has been by the tenant, I have already given reasons for holding that the suit is not within the purview of Section 77(3)(d). If brought by the landlord it could not be within the purview of Section 77(3)(d) because the landlord on the facts of this case does not admit the tenant to be a tenant and under Section 77(8)(d) such a suit must be by a landlord to prove that a tenant has not such a right. As under no circumstances can this suit fall within the purview of Section 77(3)(d) and no center clause was urged to be applicable, it follows that the suit does not come within Section 77(3) either and is not barred from the jurisdiction of the civil Court by the operation of Section 77(3).

14. In this connection some emphasis was laid on the Privy Council ruling reported in *Mohamed Nawz Khan v. Bhagta Nand*[8], In that ruling their Lordships however were dealing with Clause (j) of Section 77(3). Their Lordships were pleased to construe Section 77(3)(j) as including not only suits for the amount payable but also suits for the liability to pay. It followed that if a suit were brought to levy haq buha arid it was not contested that haq buha was a village cess, or that the person was a proprietor and therefore not liable to pay haq buha, then such a suit would lie within Section 77(3)(j). It would have been absurd to hold that the converse suit, namely, a suit to have it declared that haq buha was not leviable from any particular person, was however a suit cognizable only by a civil Court. Their Lordships pointed out that emphasis should not be laid on the form of the suit but on the substance of the dispute or matter with respect to which any suit might be instituted. In that case the dispute or matter was the liability to pay haq buha. A suit about that could be brought under Section 77(3)(j) and, therefore, the converse suit also could only be brought in the revenue Courts. I do not see how this ruling can be held to finish the matter so far as the present suit is concerned in favor of the appellants. Indeed as I read the ruling, if it at all touches this case, it would go in favour of the respondents. Their Lordships pointed out in that case that the suit by a proprietor to have himself declared as such would not be a suit within the category, even though it involved the question of his nonliability to pay haq buha. Their Lordships at p. 524 of that ruling further remarked as follows:

> A suit to take the plaintiff out of any other category than that defined by a custom as to village cases or expenses would not be rendered incompetent by the section so far as Clause (j) is concerned; and if the suit was not a suit about the custom or the plaintiff's liability under the custom, it would be equally competent notwithstanding that the plaintiff's rights in the subject-matter of the suit depended upon his proving something which would be inconsistent with his being liable under the custom. After all, the same category may be employed for many different purposes.

15. The only meaning that I have been able to attach to these words is that if a suit were brought to declare that a man was the proprietor, though the motive of the suit might be to hold himself not liable to pay haq buha, the suit would not be within Clause (j). It would follow, therefore, similarly, that though the motive might be to recover possession of land as an occupancy tenant, yet the suit not being the class of suit prescribed by Section 77(3)(d), which I have already demonstrated it is not, the suit would not be barred by reason of Section 77(3). The only question left is the question whether the proviso to Section 77, namely, proviso (1), will, when the Court comes to determine the question of the abandonment of the occupancy tenancy, cause the civil Court to stay its hands and send the suit for decision to the revenue Court. I am unable to see that any such result follows because even in the proviso it is stated as follows: "It becomes necessary to decide any matter which can under this Sub-section (that is, Sub-section (3), of Section 77) be heard and determined only by a

[8] AIR 1938 PC 219

revenue Court." But if my reasoning is correct, as previously shown, then it follows that the matter would be heard and determined only by a revenue Court either under Section 77(3)(d) or Section 77(3). It follows, therefore, that the proviso has no application to such a suit and I would hold accordingly. This concludes both the questions which were referred to the Pull Bench and this is the answer I would give to the questions propounded. I would, therefore, answer the first question formulated in the affirmative and I would answer the second question formulated in the negative.

Bhide, J.

16. The material facts of the case giving rise to the present reference to a Full Bench may be shortly stated as follows: The plaintiffs were admittedly occupancy tenants of the land in dispute while the defendants are the landlords. According to plaintiffs' allegations, the land was leased by them to the defendants as tenants-at-will. Defendants having failed to pay rent, they sued for their ejectment in a Revenue Court. The defendants resisted the suit on the plea that the plaintiffs had lost their occupancy rights by abandonment. This plea was upheld and the suit was dismissed by the Revenue Court. The plaintiffs then instituted the present suit in a civil Court, alleging that they were occupancy tenants of the land in dispute and that the defendants, to whom the land had been leased by them as tenants-at-will, having denied their title, their possession had become that of trespassers. They therefore sued for their ejectment. The defendants again raised the same plea

of abandonment. The trial Court held that the suit was in effect one to establish a claim to occupancy rights and fell within the purview of Section 77(3)(d), Punjab Tenancy Act. It therefore returned the plaint for presentation to a Revenue Court. In support of this decision, the Court relied on *Nand Ram v. Ishar*[9] *Jai Karan v. Nathu Ram*[10] and *Chuha v. Asa*[11] On appeal, the learned Senior Subordinate Judge was of opinion that the suit was triable by a civil Court, He pointed out that the fact that the relationship of landlord and tenant had once existed between the parties was admitted and the only question in dispute was whether the plaintiffs' occupancy rights had been extinguished by abandonment. This question of abandonment was in his opinion not within the purview of Section 77(3), Punjab Tenancy Act. He therefore held that the suit was cognizable by a civil Court. In support of this decision he relied on *Jamadar Mansab Ali Khan v. Ram Karan*[12] and *Cheta v. Baija A.I.R. 1927 Lah. 452(supra)*. On merits he found in favour of the plaintiffs and decreed the suit. A second appeal having been preferred to this Court, it was held by Din Mohammad, J. that the suit was cognizable by a civil Court as the plaintiffs, being out of possession, were not 'tenants' within the meaning of the term as defined in the Punjab Tenancy Act and hence Section 77(3)(d) could not apply. The learned Judge relied in support of this view chiefly on the reasoning in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(supra)* and *Makhan Singh v. Nanda Singh*[13] He accordingly affirmed the Senior Subordinate Judge's decision decreeing the suit. An appeal was then preferred by the defendants landlords under Clause 10, Letters Patent, which was heard by a Division Bench consisting of Dalip Singh and Sale JJ. The question of jurisdiction was again raised before the Bench and it was further argued that the matter in dispute between the parties was 'res judicata' by virtue of the decision of the Revenue Court referred to above. The plea of 'res

[9] A.I.R. 1926 Lah. 128 [11] A.I.R. 1922 Lah. 33 [13](11) 1 P.R. 1911
[10] A.I.R. 1926 Lah. 338 [12] A.I.R. 1935 Lah. 686

judicata' was however ruled out by the Bench on the ground that it had not been relied on at any earlier stage of the suit and also because there was no evidence on the record to support it. As regards the question of jurisdiction, the Bench pointed out that there was a considerable divergence of authorities on the point and therefore referred the following two questions to a Full Bench for decision:

> (1) Is a suit by a dispossessed occupancy tenant to recover possession from his landlord of the land to which he claims the occupancy rights initially within the jurisdiction of the civil Court or not?
> (2) Even if the first question be answered in the affirmative, is the civil Court precluded from trying the question whether the occupancy right has been extinguished by abandonment by reason of proviso (1) to Section 77(3), Punjab Tenancy Act?

17. When this reference came up before the Full Bench for hearing, it was pointed out at the out set that the plaintiffs in the present case could not be said to have been really dispossessed; for they had themselves, according to their allegations, given possession of the land to the defendants as tenants-at-will. It was agreed that in the first question the expression 'dispossessed occupancy tenant' should be taken as equivalent to 'occupancy tenant who is out of possession.'

Coming now to the first question, we have to see whether the suit as framed was triable by a civil Court or a Revenue Court. The plaintiffs were admittedly occupancy tenants of the land in dispute at one time. According to their allegations the land had been given to the defendants as tenants-at-will, but the defendants had denied their title and hence they had brought the present suit for recovery of possession, treating the defendants as trespassers. It is well established that the nature of a suit for the purpose of determining jurisdiction, has to be decided on the basis of the averments in the plaint and not on the basis of any defence that may be taken up, Proviso 1 to Section 77 creates, no doubt, an exception to this rule in so far as it lays down that if in the case of a suit which is originally triable by a civil Court, it becomes necessary to decide any 'matter' which may be heard and determined by a Revenue Court only, under Section 77, Punjab Tenancy Act, the plaint shall be returned for presentation to a Revenue Court. The question whether the present suit would become cognizable by a Revenue Court by virtue of this proviso, will be considered in dealing with the second question. For the purposes of the first question it is only necessary to consider whether the suit as framed, was initially triable by a civil Court.

18. As pointed out above, according to the averments in the plaint, the plaintiffs' suit was for recovery of possession, on the basis of their title as occupancy tenants, the defendants being treated as trespassers. It is true that the defendants in the present case were also the landlords. But the suit was not brought against the defendants in their capacity as landlords, but merely as trespassers. Prima facie, therefore the suit was cognizable by a civil Court. It was urged, however, on behalf of the defendants-appellants that the suit was triable by a Revenue Court, a it was a suit by 'tenants' to establish their occupancy rights and therefore fell under Clause (d) of the second group of suits mentioned in Section 77, Punjab Tenancy Act. But a careful consideration of the facts of the case will, I think, be sufficient to show that this was not the nature of the suit. The fact that the plaintiffs were at one time occupancy tenants of the land was not in dispute as already pointed out. There was, therefore, really no question of the plaintiffs having to establish that they had occupancy rights. The defendants pleaded that the occupancy rights had been lost and the burden of proving this fact lay on them. Moreover, the suit was for recovery of possession and not for establishment of occupancy rights. A suit for mere establishment of occupancy rights would be in the nature of a declaratory suit and could therefore only be brought by a person in possession. Clause (d) of Section 77, applies to suits by a 'tenant' to establish occupancy rights or by a landlord to establish that a 'tenant' has no such right. It has been repeatedly held that the clause applies only when the relationship of landlord and tenant is admitted and the nature of the tenancy alone is in dispute, *cf. Sham Singh v. Amarjit Singh*[14] In such cases, the tenant would naturally be in possession and consequently a declaratory suit would lie. In the present case, the plaintiffs being out of possession, a suit for mere establishment of occupancy rights would not have been competent in view of the provisions; of Section 42, Specific Belief Act, and the suit had therefore to be for recovery of possession. It is true that the suit is based on plaintiffs' title as occupancy tenants, but this fact by itself would not justify the suit being classed as a suit for establishing occupancy rights as pointed out in the Pull Bench decision of the Punjab Chief Court reported in *Nihal singh v. Kaman*[15] the facts of which were on

all fours with the present case.

19. It has been, however, suggested that the real 'dispute' between the parties in this case was whether the plaintiffs had still occupancy rights or had lost them by abandonment and in view of this 'dispute' the cognizance of civil Courts was barred by the provisions of Sub-section (3), Section 77, Punjab Tenancy Act, which lays down that no Court except AIRevenue Court 'shall take cognizance of any dispute or matter, with respect to which any such suit (i.e. a suit mentioned in Section 77, Punjab Tenancy Act), might be instituted.' Reference was made in this connection to a recent decision of their Lordships of the Privy Council reported in *Mohamed Nawaz Khan v. Bhagta Nand*[16], In that case the plaintiff had instituted a suit in a civil Court for a declaration that he was not liable to pay a village-cess known as haq buha to the defendant who was a proprietor of the village. Prior to the institution of the suit, the defendant had already sued the plaintiff in a Revenue Court for recovery of haq buha and it was during the pendency of that suit that the plaintiff had brought the declaratory suit. The question arose whether the plaintiff's declaratory suit was cognizable by a civil or Revenue Court. The Courts in India had given conflicting decisions on the point and it had been ultimately decided by a Division Bench of this a Court on an appeal under Clause 10 of the Letters Patent that the suit was cognizable by a civil and not by a Revenue Court. Their Lordships of the Privy Council considered this view to be erroneous. According to-their Lordships the liability of the plaintiff to pay haq buha was the subject-matter of both the suits and inasmuch as a suit with respect to this subject-matter could be instituted under Clause (J)of Section 77 with? respect to it, the cognizance of the suit by a civil Court was barred. In other words, their Lordships-considered the form of the suit to be immaterial' and held that a suit would be outside the jurisdiction of a civil Court if one or the other of the parties to it could institute a suit with respect to the real subject-matter in dispute between the parties, which came under one or the other of

[14] A.I.R. 1931 Lah. 362 [16] AIR 1938 PC 219

[15](88) 9 P.R. 1888

the various categories of suits mentioned in Sub-section (3) of Section 77. This decision puts, no doubt, a wide construction on the provisions of Sub-section (3) of

Section 77; but I do not think it helps the appellants in this case. In order to apply the principle laid down by their Lordships to the facts of this case, we must Section (i) what is the real subject-matter in dispute in the present case and (ii) whether any suit falling under Sub-section (3) of Section 77 could be instituted with respect to it. As already stated, the subject-matter of the real dispute in the present case is whether the occupancy rights enjoyed by the plaintiffs had been lost by abandonment as alleged by the landlords. We have therefore to see whether any suit under Section 77(3) could be instituted with reference to this subject-matter by one or the other of the parties to the suit. Now, there is no specific clause in. Section 77 applicable in terms to this subject-matter. The only clause which has been suggested on behalf of the appellants as applicable to it is Clause (d). Clause (i) was also suggested at first, but the learned Counsel for the appellants gave up this position in the course of arguments as he realized that this position was wholly untenable, there being no dispute about the 'conditions' of the tenancy. We need therefore consider Clause (d) only. That clause covers suits of two kinds viz. (i) suits-by a tenant

to establish occupancy rights; (ii) suits-by a landlord to establish that a tenant has no occupancy rights.

20. In the present instance, if the plaintiffs had to bring a suit with reference to the subject-matter is dispute, they would have had to sue for a declaration that they had not lost their occupancy rights by abandonment. But they could not sue for a mere declaration, as pointed out above, as they were out of possession and were therefore entitled to thee on sequential relief for recovery of possession. No suit with respect to the subject-matter in dispute could therefore, have been brought by the plaintiffs tenants under part 1, Clause (d). As regards part 2 the landlords, being in possession, could no doubt sue for a declaration that the present plaintiffs were not their occupancy tenants. But such a suit could not fall under part 2 of Clause (d), as the present plaintiffs, who-would have been defendants to such a suit by the landlords were no longer occupying the status of tenants, according to the allegations of the landlords, having lost that status by abandonment. In other words, according to the averments in the-plaint, in such a suit by the landlords the suit would have been not against 'tenants' but against persons who were merely claiming to be occupancy tenants and therefore it could not fall under Clause (d). No suit falling under Clause (d) with respect to the real' subject-matter in dispute in this case would thus appear to be competent by either party. It follows, therefore, that the present case is not taken out of the cognizance of the Civil Court by the rule laid down by their Lordships of the Privy Council in *Mohamed Nawaz Khan v. Bhagta Nand, AIR 1938 PC 219(Supra).*

21. In view of the above finding I consider it unnecessary to discuss whether the present suit would not fall under Clause (d), also on account of the interpretation placed on the word 'tenant' as defined in the Punjab Tenancy Act, in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(supra)*. It was contended on behalf of the respondents that the plaintiffs in this case could not be considered to be 'tenants' at all as they were admittedly out of possession and hence Clause (d) would be inapplicable. It was held in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(Supra)*, that no person could be considered to be a 'tenant' within the definition of that term in the Punjab Tenancy Act unless he 'held' land, i.e., was in possession thereof, at the relevant time,--except in the case of a dispossessed tenant, who institutes a suit under Section 50 of the Act. The present suit was lodged more than one year after the alleged 'dispossession and does not fall under Section 50. Consequently, according to the interpretation placed on the term 'tenant' in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(supra)*, the plaintiffs in the present case could not be held to be 'tenants'. It was therefore argued by the learned Counsel for the respondents that according to the above interpretation of the word 'tenant' any suit brought by or against them could not fall under Clause (d) of Section 77. The learned Counsel for the appellants challenged the correctness of the interpretation placed on the term tenants in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(supra)* and contended that the meaning of the term is wider under general law and there is no justification for placing such a narrow interpretation on the term, as the word 'hold' according to its dictionary meaning does not necessarily connote possession, but also means 'derive title from.' There was a great deal of controversy over this question before us and various rulings were cited

on both sides. With the greatest respect for the view taken in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(supra)*, I must say that the point seems to me to be not free from doubt or difficulty. I consider it, however, unnecessary to discuss the point for the purpose of this appeal as I have come to the same finding viz., that the subject-matter of the present suit does not fall within the purview of Clause (d) of Sub-section (3) of Section 77,--though my finding is based on different grounds. For the reasons given above, my conclusion on the first question is that the present suit as laid was cognizable by a civil Court and I would answer the question accordingly. I now come to the second question, viz., whether even if the suit was initially triable by a civil Court, it became triable by a Revenue Court by virtue of proviso 1 to Section 77, In order to determine this point, it is necessary to consider the wording of the substantive portion of Section 77 as well as of the proviso thereto. The Sub-section and the proviso run as follows:

> (3) The following suits shall be instituted in and heard and determined by Revenue Courts, and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted:
> Provided that (1) where in a suit cognizable by and instituted in a civil Court it becomes necessary to decide any matter which can under this Sub-section be heard and determined only by a Revenue Court, the civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by Order 7, Rule 10, Civil Procedure Code, and return the plaint for presentation to the Collector.

22. It may be mentioned here that it was noticed in the course of the arguments that the word 'such' before the word 'suit' in the substantive portion, of the section was omitted in some of the books referred to by the learned Counsel before us. It was, however, ascertained from the Act as published originally in the Gazette of India (see p. 88 of the Gazette of India, 24th September 1887, Part 4) that the word 'such' was in the Act as passed and its omission in the Act as published in the Punjab-Record 1887 and some other books was an error. The omission of the word would not perhaps make much difference so far as the meaning of the Sub-section is concerned, but the word 'such' certainly serves to make the meaning clearer. Coming now to proviso (1), it will be noticed that there is some difference in the language used in the substantive-part of the Sub-section and that of proviso (1). The substantive part refers to any dispute or matter with respect to which any such suit i.e., a suit referred to in the various clauses of Sub-section (3), might be instituted while the proviso refers to the situation when 'in a suit cognizable by and instituted in a civil Court, it becomes necessary to decide any matter which can under this Sub-section be heard and determined only by a Revenue Court.

23. It will appear that the word 'dispute' is omitted in the proviso and only the word 'matter' is used therein. Was the omission of the word 'dispute' intentional and does the omission make any difference? So far as I can see, the word 'matter is more comprehensive than the word 'dispute'. A matter on which the parties are 'at issue may be described as a 'dispute', but when the parties are not at issue, the matter could only be described as a 'matter'. The object of the proviso perhaps

was that whether the parties are or are not at issue on a particular matter, if the matter is such that it can only be heard and determined by a Revenue Court and if a finding has to be given thereon the Court should adopt the procedure laid down in the proviso. It need hardly be pointed out that even if a point is not disputed, a finding may still be necessary and may have to be given on the admission of a party. However, the point is not of importance for the purpose of this case and need not be pursued further. The proviso must obviously be read with the Sub-section. The words 'no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted' occurring in the Sub-section, seem to be comprehensive enough to include disputes or matters, whether they are raised in the averments in the plaint or arise out of the pleas of the defendants. If they are raised in the plaint, the suit would not be initially cognizable by a civil Court. But, if they arise out of the pleas of the defendants, the suit may be initially cognizable by a civil Court, but would cease to be so when the Court finds that there is a dispute or matter with respect to which a suit falling within one of the clauses of the Sub-section could be instituted. The suit with which their Lordships of the Privy Council had to deal in *Mohamed Nawaz Khan v. Bhagta Nand, AIR 1938 PC 219(supra)* fell under the former category and it is noteworthy that their Lordships held the suit to be cognizable by a Revenue Court on the basis of the above-mentioned words in the Sub-section itself and not on the basis of proviso 1.

24. In the suit before their Lordships of the Privy Council, the plaintiff had sued (as already stated above) for a declaration that the defendant was not entitled to demand any amount from the plaintiff as haq buha. This suit raised a dispute with regard to plaintiff's liability to pay haq buha, which was admittedly a village cess. According to Clause (j) of Section 77, suits for sums payable on account of village cesses or expenses are cognizable by a revenue Court only. Their Lordships held that although the plaintiff bad merely sued for a declaration as to his liability to pay a village cess, the subject-matter of the suit was one with respect to which a suit could be instituted under Clause (j) of Section 77 and hence the suit was cognizable by a revenue Court. In other words, their Lordships seem to have held the suit to be cognizable on the basis of the averments in the plaint itself and not on account of the pleas of the defendants. It was apparently for this reason that their Lordships merely dismissed the suit, holding it to be not triable by a civil Court and did not adopt the procedure laid down in proviso (1). Tor proviso (1) deals with only that limited class of cases in which the suit as laid is cognizable by a civil Court, but it becomes necessary (presumably on account of the pleas raised by the defendants or possibly even on account of any counter pleas which may be raised subsequently by the plaintiffs in replication) to decide any matter which can be heard and determined only by a revenue Court, under Sub-section (3). The proviso requires that where this situation arises, the Court shall return the plaint for presentation to the revenue Court (Collector), endorsing therein the nature of the matter for decision and the particulars required Order 7, Rule 10, Civil Procedure Code Before the enactment of the proviso, the Courts had taken divergent views as to the procedure to be adopted when such a situation arose. Sometimes the suit was held to be not triable by a civil Court and therefore merely dismissed, while sometimes the pleas raised by the defendants were ignored as outside the cognizance of the civil Court and the case was decided on the other pleas. The matter

came up before a Full Bench of the Punjab Chief Court in *Haji Muhammad Bakhsh v. Bhagwan das*[17] and the decision of the Full Bench was that the pleas should simply be ignored by the civil Court in such oases. This was obviously an anomalous and unsatisfactory state of affairs (and this was recognized in the judgment) but the Court was constrained to give the decision owing to the law as it stood at the time. The Legislature, therefore, intervened and enacted the proviso with a view to lay down a procedure for dealing with this class of cases.

25. In order to determine whether the present suit becomes cognizable by a revenue Court owing to the above mentioned proviso, we must therefore see if the defendants have raised any pleas, which make the suit cognizable by a revenue Court., Now the only relevant plea of the defendants in this respect is the alleged extinction of the occupancy rights of the plaintiffs by abandonment. Is this plea then a 'matter' which can be heard and determined by a revenue Court only, as required by the proviso? This would obviously be the case only, if a suit with respect to it could be instituted under one of the clauses of Sub-section (3) of Section 77. In other words, the requirement of the proviso in this respect is substantially the same as that laid down in the main portion of the Sub-section, viz., any dispute or matter with respect to which any such suit might be instituted' although the phraseology of the proviso is different from that of the Sub-section. We have, therefore, to come back to the same point as was discussed with reference to the first question--viz., whether any suit falling under Sub-section (3), could be instituted with respect to the above plea of the (defendants. For reasons already given, I hold that no such suit could be instituted and therefore the proviso does not apply.

26. It was, however, urged on behalf of the appellants that all that need be considered for the purpose of the proviso is whether any suit could be instituted under the proviso with respect to the 'matter raised by the pleas of the defendants and it is unnecessary to consider further whether such a suit could be instituted by one of the parties to the suit against the other at the time this plea was raised. It was contended that the plea of the defendants was that plaintiffs were no longer occupancy tenants and as the question whether a person is or is not an occupancy tenant is the subject-matter of suits falling under Clause (d), that clause should be held to apply. In support of the above contention the learned Counsel for the appellants relied on the observations, of

[17](09) 76 P.R. 1909

some of the Judges who decided the Full Bench case reported in *Cheta v. Baija*[18] The present reference to a Full Bench has been made partly on account of these observations and it is therefore necessary to consider these observations. It may be stated at the outset that the facts of the case reported in *Cheta v. Baija A.I.R. 1927 Lah. 452(Supra)* were different from those of the present case. The plaintiffs in that suit were tenants to whom a notice of ejectment had been issued under Section 43, Punjab Tenancy Act, and who after having failed in a suit to contest the notice had been ejected from the land in pursuance of the decree obtained by the landlords. They then instituted a suit for possession of the land in a civil Court on the ground that they were occupancy tenants and the question was raised whether the suit was cognizable by a civil or revenue Court. The only question referred to the Full Bench was:

> Whether a civil Court has jurisdiction to try ft suit brought by a person, who has been dispossessed from his tenancy after a notice issued to him under Section 43, Tenancy Act, and who has been unsuccessful in a suit under Section 45 to contest his liability to ejectment, for possession of the land from which he has been ejected on the ground that he has a right of occupancy therein, and whether Section 77(3)(d) of the Act bars such a suit or not.

27. It was held by the Full Bench that the suit was rightly instituted in a civil Court, but that the civil Court would have to deal with it in accordance with the procedure prescribed by proviso (1) to Sub-section (3) of Section 77, i.e., its jurisdiction would continua until it becomes necessary to decide a matter which can under the Sub-section be decided by a revenue Court only. The plea of res judicata had also been raised in that case but this plea had not yet been adjudicated on. The question whether proviso (1) did or did not apply to the case did not therefore actually arise at the stage and was not actually decided by the Full Bench. But some of the learned Judges have undoubtedly made observations to the effect that the proviso would apply if the plea of res judicata did not succeed. The Full Bench case was decided by five Judges, viz., Broadway, force, Addison, Tek Chand and Dalip Singh JJ. Broadway, J. who delivered the main judgment merely observed that in oases of this nature' proviso (1) to Section 77(3) is applicable and renders it necessary for the civil Court 'to act thereunder.' He did not however discuss the matter further and it is not very clear on what grounds he considered the proviso to be applicable; but so far as one can gather the learned Judge considered the proviso to be applicable because the 'matter' to be decided in the suit was the existence of an occupancy tenancy. The learned Judge does not appear to have considered whether a question of this type is always triable by a revenue Court or only when it arises between parties occupying the status mentioned in Clause (d) of Sub-section (3) of Section 77. force J. merely agreed with Broadway J., Addison J. seems to have discussed the question at some length. His view apparently was that the plaintiffs were out of possession and therefore not 'tenants' and hence the suit was rightly instituted in a civil Court; but he considered that the suit would have to go to a revenue Court, if it became necessary to decide the matter raised by the plaintiffs, viz., whether they are in fact tenants and as such have occupancy rights. The learned Judge held this matter to fall under Clause (d) of Sub-section (3) of Section 77. But here again the learned Judge does not appear to have considered the question of the status of the parties as required by Clause (d). With all

[18] A.I.R. 1927 Lah. 452

respect I must say that I do not see how the question of the existence of an occupancy tenancy can be held to be one which can be heard and determined by a revenue Court only unless it arose between the parties who had the status mentioned in Clause (d). Tek Chand J. agreed with Broadway and Addison JJ., but he too did not discuss the question of the status of the parties as laid down in Clause (d). Dalip Singh J. on the other hand seems to have taken a contrary view. The discussion of the point is of a general character, but such appears to be the trend of his judgment.

28. It will, thus, appear that the observations of some of the learned Judges who decided *Cheta v. Baija A.I.R. 1927 Lah. 452(Supra)* on which reliance is placed by the learned Counsel, were really in the nature of obiter dicta, and were not based on a full consideration of the requirements of Clause (d) perhaps because no occasion had yet arisen for deciding that point. One of the learned Judges who discussed the question generally (Dalip Singh, J.) on the other hand seems to have held a contrary opinion. The learned Counsel for the appellants referred to some other rulings also in which it seems to have been assumed without discussing the matter fully that whenever any question of the existence of occupancy rights arose the case became triable by a revenue Court: see e.g. *Chuha v. Asa*[19] and *Jai Karan v. Nathu Ram*[30] But not a single case was cited in which the requirements of Clause (d) and of the proviso were fully discussed and a conclusion was arrived at that it was unnecessary to consider the status of the parties in determining whether the matter falling for decision under the proviso was one which could be heard and determined by, a revenue Court only. On the other hand, the interpretation placed on Clause (d) of Sub-section (3) of Section 77 in *Sham Singh v. Amarjit Singh*[31] (the soundness of which was conceded by the learned Counsel for the appellants) fully supports the conclusion arrived at above.

29. The argument that a suit becomes cognizable by a revenue Court under Clause (d) merely because there is a question of the existence of an occupancy tenancy seems to me to be wholly untenable. The object of the Punjab Tenancy Act evidently is to take certain disputes between landlords and tenants and other cognate matters out of the jurisdiction of civil Courts. It is well established that an enactment of this nature which restricts the jurisdiction of civil Courts ought to be construed strictly. In order to see therefore whether Clause (d) of Section 77 applies to the circumstances of a case, it is necessary to see whether all the requirements of the clause are fulfilled. It is therefore necessary to consider not only the nature of the dispute, but also the status of the parties as mentioned in the clause. For instance, if an occupancy tenant sues to eject a mere trespasser from his land, he may have to prove that he is an occupancy tenant, if the fact is denied by the defendant. But is that any reason for holding the case to fall under Clause (d)? The answer must, I think, be obviously in the negative. The intention of Clause (d) clearly is that only those suits should be held to fall under it which arise between parties occupying the status mentioned in the clause. It is only when this condition is satisfied that the dispute about the existence of an occupancy tenancy ceases to be cognizable by a civil Court. The words "any dispute or matter with respect to which any such suit might be instituted" appearing in Sub-section (3) are very significant. There must be possibility of such a suit at the time when the

[29] A.I.R. 1922 Lah. 33 [31] A.I.R. 1931 Lah. 362

[30] A.I.R. 1926 Lah. 338

dispute or matter is raised. The object of this provision evidently is to prevent circumvention of the Punjab Tenancy Act by taking any 'dispute' or 'matter' to a civil Court which the Legislature has thought it fit to leave to the decision of the revenue Courts. The language used in the proviso is somewhat different from the language of the corresponding provision in Sub-section (3), but its effect is the same as already pointed out. Unless therefore it

is shown in any particular case that there is a 'matter' to be decided with respect to which one or the other party could institute a suit which would be cognizable by a revenue Court only, the jurisdiction of the civil Courts will not be ousted.

30. It has been already held above that the requirements of Clause (d) of Section 77 as regards the status of the parties are not fulfilled in respect of the real subject-matter of the dispute between them in this case. I would accordingly answer the second question in the negative. In the end, reference may be made to one point which was raised on behalf of the appellants in the course of the arguments. It was urged that the present action in the civil Court was not maintainable in view of the provisions of Section 50 and Section 77(g), Punjab Tenancy Act. This argument was based on a Pull Bench decision of the Punjab Chief Court reported in *Akbar Hussain v. Karm Dad A.I.R. 1919 Lah. 475(Supra)*. This was not however one of the points referred to the Full Bench and was, therefore, not allowed to be argued.

Abdul rashid, J.

31. I have had the advantage of reading the judgments of my brothers Dalip Singh and Bhide. I find myself in agreement with my brother Dalip Singh, and have nothing to add.

Muhammad Munir, J. I also agree with

Dalip Singh, J. Tek Chand, Ji.

32. I have had the advantage of reading the judgments prepared by my learned brethren, Dalip Singh and Bhide JJ. and agree with them that the first question referred to the Full Bench must be answered in the affirmative and the second in the negative. There is no doubt that the suit, as framed, was properly instituted in the civil Court. In order to determine whether the Court, in which a suit is brought, has or has not jurisdiction, initially, to entertain it, what has to be seen is the allegations in the plaint, the cause of action disclosed therein and the relief claimed. It is common ground that defendants are the owners of the land and the plaintiffs were occupancy tenants under them and were in possession as such till 1927. According to the plaint, in that year the plaintiffs gave the land to the defendants for cultivation as tenants-at-will under them on payment of rent and put the defendants in actual possession for this purpose. It was averred that the defendants paid the rent for some time but were now denying the tenancy-at-will and were in wrongful possession as trespassers. The plaintiffs, therefore, prayed that a decree for possession of the land be passed in their favor.

33. It is not denied for the defendants that a suit, framed as above, is cognizable by a civil Court. It is however contended that we have not merely to look to the form in which the claim is put but to its substance and that in this case what the plaintiffs were really seeking was to establish their claim that the occupancy rights, which they once had but which had become extinct by

abandonment in 1927 were still subsisting. It was accordingly urged that the suit was of the class described in Clause (d) of Sub-section (3) of Section 77 and, as such, was exclusively triable by a revenue Court. Clause (d) refers to suits "by a tenant to establish a claim to a right of occupancy or by a landlord to prove that a tenant has not such a right." Assuming, that the real nature of the suit is as contended, for by the defendants' learned Counsel, the suit would not fall within Clause (d). That clause contemplates that the relationship of landlord and tenant, admittedly subsists between the parties; and the dispute is as to the nature of the tenancy, that is to say, whether the tenant is a mere tenant-at-will or is a tenant having a right of occupancy and if so, of what class. If the parties are at issue on the question as to whether the plaintiff is a "tenant" at all, Clause (d) would not apply. See in this connexion *Sham Singh v. Amarjit Singh A.I.R. 1931 Lah. 362(Supra)*, and the rulings cited therein, the correctness of which has not been questioned by the appellants' counsel.

34. Further, the suit covered by Clause (d) is a suit for a declaration and not a suit for possession. The leading case on this point is *Nihal Singh v. Kaman (88) 9 P.R. 1888(Supra)* , decided by a Pull Bench of the Chief Court under Section 45(a) of Act 18 of 1884 (which corresponded to Section 77 of the present Punjab Tenancy Act), the facts of which were on all fours with those of the case before us. It was held in that case that where a plaintiff asked to be placed in possession of land on the ground that he was entitled to hold such land as a tenant with a right of occupancy, his suit is not one "by a tenant to establish a claim to a right of occupancy" and so cognizable by Revenue Courts only. It was observed that it was true that in a case of this kind it was essential to the obtaining of the relief asked for that a plaintiff should "establish his claim to a right of occupancy," but that this question of title arises only incidentally. The cause of action alleged by the plaintiff is being wrongfully deprived of, or kept out of the cultivating possession of certain lands, and the relief he asked for is a restoration to such possession. This is a relief which the civil Courts alone can give him. The definition of "tenant" in the Tenancy Act and other changes made by it have not affected the correctness of *Nihal Singh v. Kaman (88) 9 P.R. 1888(supra)*, indeed, it was re-affirmed by other Full Benches of the Chief Court in *Joti v. Maya (91) 44 P.R. 1891(suupra)* and *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(supra)*, in cases decided under that Act. A Full Bench of five Judges of the High Court in *Cheta v. Baija A.I.R. 1927 Lah. 452(Supra)*, has endorsed this conclusion, and nothing said before us leads me to come to a contrary decision. With great respect, I entirely agree with the view expressed by 1'lowden, J. in *Kesar Singh v. Nihal Singh (91) 45 P.R. 1891(supra)*, that in order to constitute the relation of "landlord" and "tenant" as defined in the Tenancy Act, the latter must not merely have the "right to hold" but must also have entered into possession as such, and further that the continuance of possession (actual or constructive) is necessary for the continuance of the relation, except for purposes for which the legislature has laid down the contrary, e.g., in oases covered by Sections 50 and SOA of the Act. This matter has been discussed fully by my learned brother Dalip Singh and I entirely agree with his reasoning, and conclusion.

35. The second question relates to the effect of proviso (3) to Section 77 (added by Act 3 of

1912) which lays down that where in a suit cognizable by and instituted in a civil Court it becomes necessary to decide any "matter" which can under this Sub-section be heard and determined by a revenue Court a civil Court shall endorse upon the plaint the nature of the "matter" for decision and return the plaint for presentation in the revenue Court. The question, therefore, is whether the defendants' pleas in this case raised a "matter" in respect of which a suit, if brought by the defendants would fall within any of the clauses of Sub-section (3) of Section 77. The defendants' learned Counsel is unable to refer to any clause other than Clause (d). As from above the first part of the clause does not apply, but it is argued that if the defendants were to bring a suit against the plain, tiffs, based on the allegations contained in their pleas in this case, it would be a suit falling under the second part of that clause. But in order to make the second clause applicable it is necessary that the plaintiff in the hypothetical suit (i.e., the present defendants) recognize the defendants in that suit (i.e., the present plaintiffs) as "tenants" under him and admit that they are in possession as such, but that their status is not of occupancy tenants but is of tenants-at-will or tenants for a fixed period or tenants of some other kind. Now this is not the defendants' plea in the present case. They altogether deny that the relationship of landlord and tenants exists between them and the plaintiffs, and it is common ground that the plaintiffs are not in actual or constructive possession. The defendants no doubt admit that the plaintiffs were once occupancy tenants under them, but their case is that the tenancy became extinct in 1927 since when the plaintiffs have had nothing whatever to do with the land. It cannot, therefore, be said that on the defendants' pleas it has "become' necessary" to decide a "matter" which, under Sub-section (3), can be heard and determined by the revenue Courts only The answer to the second question is in the negative.

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