application *in forma pauperis*. No doubt a Pleader may be an authorised agent within the meaning of R. 3 of O. 33, but it was held in *Must. Bhugobatty Kooer* v. *Gunesh Dutt* (1) that in that case he must be specially authorised as the pauper's Attorney, an ordinary *vakalatnama* not being sufficient. Under O. 3 of the Civil Procedure Code any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a Pleader duly appointed to act on his behalf. Now, R. 3 of O. 33 lays down that notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent, and so on. Now 'authorized agent' in this rule clearly does not include a "recognized agent or a Pleader" as such. A Pleader no doubt may be an authorized agent, but in order to bring him within R. 3 he must, in my opinion, be specially authorized to present an application under O. 33 and he must fulfil the other conditions detailed in R. 3. In the present case the Legal Practitioners who presented the application have merely an ordinary power-of-attorney and are not specially authorized for the presentation of such an application. *Prima facie*, therefore, the presentation was not a due presentation within the meaning of the rule. It is now urged that the Pleaders or *mukhtars* were orally authorized. This, however, does not appear to have been urged in the Court below and though a date was given them for the production of evidence, no attempt was made to show that they were authorized in any way other than by the power-of-attorney on the record. I have no doubt that the present allegation that they were authorized verbally is an after-thought.

I am doubtful whether a verbal authorization would be sufficient. Ordinarily a recognized agent shows his authority by a power-of-attorney, and I think the authority required by the rule should be apparent on the face of the record. I do not, however, consider it necessary to finally decide this point.

(1) (1874) 21 W. R. 308.

The application for revision is rejected, but I leave parties to bear their own costs in this Court.

R.M./R.K.

Revision rejected.

A. I. R. 1915 Lahore 370

JOHNSTONE AND SHAH DIN, JJ.

Budha Khan and *others*—Plaintiffs—Appellants.

v.

Mohammad and *others*—Defendants—Respondents.

First Appeal No. 384 of 1911, decided on 12th March, 1915, from the Decree of Dist. Judge, Attock.

(a) Evidence—Value of—Entry in two successive settlements that all members of certain tribe are entitled to share in *Shamilat*—Contrary entry in third settlement—Held, entry had no evidentiary value.

In the Settlement of 1863, it was entered that the *shamilat* of the village belonged to all the members of a certain tribe and this entry was repeated in the Settlement of 1887, but in the Settlement of 1900 it was provided that it belonged to only one section of the tribe:

Held, that the last entry was unauthorised and was not of much evidential value as there was nothing on the record to show why the entries of the two previous Settlements were changed and the new entry substituted in the place. [P. 372, C. 1.]

(b) Specific Relief Act (1 of 1877), S. 42—Cause of action—Suit for declaration.

Where defendants have done no overt act amounting to an invasion of plaintiffs' right, the mere allegation in the plaint that the defendants consider themselves co-sharers and openly deny the plaintiffs' exclusive proprietary rights in the land, cannot furnish the plaintiffs a definite cause of action so as to enable them to seek declaration of their title. [P. 372, C. 1.]

Muhammad Iqbal—for Appellants.

N. C. Mehra and *Noor-ud-Din*—for Respondents.

Judgment.—The plaintiffs who are *Awans Hajtal* by caste, brought the present suit against the defendants, who belong to four other sections of *Awans* known as *Awans Jafral*, *Khilan*, *Jaswal* and *Jamal*, for a declaration that the plaintiffs together with *pro forma* defendants Nos. 52 to 59 were exclusively entitled to proprietary rights in 24,476 *kanals* of *shamilat* land known as *Chak* Nakka, situate in village Dunda Shah Balwal, and that the defendants other than the *pro forma* defendants Nos. 52 to 59 possessed no rights in the said *shamilat* area. A plot of 706 *kanals* 2

marlas which at one time formed part of the *shamilat*, was alleged to have been in possession of the defendants for a long time and was excepted from the claim. According to the plaintiffs, they and defendants Nos. 1 to 16 were descendants respectively of Shahadat and Jafar, who were sons of Hayat; the plaintiffs were known as *Awans Hajtal* and the said defendants Nos. 1 to 16 as *Awans Jafral*; the *Chak* Nakka in dispute was acquired by plaintiffs' ancestor, Shahadat, who paid Rs. 1,200 by way of fine to a Sikh nobleman, called Sardar Attar Singh, in Sikh times, and ever since the date of the acquisition Shahadat's descendants had been in possession of the said *chak*. Jafar, brother of Shahadat, had not paid any part of the fine of Rs. 1,200 and he and his descendants had, therefore, acquired no proprietary rights in *Chak* Nakka. In support of this origin of their exclusive title to the *chak* in dispute, the plaintiffs have relied on a judgment of Sayyad Faiz-ul-Hussan, Extra Assistant Commissioner, dated the 25th August, 1863, by which the claim of the *Jafrals*, ancestors of defendants Nos. 1 to 16, sharers in *Chak* Nakka along with the descendants of Shahadat was dismissed. The plaintiffs have further relied upon another judgment of Sayyad Faiz-ul-Hussan dated the 22nd August 1863, which, however, does not seem to bear directly on the question of proprietary rights in *Chak* Naka.

In the Regular Settlement of 1863 the land of *Chak* Nakka (though the name *Chak* Nakka does not appear in the Revenue Record) was entered as the village *shamilat* belonging to all proprietors of the *Awan* tribe without any distinction, and in the Revised Settlement of 1887 the same entry was repeated. In the Settlement Record of 1900, however, it is entered as the *shamilat* of the proprietors belonging to the *Hajtal* section of *Awans* (see evidence of Ghulam Jafar, *Naib Sadar Kanungo*, at p. 47 of the paper-book). The plaintiffs claim that as they and defendants Nos. 52 to 59 alone are members of the *Awan Hajtal* section, the rest of the *Awans* being known, as *Jafrals*, *Jaswals*, *Khilans* and *Jamals*, the whole of the *shamilat* area in dispute belongs exclusively to them and defendants Nos. 52 to 59, and they ask for a declaration to that effect.

The District Judge, after referring to and discussing the entries in the record of the three Settlements of 1863, 1887 and 1900 and also to the entry in the *wajib-ul-arz* of the village, has held that, although the village land in suit was originally acquired by Shahadat, the ancestors of the defendants have held possession of it along with Shahadat's descendants, that the defendants are co-sharers in the land with the plaintiffs, and that plaintiffs' suit is barred by limitation; on these findings he has dismissed the plaintiffs' suit.

In support of the appeal the learned Counsel for the appellants has relied upon the history of the village (page 24 of the paper-book), the judgment of Sayyad Faiz-ul-Hussan, dated the 25th August, 1863, which is not printed but a copy of which is on the record, and the report of the Local Commissioner, Amir Chand, dated the 17th November, 1910, (pages 57—66). On the other hand the Counsel for the respondents has called our attention to the mutation proceedings of March 1909 relating to the sale of a part of the land in suit by Allah Yar, son of Misri *Jafral* (pages 28—35), to the deposition of the *Naib Sadar Kanungo* at paragraph 47 and to certain portions of the report of the Local Commissioner referred to above.

In the history of the village we can find nothing which would support the claim of the plaintiffs that they alone, together with the *pro forma* defendants Nos. 52 to 59, from among the descendants of Hayat are entitled to be called *Awans Hajtal*, the descendants of Jafar being known as *Awans Jafral*. This distinction is no doubt drawn in the judgment of Sayyad Faiz-ul-Hussan, dated the 25th August, 1863, but it does not seem to have been adhered to later.

In the mutation proceedings of March 1909, above referred to, it would seem that the Revenue Authorities considered all the descendants of Hayat, including the descendants of Hayat's son Jafar, as *Awans Hajtal*, and that this appellation was not restricted to the descendants of Shahadat. The entry in the Settlement Record of 1900 according to which the land in suit belongs to *Awans Hajtal*, therefore, supports the claim of defendant Nos. 1 to 16 to share in *shamilat* along with the plaintiffs; and the mere fact that the said defendants have not actually cultivated any part of the *shamilat* land in dispute is not sufficient to deprive them of their proprietary rights therein.

Besides, it is not at all clear what cause of action the plaintiffs had against these defendants so as to be able to seek a declaration of title against them. The allegation

in the plaint that these defendants considered themselves co-sharers in the land in question, and that the other defendants openly denied the plaintiffs' exclusive proprietary rights in the land two months before suit, cannot furnish the plaintiffs with a definite cause of action in which a suit like the present can be based. The defendants have done no overt act amounting to an invasion of the plaintiffs' rights and the suit is, therefore, of a speculative character. It is said by the plaintiffs' Counsel that the sale of a part of the *shamilat* by defendant No. 40, Nur Mohammad, *Awan Jamal*, five years before suit (see deposition Megh Raj *Patwari* at page 25) and the sale of another part of the *shamilat* by Allah Yar, son of Misri *Jafral*, (defendant No. 7), furnish the plaintiffs with a cause of action for the present suit. It is clear, however, that by reason of these two sales no cause of action accrued to the plaintiffs as against all the defendants, except against the above named Nur Muhammad and Allah Yar.

Assuming, however, that the plaintiffs had a valid cause of action against all the defendants, it seems to us that the entries in the Settlement Records of 1863 and 1887, showing that the *shamilat* land in question was owned by the *Awans* proprietors of the village, coupled with the fact that the defendants who belong to the *Khilan Jaswal* and *Jamal* sections of the *Awans* have been in possession of portions of the *shamilat* and have built their *dhoks* on the portions in their possession, tell strongly against the plaintiff's claim to exclusive proprietary rights in the *shamilat*. In the Settlement Record of 1900 the entry is, no doubt, in favour of *Awans Hajtal*, but this description, as we have seen above, applies to the *Jafrals* as well, who cannot, therefore be excluded from a share in the *shamilat*.

As regards the other defendants, *i. e.*, *Khilans*, *Jaswals* and *Jamals*, there is nothing whatever on the record to show why the entries of the two previous Settlements of 1863 and 1887 were changed and the new entry substituted in their place in 1900. This entry appears to have been unauthorized and to have been made without the knowledge of the section of the *Awans* just mentioned and in face of their actual possession of portions of the *shamilat* it cannot be considered as of much evidential value.

On the whole, therefore, our conclusion is that the plaintiffs have failed to establish that they are entitled to be declared exclusive owners of the *shamilat* area in suit as against the *Jafrals*, the *Khilans*, the *Jaswals* and the *Jamals*, and we accordingly maintain the decree of the lower Court and dismiss the appeal with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1915 Lahore 372

SHAH DIN AND LE ROSSIGNOL, JJ.

Mt. Rukua and *others*—Defendants—Appellants.

v.

Dungar Mal and *others*—Plaintiffs and others—Defendants—Respondents.

First Appeal No. 885 of 1910, decided on the 13th February, 1915, from the Decree of the Dist. Judge, Gurgaon, dated 27th May, 1910.

Transfer of Property Act (4 of 1882), S. 58—Usufructuary mortgagee—Mortgage to terminate on certain date—Deed stipulating that mortgagors should be liable for rent due to mortgagees from village tenants—Revenue Officer ordering mutation of redemption—Suit by mortgagees for possession alleging that redemption could not be made until sum due by mortgagors on account of rent was paid cannot be decreed in the strength of stipulation in deed.

A mortgage-deed executed on the 25th February, 1895, contained an express stipulation to the effect that the mortgagees should remain in possession up to the 15th July, 1907, on which date the mortgage was to determine, without the payment of any further sum, and that the mortgagors should be liable for any amount of rent left due to the mortgagees from the village tenants. In 1908 the Revenue Tahsildar at the instance of the mortgagors ordered a mutation of redemption. On the 7th June, 1909, the plaintiffs-mortgagees instituted a suit for possession of the mortgaged area, on the allegation that no redemption could be made until the sum due by the mortgagors on account of arrears of rent had been made good to them:

Held, (1) that the mortgage-deed did not contemplate that rent due from the mortgagors as tenants should be secured upon the mortgaged property and that as a large portion of the sum claimed by the plaintiffs was made up of rent alleged to be due not by the village tenants, but by the mortgagors themselves in their capacity of tenants of the mortgagees, the plaintiffs could not get a decree for possession on the strength of the stipulation in the mortgage-deed; [P. 373, C. 2.]

(2) that the accounts put in by the plaintiffs had not been proved and the suit must, therefore, be dismissed. [P. 374, C. 1.]

Muhammad Shafi—for Appellants.

Manohar Lal—for Respondents.