**IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA**

***R.S.A. No. 419 of 2002***

**Reserved on: 30.5.2017**
**Date of decision: 20.6.2017.**

---

Phuyian(deceased) through her L.Rs. Umed Ram and Ors.

.....Appellants

Versus

Krishan Kumar (deceased) through his L.Rs.

.....Respondents

---

*Coram:*

**The Hon'ble Mr. Justice Chander Bhusan Barowalia, Judge.**

[1] *Whether approved for reporting? Yes.*

| | |
|---|---|
| **For the appellants:** | **Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vashisht Advocate.** |
| **For the respondents:** | **Mr. Ankush Dass Sood, Sr. Advocate with Mr. Rakesh K. Sharma, Advocate.** |

**Chander Bhusan Barowalia, Judge.**

The present regular second appeal is maintained by the appellants against the judgment and decree dated 13.7.2001, passed by the learned Additional

---

[1] *Whether reporters of Local Papers may be allowed to see the judgment? Yes.*

District Judge, Solan, H.P., in Civil Appeal No.3-S/13 of 2001, whereby the learned Appellate Court has modified the judgment and decree dated 22.11.2000, passed by the then learned Sub Judge, Ist Class, Kandaghat, District Solan, H.P., in Civil Suit No.18-K/1 of 1998, with the prayer to set aside the impugned judgment and decree passed by the learned Appellate Court.

2. The dispute in the present case is with regard to the land comprised in Khewat/ Khatauni No.39/66 Khasra No.837 (old Khasra No.510/329 min), 849 (old Khasra No.568/336 min), 850 (old Khasra No.568/336 min.), 852 (old Khasra No.568/336 min) and 854 (old Khasra No.510/329) min, kita 5, measuring 2044 sq.mtrs (2 bighas 09 biswas) situated in Mauza, Salihari (Sapar) Pargana Bagri-Khurd, Tehsil Kandaghat, District Solan, H.P. (hereinafter referred to as the suit land). It has been alleged that said Puran Chand had expired on 13.12.1997 and after his sad demise, the plaintiff Krishan Kumar(since deceased) (hereinafter to be referred as the appellant) was owner in possession of the suit land after the death of his father Puran Chand. It has also been alleged

that the defendants (hereinafter to be referred as the appellants) and their deceased father Mathu Ram have or had any concerned over the suit land after 10.4.1976. It has also been averred that earlier various civil suits were filed by the deceased Mathu Ram with regard to the suit land against the deceased Puran Chand, which were dismissed by the Court since long ago. It has been alleged that deceased Mathu Ram in connivance with the settlement staff got the revenue entries of the suit land, qua possession in his favour, which entries are illegal, void and against the factual position existing on the spot.

3. It has been alleged that the suit was contested by all the defendants(appellants), except defendant No.3 and they also filed written statement. They pleaded that they are in possession of the suit land since time immemorial and are cultivating the same peacefully and without any interruption and interference from any side and pleaded that Mathu Ram (deceased) was inducted, as tenant, by the predecessor-in-interest of the defendants/respondents and after passing of H.P. Tenancy and Land Reforms Act, the father of the defendants became owner-in-possession of the suit land and the entries in the

revenue record have rightly been changed by the revenue staff after due enquiry and verification.

4. On the pleadings of the parties, the trial Court framed the following issues:

> **"1. Whether Sh. Puran Chand, Advocate was owner-in-possession of the suit land, as alleged?**
>
> **... OPP**
>
> **2. Whether Puran Chand has expired on 13.12.1997 at Chandigarh?**
>
> **... OPP**
>
> **3. If issue No.2 is proved in affirmative, whether the plaintiff is the only son of Shri Puran Chand and is not owner-in-possession of the suit land ?**
>
> **... OPP**
>
> **4. Whether the change of the entries by the Settlement Officer is illegal, void, wrong and against the factual position existing on the spot, qua the suit land, as alleged?**
>
> **... OPP**
>
> **5. Whether the suit is not maintainable in the present form?**
>
> **.... OPD**
>
> **6. Whether the plaintiff is estopped from filing the suit by his own acts, conducts and acquiescence?**
>
> **.... OPD**
>
> **7. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction?**
>
> **.... OPD**

**8. Whether late Sh. Mathu Ram had been inducted as tenant by the predecessor-in-interest of the plaintiffs?**

**.... OPD**

**9. Whether after the passing of the H.P. Tenancy Land reforms Act, the father of the defendants has become owner in possession of the suit land?**

**.... OPD**

**10. Relief."**

5. The learned trial Court decided Issues No.1 to 4 and partly allowed Issue No.8 in favour of the plaintiffs and Issues No.5,6, 7 and 9 in favour of the defendants and decreed the suit.

6. Feeling aggrieved and dis-satisfied by the judgment and decree passed by the learned Trial Court, the plaintiff filed an appeal before the learned lower Appellate Court. Learned lower Appellate Court partly allowed the appeal and modified the judgment and decree to the extent that the plaintiff-respondent is entitled for a decree of possession on the basis of title and is not entitled for a decree of permanent prohibitory injunction restraining the defendants from causing interference in the suit land because the possession of the plaintiffs-respondent is not found in possession over the suit land. Hence, the present

appeal, which was admitted on the following substantial question of law:- .

> **"a). Whether the learned first Appellate Court was right in granting decree, for possession, in favour of the plaintiff in a suit for permanent prohibitory injunction, against the defendant in the facts and circumstances of this case?"**

7. I have heard the learned counsel for the parties and have also gone through the record.

8. Learned counsel for the appellants has argued that there was no prayer for decree of possession. However, the lower Appellate Court has granted decree of possession, which is not permissible.

9. On the other hand, the learned counsel appearing for the respondents, has argued that the judgment passed by the learned Appellate Court is as per law and the finding of the learned Appellate Court holding the defendants in possession of the suit land is wrong. He has further argued that the findings against him are required to be set right after applying the provisions of Order 41, Rule 33 CPC. In rebuttal, the learned counsel for the appellants has argued that as there is no cross-appeal neither cross objections. Provisions of Order 41 Rule 33

CPC cannot be relied upon which are exceptional.

10. To appreciate the arguments of the learned counsel for the parties, I have gone through the record of the case, in detail.

11. Vinay Kumar Gupta has appeared as PW-I and has stated that Puran Chand, Advocate was his grand-father, who died in the year 1997. He has further deposed that his father Krishan Kumar was son of Puran Chand and that he is the Power of Attorney holder of Krishan Kumar. He has further stated that the property of deceased Puran Chand devolved upon his father Krishan Kumar. Further, he has stated that Mathu Ram and his family have no legal right, title or interest in or over the suit land. He has further stated that Mathu Ram was tenant of his grand–father and in the year 1976 and the land was resumed by his grand-father. He further stated that after resumption of land under tenancy of Land Reforms Act, Mathu Ram has no right, title or interest over the suit land. He has further stated that Mathu Ram filed civil suit and the same was dismissed, even an appeal filed by said Mathu Ram, was also dismissed. He also stated that the plaintiff is in possession of the suit land and the defendants

intended to raise construction over the suit land. He has further deposed that Mathu Ram had died and now the defendants are trying to take the possession over the suit land and in case the defendants are found in possession of the suit land, then a decree for possession be granted to him. He has also deposed that had the land was resumed entries to the contrary, which has come in favour of the defendants, are not as per law.

12. DW1, Munu Ram has stated that in the revenue papers, father of the plaintiff Puran Chand, has been recorded, as owner, but the suit land is in the possession of the defendants. He has further stated that prior to the defendants, the predecessor-in-interest of the defendants was in possession of the suit land. He has also stated that predecessor-in-interest of the defendants died in the year 1995 and, thereafter, the defendants came in possession of the suit land. He has also stated that the plaintiffs and his predecessor-in-interest had never come to the suit land and they are residing at Chandigarh only. He has further stated that in the settlement took place in the year 1991-92, defendants became owners in possession of the suit land and

they were rightly recorded.

13. DW2, Hari Nand stated that he had seen the suit land and the same adjoins to his land. He has stated that the suit land was in possession of Mathu Ram and after the death of Mathu Ram, his children came in possession of the suit land. He has also stated that the plaintiff did not remain in the suit land. He has also stated that the plaintiff used to reside at Chandigarh and in the settlement, possession of the defendants was recorded, as per the factual position.

14. DW3, Medh Ram has stated that he has seen the suit land and the same adjoins his land and the suit land was being cultivated by Mathu Ram. He has further stated that the plaintiff did not remain in possession of the suit land at any point of time. In the settlement which took place in the year, 1992-93, he was present on the spot and the possession was recorded by the Settlement Authority, as per the factual position. From the record, it is clear that defendants were owner in possession of the suit land.

15. Mathu Ram earlier was inducted, as a tenant over the suit land and the predecessor in interest of the respondents and after passing of H.P. Tenancy and Land Reforms Act, the appellants have become owners in possession of the land. Resumption order in favour of Puran Chand was challenged by Mathu Ram by way of filing civil suits, but he could not succeed in those civil suits. Even in the appeal, he has failed, so, it is clear that resumption was there in favour of Puran Chand qua the suit land. However, it has come on record that thereafter it was Mathu Ram and his successors, who remained in possession of the suit land and the settlement took place and the possession of Mathu Ram was recorded and, thereafter, continued with the L.Rs. of Mathu Ram i.e. defendants.

16. Though, the defendants are required to prove its tenancy by way of agreement and payment of rent, but qua the suit land, the defendants have failed to prove this fact in the Court of law. Meaning thereby that the plea that they are joint owner after 1976 of the suit land, could not be fortified by them.

17. In the present case, no bilateral agreements of the subsequent tenancy has been found on record by the defendant. No receipt of tenancy has been placed on record by the defendant under law. DW2, Hari Nand, when appeared in the witness box, did not state that the subsequent tenancy was created in favour of the defendant. He did not state that any rent was paid by the defendant in his presence. He also did not state that the defendant was tenant over the suit land. DW3, Medh Ram also did not state that any subsequent tenancy was created between the parties in his presence and he did not state that any rent was paid by the defendant. He also did not state that the defendant was tenant over the suit land. Even the revenue entries shows that Mathu Ram has been recorded, as ***Kabiz*** and subsequent tenancy of Mathu Ram has not been recorded. Further, in the revenue entries, the rent column is found blank. It has been alleged that the revenue record has been prepared by the public official, while discharging his official duties, which is relevant fact under Section 35 of the Indian Evidence Act. Hence Section 35 of the Indian Evidence Act is reproduced as under for the sake of

convenience:

> **"35. Relevancy of entry in public record, made in performance of duty: An entry in any public or other official book register or record stating a fact, in issue of relevant fact and made by a public servant in the discharge of official duty or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept is itself a relevant fact."**

18. This Court finds that Mathu Ram had not been inducted as subsequent tenant of the plaintiff over the suit land, therefore, Mathu Ram father of the defendants has not become owner of the suit land after passing of H.P. Tenancy and Land Reforms Act. On the contrary, the suit land has been alleged to be resumed by the deceased Puran Chand, Advocate, as per the provision of law and after resumption, no subsequent tenancy was created in favour of the deceased Mathu Ram by deceased Puran Chand, qua the suit land, as required under law.

19. It has also been alleged that the appellants are in possession of the suit land and the learned trial Court did not appreciate the oral evidence adduced by the appellants in support of their contentions qua possession. This Court

finds that DW2, Hari Nand has specifically stated that the suit land is in the possession of the defendant and that his land adjoins the suit land. DW3, Medh Ram has also specifically deposed that the suit land is in possession of the defendant and also that his land adjoins the suit land. DW1, Munu Ram has also deposed that the suit land is in the possession of the defendant. The testimony of DW1 qua the possession of the suit land has been corroborated by DW2 & DW3 and also by the revenue entries Ex.PW1/D, in which Mathu Ram has been recorded as *Kabiz*. It has also been alleged that the revenue entries have been recorded by the public officials. It has also been alleged that respondent Krishan Kumar did not adduce any independent witness in order to prove that he is in possession of the suit land. It has been alleged that Krishan Kumar only examined his General Power of Attorney and did not adduce any oral evidence qua possession in support of his contention. This Court finds that a person in settled possession can be dispossessed only by way of due process of law. However, Krishan Kumar did not adduce any positive, cogent and reliable evidence qua the possession over the suit land and did not rebut the evidence adduced by the defendant and did

not rebut the testimonies of DW1,DW2 and DW3 qua possession over the suit land. He also did not adduce any rebuttal evidence in support of his contention.

20. This Court finds that the plaintiff had not examined the official(s) from the revenue department, to ascertain that the entry in favour of Mathu Ram is against the factual position. Nothing has come on record that the entry in favour of the defendants is against the factual position neither Patwari nor Tehsildar, field Kanungo or any other official of the Revenue Department has been examined by the plaintiff. The Settlement Authority, who has made the entry in favour of the defendants with regard to cultivation, has not been examined. The statements of DW1 Munu Ram, DW2 Hari Nand and DW3, Medh Ram were recorded on 29.9.2000, which specifically proves that the defendants are in possession of the suit land. The testimonies of DWs 1, 2 and 3 inspires confidence qua the possession of the defendant over the suit land. Statement of PW1 has thus no relevance and has not rebutted the presumption of truth attached to the revenue entries when other witnesses of the defendants also support the case of

the defendants to that regard.

21. Now, it is the defendants, who are in possession of the suit land. Now coming to the fact that when the plaintiff has not prayed for a decree of possession, can the decree of possession be granted to the plaintiff? This Court finds that there was no cross-objection or cross-appeal filed by the plaintiff in the Court below, neither in this Court, so, in these circumstances whether to apply the provisions of Order 41 Rule 33 CPC and then pass a decree of possession in favour of the plaintiffs, is required to be scrutinized by this Hon'ble Court. The Hon'ble Apex Court in a case titled *Choudhary Sahu (dead) by LRs*. Versus *State of Bihar,* (1982)1 Supreme Court Cases 232, has held as under:

> **"12. The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the Appellate Court does not agree with the opinion of the court appealed from.**

> **13. Ordinarily, the power conferred by this Rule will be confined to those cases where as a result of interference in favour of the**
>
> **appellant further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this Rule the Court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the Law of the Limitation or the law of court fees etc."**

22. Further, the Hon'ble Supreme Court in a case titled ***Banarsi and others*** versus ***Ram Phal,*** (2003) 9 Supreme Court Cases 606, has held as under:

> **"11.** In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to & finding recorded against him either while answering an issue

or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

**14.** The learned counsel for the respondent forcefully argued that even in the absence of appeal preferred by the plaintiff or cross objection taken by the plaintiff-respondent the Appellate Court was not powerless to grant the decree which it has done in exercise of the power conferred by Rule 33 of Order 41 of the CPC. Rule 33 of Order 41 as also Rule 4 thereof, which have to be read necessarily together, are set out hereunder:

**ORDER 41**

Appeals from Original Decrees

33. Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be

exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under **Section 35A**, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

Illustration

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X, appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

"4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.- Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

"15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The above said provisions confer power of widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject matter of appeal, who has filed the appeal and whether the

appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to

> the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41."

23. Similar view has been taken by the Hon'ble Supreme Court of India in a case titled ***Lakshmanan and others*** versus ***G. Ayysamy,*** (2016)13 Supreme Court Cases 165, by holding as under:

> **"6**. The fact remains that as per the finding of the trial court, the suit came to be filed in the year 2002 and the windows had been in existence for nearly four years only anterior to the filing of the said suit and not for 20 years, so as to attract the acquisition by prescription as provided under Section 15 of the Indian Easements Act, 1882, wherefor, the respondent/plaintiff was entitled to the relief of removal of those three windows in the Western wall of the appellants/defendants and for closure of that area occupied by those windows and the defendants shall comply with the same by closing down the windows, the said decree is granted even though there is neither an appeal nor cross-objection filed by the respondent/plaintiff before the High Court contending the substantial question of law would arise in his appeal/cross objection in view of the fact that the said relief(s) was rejected by both the courts below.
>
> **7.** Learned counsel for the appellants Mr. K.K. Mani submits that the grant of such relief by the High Court in exercise of its second appellate jurisdiction is contrary to law laid down by this Court in Banarsi and Ors. v. Ram Phal. Paras 6 and 7 read thus:

"6. The appeals raise a short but interesting question of frequent recurrence as to the power of the appellant court to interfere with and reverse or modify the decree appealed against by the appellants in the absence of any cross-appeal or cross-objection by the respondent under Order 41, Rule 22 CPC and the scope of power conferred on the appellate court under Rule 33 Order 41 CPC.

7. The first question is whether without cross-objection by the respondent, could the appellate court have set aside the decree passed by the trial court and instead granted straight away a decree for specific performance of contract. This would require reference to the principles underlying right to file an appeal and right to prefer cross-objection or when does it become necessary to prefer cross-objection without which decree under appeal cannot be altered or varied to the advantage of the respondent and/or to the disadvantage of the appellant.

It has also been held by this Court in Samundra Devi v. Narendra Kaur SCC(para 21), that this power under Order 41, Rule 33 CPC cannot be exercised ignoring a legal interdict.

15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject matter of appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or

make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. *The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 Order 41.* (emphasis supplied)

**8.** In support of the same proposition of law, learned counsel for the appellants placed reliance upon another judgment of this Court in the case of Pralhad and Ors. v. State of Maharashtra, wherein this Court after interpretation of Order 41, Rule 33 CPC has clearly held that in the absence of an independent appeal or cross-objection being filed by the aggrieved party, the relief which was denied by the courts below cannot be granted in the second appeal filed by the appellant."

24. From the evidence on record, it is clear that it is the defendants who are in possession of the suit land, as the plaintiff even after the resumption of the suit land never came in possession of the suit land. The revenue entries in favour of the defendants are as per law. The plaintiff's witnesses while appearing in the witness box have specifically stated that in case the defendants are found in possession of the suit land then the decree for possession be granted in favour o the plaintiff. The statements of DW1, DW2 and DW3 coupled with the statements of the plaintiff's witness shows that it is the defendants who are in possession of the suit land and though it is on record that the plaintiffs grand father got the land resumed under the H.P. Tenancy and Land Reforms Act, but the suit land remained in possession of the defendants throughout.

25. Now, it is on record that the land was resumed as the defendants earlier were tenants of the grand-father of the plaintiff. It is also evident from the record that thereafter physical possession was never taken by the plaintiff of the suit land and again the defendants were recorded in possession of the suit land. However, nothing

has come on record in the statement of DW 3, Medh Ram, whether any fresh subsequent tenancy was created in between the parties. However, they remained 'Kabiz' on the suit land. The entry of the defendants being in possession of the suit land is not rebutted by the plaintiff by a cogent evidence.

26. In the present case, the suit was not for possession in the Courts below. The suit was simplicitor for injunction under Section 38 of the Specific Relief Act and not for possession. The substantial question which arises: "**Whether the learned first Appellate Court was right in granting decree for possession, in favour of the plaintiff in a suit for permanent prohibitory injunction, against the defendant in the facts and circumstances of this case?"**

27. Now, here the interpretation of Order 41 Rule 33 CPC is required.

> **"Order 41 provides Appeals from Original Decrees and Rule 33 thereof is reproduced as under for the sake of convenience:.**
>
> **33. Power of Court of Appeal.-** The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of

> the decree and may be exercised In favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:
>
> Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order."

28. However, this Court observes as under:

a) the power to grant a relief, which was not claimed by the plaintiff is required to be exercised very cautiously;

b) the power cannot be exercised against a party who is not party in the litigation; and

c) a claim given-up or lost, cannot be revived and a part of the decree, which is required to be appealed against or objected to. Neither any such claim is appealed against nor objected to, that relief cannot be granted if the finality is attained.

29. In the present case, decree of possession was never prayed for by the plaintiff. Can this decree be granted by the learned lower Appellate Court, while holding that it was the defendants, who were in possession of the suit land, is considered in the light of the above mentioned Rules and

this Court finds that even if before the learned Trial Court, that prayer for decree for possession would have made but only injunction was granted and without there being any appeal to that effect, the lower Appellate Court after applying these provisions could not have granted the decree for possession, i.e. in the absence of appeal by the plaintiff against the findings, if those were prayed in the civil suit. This was a hypothetical situation, which does not exist in the present case. In the present case, if the plaintiff has not bothered to pray for a decree for possession and it was a suit simplicitor for injunction and when the learned lower Appellate Court has rightly come to the conclusion, it is the defendants, who are in possession of the suit land, decree for possession cannot be granted to the plaintiff. So, the substantial question of law framed by this Court is answered holding that the learned lower Appellate Court was not right in granting a decree for possession in favour of the plaintiff over the suit land, as from the record, it is clear that the defendants are in possession of the suit land from 1976 and before that as tenant and decree for possession never prayed for.

30. Resultantly, the present appeal is allowed and the judgments and decrees passed by the learned Courts below are set-aside and the suit of the plaintiff is dismissed. However, in the peculiar facts and circumstances of this case, there is no orders as to costs. Pending application(s) if any, also stands disposed of.

**(Chander Bhusan Barowalia)**
**Judge**

**June 20,2017**
***(M. gandhi)***