LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

MUSSAMMAT ATTE (PLAINTIFF) Appellant,

versus

FAIZ MOHAMMAD AND OTHERS (DEFENDANTS) Respondents.

1938

Jan. 3.

Letters Patent Appeal No. 136 of 1937.

Punjab Tenancy Act (XVI of 1887), S. 59 Proviso — "Occupied" — meaning of.

In an action brought by *Mst.* A, for possession of land as landlord on the death of the last occupancy tenant on the plea that the deceased tenant left no such persons as are mentioned in section 59 (1) of the Punjab Tenancy Act, it was found that the common ancestor of the deceased tenant and the defendants was one of the co-sharers in the *shamilat deh* of which the land in suit formed a part and that the land was in physical possession of two different persons who, though included among the owners of this land, were holding the land in their own right and not under other co-sharers. It was contended on behalf of defendants that the common ancestor occupied the land within the meaning of proviso to section 59 (1) of the Act.

Held, that neither on general principles nor on the particular facts of the case the common ancestor of the deceased tenant and the defendants ever occupied the land in suit within the meaning of section 59 (1) of Tenancy Act.

That the word 'occupied' in Punjab Tenancy Act implies some physical control over the land or constructive possession thereof, where the person is in a position to exercise any dominion over the property through his tenant or servant or is in a position to assume physical control over it.

Kanh Sing v. *Wuzeera* (1), *Vazira* v. *Jawand Sing* (2), *Mahla Khan* v. *Hakim Khan* (3) and *Nihal Singh* v. *Hari Singh* (4), distinguished.

(1) 20 P. R. 1871.
(2) 20 P. R. 1876.
(3) 4 P. R. (Rev.) 1881.
(4) 26 P. R. 1895.

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Kahn Singh v. *Hardit Singh* (1), *Rahiman* v. *Nagar Mal* (2), and *Attar Singh* v. *Bhagwan Das* (3), relied upon.

Letters Patent Appeal from the decree of Bhide J., dated 18th June, 1937, passed in Regular Second Appeal No.355 of 1937, reversing that of Dewan *Sri Ram Puri, Senior Subordinate Judge, Hoshiarpur, dated 21st December, 1936, and restoring that of* Lala *Ram Gopal, Subordinate Judge, 4th Class, Garhshankar, dated 3rd February, 1936, dismissing the plaintiff's suit.*

MALIK MOHAMMAD AMIN, for Appellant.

GHULAM RASUL KHAN, for Respondents.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.

DIN MOHAMMAD J.—The facts bearing upon the question of law involved in this case may shortly be stated. One Imam Din, who was an occupancy tenant of the land in suit, died on the 3rd December, 1934. Thereupon Faiz Mohammad and others took possession of the land and later, on the 7th June, 1935, mutation was sanctioned in their favour by the revenue authorities. Consequent upon this one *Mussammat* Atte claiming to be the landlord instituted the suit out of which the present appeal has arisen for possession of the said land.

The principal question that arose for decision by virtue of section 59 of the Tenancy Act was whether the common ancestor of the defendants and the deceased Imam Din ever occupied the land. The Subordinate Judge who tried the suit came to the conclusion that, inasmuch as the common ancestor of the defendants and the deceased occupancy tenant happened to be recorded as one of the co-sharers in

(1) 100 P. R. 1908. (2) 1933 A. I. R. (Lah.) 1010.
(3) 65 P. R. 1909.

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the *shamilat-deh* of which the land in suit formed a part, the plaintiff's suit could not succeed. On appeal, the Senior Subordinate Judge, holding that it had not been proved that the common ancestor of the defendants and the deceased tenant had occupied the land within the meaning of section 59 of the Tenancy Act in spite of his having been entered as a co-sharer in the *shamilat*, decreed the suit with costs throughout. The defendants presented a further appeal to this Court which came for hearing before Bhide J. He agreed with the trial Court in its interpretation of the word ' occupied ' as used in section 59 of the Tenancy Act and accepted the appeal. He, however, in view of the peculiar circumstances of the case, left the parties to bear their own costs throughout.

The sole question that falls to be determined in this case is, what is the true construction to be put on the word ' occupied ' as used in the proviso to section 59 of the Tenancy Act. On behalf of the appellant it is strenuously contended that the mere mention of a co-sharer's name in the revenue papers in relation to *shamilat-deh* does not connote such occupation on the part of that co-sharer as is contemplated by the framers of the Tenancy Act and that, in order to satisfy the requirements of the proviso to section 59, some definite contact with or apparent control over the land is necessary. The respondents on the other hand have urged that the word ' occupied ' is wide enough to include such possession as existed in this case. There is no direct authority on the point at issue but after giving full consideration to the matter we are disposed to think that whatever interpretation the word ' occupied ' may have in different legislative enactments, in the Tenancy Act it implies some control over

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the land by whatever name it may be expressed in law. It may not necessarily be actual possession. For instance, if a person cultivates the land through his tenants, in legal parlance his possession would not be actual but constructive, but even if so it cannot be denied that the said person is in occupation of the land. The person in question has dominion over the property and can oust trespassers, realise rents and even eject the tenants and himself assume physical control over the said property. But where neither he has physical control over the property nor is he in a position to exercise any dominion over the property through his tenants or servants or in a position to assume physical control over it, he cannot be said to be in occupation of the land. A co-sharer whose name is merely mentioned along with other co-sharers as a co-owner in the *shamilat-deh* may neither have physical control over the property nor be in constructive possession thereof. His contact with the land by virtue of such entry alone is too remote to be dignified by the name of possession even in the literal sense of the term. In fact in the present case Exhibit D.5 on which reliance was mainly placed by the trial Court clearly indicates that the land was in physical possession of two different persons, namely, Pir Bakhsh, son of Umar Khan, and Sandal Khan, son of Bahar Khan, who though included among the owners of this land were holding the land in their own right and not under the other co-owners. They were the only persons who could be said to be in occupation of the land. We have no hesitation, therefore, in holding that neither on general principles nor on the particular facts of this case the common ancestor of the defendants and the deceased tenant ever occupied the land in suit within the meaning of section 59 of the Tenancy Act.

The learned Judge of this Court referred to certain rulings of the Punjab Chief Court, namely, *Kanh Sing* v. *Wuzeera* (1), *Vazira* v. *Jawand Sing* (2), *Mahla Khan* v. *Hakim Khan* (3) and *Nihal Singh* v. *Hari Singh* (4) in support of his conclusion, but all that those rulings have laid down is that a person is held to be in occupation of the land even if he does not cultivate it himself, but gets the land cultivated through others. This proposition, however, is of no use in the present case, as here that circumstance does not exist.

For the appellant reliance has been placed on *Kahn Singh* v. *Hardit Singh* (5), *Rahiman* v. *Nagar Mal* (6) and *Attar Singh* v. *Bhagwan Das* (7) and though those authorities also are not exactly in point, they are of some help in interpreting the word ' occupied ' generally. In *Kahn Singh* v. *Hardit Singh* (5) one of the questions that arose for decision was whether upon the assumption that the tenancy of the three mortgagees was joint, the constructive possession of Kahn Singh over the whole land could be said to amount to ' occupation ' of the land actually occupied by Kishan Singh within the meaning of section 59 and the learned Judges remarked, " We have grave doubts upon this point and as at present advised, we are inclined to hold that the word ' occupied ' means actually occupied, and that it does not include an occupation which is merely such by implication of law." No doubt no definite opinion was given upon that question as the case was decided on a different point but the interpretation of the word ' occupied '

(1) 20 P. R. 1871.
(2) 20 P. R. 1876.
(3) 4 P. R. (Rev.) 1881.
(4) 26 P. R. 1895.
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(6) 1933 A. I. R. (Lah.) 1010.
(7) 65 P. R. 1909.

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was given after consideration and not in an off-hand manner. In *Rahiman* v. *Nagar Mal* (1) Dalip Singh J. observed in connection with a case under the Provincial Insolvency Act where also the word 'occupied' has been used that that word seems to be a physical fact. In *Attar Singh* v. *Bhagwan Das* (2), Johnstone J. remarked that in the expression 'belonging to and occupied by agriculturist' the words 'belonging to' are not synonymous with 'occupied by' and that the term 'occupied by' means 'lived in by' or 'used for agricultural purposes by.'

We have already explained above that occupation in some cases may not necessarily mean physical contact and it may include constructive possession in the technical sense of the term, but as we are not prepared to hold that the mere mention of the name of a co-owner in the column of owners in relation to land which is in the cultivating possession of somebody else who does not hold the land under the co-owners denotes occupation of such co-owner, we accept this appeal, set aside the order of the learned Judge of this Court and decree the plaintiff's suit. As the question was not free from difficulty we order that the parties will bear their own costs throughout.

A. N. K.

Appeal accepted.

(1) 1933 A. I. R. (Lah.) 1010. (2) 65 P. R. 1909.