

Ajit Kaur v. Mandir Jhok Hari Har and others (G. R. Majithia, J.)

imposes on the banker an absolute obligation to pay. However, the banker is not bound or entitled to honour the bills of exchange drawn by the seller unless they, and such accompanying documents as may be required thereunder, are in exact compliance with the terms of the credit. Such documents must be scrutinised with meticulous care.

(16) To say at this stage that the plaintiff Bank has no *prima facie* case and not to allow it to keep with it as security the F.D.Rs. and balance in the bank accounts of the vendor and to allow the said amount to slip away from its hands would be putting the plaintiff Bank to a great disadvantage. It is well known that the Banks when they transact business simply deal with the money which belonged to different parties. The Banks simply charge commission for the business transacted. When the plaintiff parted with the amount by making payment "under reserve" to the vendor and it does not get payment in turn from the buyer it should be allowed to recall the amount from the vendor or to keep its securities and balances which can satisfy its claim against the vendor.

(17) The banks and their customers should normally be allowed to enforce their respective obligations under the established banking system. It is only in exceptional cases that the Court should interfere with the machinery of mutual obligations assumed by them. They must be allowed to be honoured, free from interference by the Courts.

(18) In the light of the above discussion agreeing with the Courts below that there is a *prima facie* case in favour of the plaintiff Bank, I find no force in these revisions petitions which are dismissed. I, however, leave the parties to bear their own costs.

S.C.K.

Before G. R. Majithia, J.

AJIT KAUR,—Petitioner.

versus

MANDIR JHOK HARI HAR AND OTHERS,—Respondents.

Civil Revision No. 1664 of 1980.

October 14, 1988.

Civil Procedure Code (V of 1908)—S. 47—Decree for possession—Symbolic possession delivered in execution—Execution application.

dismissed for default—Second execution application for actual possession—Maintainability of such application—Second application held competent.

Held, that the decree holder never gave consent that she may be given symbolic possession in lieu of actual possession. Even if the symbolic possession was given with her consent it will not amount to the satisfaction of the decree. The actual delivery of possession was not obtained by the decree holder in the previous execution application since the land was under crops. There is no justification in holding that the decree holder should be deprived of her right to come before the executing Court and pray for afresh delivery of possession when there is no bar to her right to executing the decree. (Paras 6, 8 and 13).

Petition under section 115 C.P.C. for revision of the order of the Court of Shri Udey Singh Gera, PCS Sub Judge II Class, Ferozepur, dated 25th March, 1980 accepting the objection petition and dismissing the execution application.

N. L. Dhingra, Advocate, for the Petitioner.

Ravinder Chopra, Advocate, for the Respondents.

JUDGMENT

G. R. Majithia, J.—

1. This revision petition is directed against the order of the executing court whereby the objections filed under section 47 of the Code of Civil Procedure by the Judgment-debtor objectors were accepted and it was held that symbolic possession was delivered to the decree-holder in full satisfaction of the decree passed in her favour.

2. The undisputed facts are that the petitioner along with another filed a suit for possession of the disputed land on the ground that they were tenants at will paying yearly rent of Rs. 834 and were entitled to remain as such (as tenant at will) until ejected in due course of law in accordance with the provisions of the Punjab Security of Land Tenures Act. It was pleaded that defendant Nos. 1, 2 and 3 conspired together and took illegal possession of the land during the absence of the plaintiffs. The suit was decreed by the learned Subordinate Judge and the judgment was affirmed in appeal by

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the learned first Appellate Court. On second appeal by the defendants, this Court had held that the plaintiff and defendant No. 6 in the suit were entitled to be restored the possession of the disputed land and the decree of the courts below in so far it directed restoration of the possession to the plaintiff and defendant No. 6 was maintained unless they were evicted in due course of law. The judgment of this Court is reported as *Mandir Jhok Hari Har and others v. Smt. Ajit Kaur and others*, (1).

3. The plaintiffs, who are petitioners, levied execution of the decree ultimately affirmed by this Court. Warrants of possession were issued and from the copy of the report *roznamcha* Exhibit O1, it is revealed that symbolic possession of the land was delivered to the decree-holder as the land was under crops and *gairmukin*. The execution application was dismissed in default on February 17, 1978 and the file was consigned to the record-room presumably after the receipt of warrants of possession. The decree-holder moved a second execution application on March 1, 1978. The learned executing Court issued notice to the Judgment-debtors and they filed objections purporting to be under section 47 of the Code of Civil Procedure. It was pleaded by them that the decree-holder was delivered symbolic possession with her consent and she appended her signature on the *roznamcha vakiyati* dated October 13, 1977 and the first execution application was dismissed on February 17, 1978. Since the decree-holder has been delivered symbolic possession as agreed to by her in execution of the decree passed in her favour, she is not entitled to file second execution application. The learned executing court framed the following issues:—

- (1) Whether the symbolic possession of the suit land was delivered to the decree-holder with her consent as alleged in the objection petition. If so, its effect? OPJD.
- (2) Relief.

4. Under issue No. 1, the learned executing court found that the decree-holder was delivered symbolic possession only. Since the previous execution application was dismissed for default of the decree-holder, he drew an inference that the decree-holder was satisfied with the delivery of symbolic possession. Aggrieved against this judgment, the decree-holder has come up in revision.

(5) The entire approach of the learned executing court is erroneous. He committed a patent illegality by refusing to entertain

(1) 1977 P.L.J. 315.

the second execution application on the ground that previous execution application having been dismissed in default and it was allowed to be so done because the decree-holder was satisfied with the symbolic possession. The conclusion is not warranted by any logic, evidence, or law for the following reasons; (a) there is not an iota of evidence that the decree-holder consented to obtain symbolic possession in lieu of actual physical possession; (b) it passes human comprehension that the decree-holder who fought the legal battle for more than a decade and succeeded in getting a decree for possession from the highest Court in the State will be satisfied with symbolic possession only; (c) the inference drawn by the executing court is irrededucible. Non appearance of the decree-holder on the date fixed in the executing court cannot lead to a conclusion that she was satisfied with symbolic possession only. To the contrary, she may be aware that the second execution application has to be filed for obtaining actual physical possession since the land at the time of delivery of symbolic possession was under crops and actual possession cannot be delivered till the crop is cut or compensation as assessed for the standing crop was deposited in the court. The consent for taking symbolic possession in lieu of actual physical possession, if any, has to be given in the executing court; (d) the manner in which the file containing warrants of possession was misplaced speaks for itself. It appears that every efforts was afoot to deprive the decree-holder of the fruits of the decree; (e) it is unbelievable that what was got by the decree-holder after fighting a tough legal battle for a decade will be offered to the judgment-debtors in a plate; and (f) in view of what is being propounded in these proceedings, there was no difficulty for the judgment-debtor to request the executing court to record the statement of the decree-holder that she is satisfied with the symbolic possession alone.

(6) In the instant case, the original warrants of possession issued by the executing court could not be produced as the file containing the warrants of possession was not traceable. The report *roznamcha* is the only document which reveals that only symbolic possession was delivered, may or may not with the consent of the decree-holder. Even if the symbolic possession was given with her consent, it will not amount to the satisfaction of the decree. In this view of the matter, I hold that there was no bar to the maintainability of the second execution application. The learned executing court has refused the prayer relying upon a judgment given by this Court reported as *Niranjan Singh v. Rameshwar Singh and another*, (2). The brief

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facts of that case may be noted. The plaintiff filed a suit for possession of agricultural land. The suit was decreed and symbolic possession was delivered. In the meantime, consolidation proceedings took place in the village. The decree-holder got symbolic possession of the pre consolidation field numbers and filed a suit for possession of post consolidation field numbers on the strength of the decree passed in his favour. The suit was decreed by the learned trial Court but on appeal the decree was reversed and it was held that section 47 of the Code of Civil Procedure barred the maintainability of the second suit. In second appeal, this Court held that section 47 of the Code of Civil Procedure did not bar the maintainability of the second suit and reversed the decree of the first Appellate Court and restored that of the trial Court whereby the suit of the decree-holder was decreed for possession of the land which was allotted during consolidation. This case on facts is wholly distinguishable and have got no relevancy to the point in controversy in the present case. This Court only held that section 47 of the Code does not bar the maintainability of the second suit. In this judgment there was no occasion for this Court to dilate on the question whether the second execution application was maintainable or not when in the first execution application only symbolic possession was delivered when the decree was for actual physical possession. This question directly arose for consideration in the judgment reported as *Daljit Singh and another v. Nand Ram and others* (3). Relying upon a Supreme Court decision reported as *Shew Bux Mohata and another v. Bengal Breweries Limited and others* (4) this Court held as under :—

“It is undisputed that if a decree is granted for possession of the land the same cannot be said to be have been fully satisfied, if the decree-holder is only granted symbolical possession of that land, unless of course at the time of the delivery of symbolical possession the decree-holder, expressly or even impliedly consents to the delivery of symbolical possession in full satisfaction of the decree.”

(7) The ratio of this case is fully attracted to the facts of the instant case.

(8) Apart from this, there is positive evidence on the record that only symbolic possession was given for the reasons that the land was

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under crops. J.D.W.1. and J.D.W.2, Kanungo, and Patwari respectively, in unequivocal terms stated on oath that at the spot only symbolic possession was given and actual physical possession could not be delivered since the land was under crops. In the light of what has been found in this case and not disputed by the respondents that actual delivery of possession was not obtained by the decree-holder in the previous execution application, I see no justification in holding that the decree holder should be deprived of her right to come before the executing court and pray for a fresh delivery of possession when there is no bar to her right of executing the decree.

(9) In *Abdual Hamid v. Prokash Chandra Nandi* (5), it was held that the decree-holder was entitled to levy a fresh execution of the decree even though he had not obtained actual delivery of possession earlier. It was held thus :—

“Where, after delivery of possession made in execution of a final decree for partition a party could not get actual possession of his share, the Court should order for fresh delivery of possession.”

(10) In *Abdual Hamid's case* (supra) in execution of a final decree for partition, delivery of possession was given, but it was proved that the decree-holder did not get actual possession of his share, as some huts belonging to other co-sharers were standing thereon. The Court, therefore, ordered fresh execution and held that it was within the jurisdiction of the executive Court to order for a fresh delivery of possession by removing the huts in question. This judgment was followed in *Ghanashyam Das Mour Aggarwalla v. Fatik Chandra Das* (6) wherein it was held as under :—

“there was no effective delivery of possession obtained by the decree-holder in the previous execution case of the entire property, as the decree provided. In the circumstances of this case, there was nothing to show that the decree-holder should be debarred from the remedy by way of execution, and should be necessarily driven to a separate suit for the purpose of obtaining possession of the property to which, under the decree, he was entitled. If the fact was that

(5) AIR 1934 Cal. 793.

(6) AIR 1957 Assam 123.

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actual delivery of possession was not obtained by the decree-holder in the previous execution case there was no justification for holding that the decree-holder be deprived of his right to come before the executing Court and pray for a fresh delivery of possession, when there was no other bar to his right of executing the decree."

(11) In my opinion, the principle of that decision will equally apply to this case.

(12) Before I conclude, I must deal with the submission of the learned counsel for the respondents. He submitted that the decree-holder agreed to accept symbolic possession in the execution proceedings in lieu of actual physical possession and the execution application was consigned to the record-room for non-appearance of the decree-holder. Resultantly, the second execution application was not maintainable and the remedy, if any, lay by bringing a second suit for possession. In support of his submission, he relied upon the following authorities. *Jarnail Singh Dasaundha Singh v. Rakha Singh and another* (7), *Radhalal v. Chabil Chand* (8), *Triveni Rai and others v. Swaroopchand and others* (9), *Bhure Khan v. Hansa and others*, (10) *Mst. Mewa widow of Matram and another v. Amar Singh and others* (11), *Rama Subudhi and others v. Bhagirathi and others*, (12). The submission is untenable in view of what has been stated supra. The decree-holder never gave consent that she may be given symbolic possession in lieu of actual physical possession. The rulings referred to by the learned counsel are inapplicable to the facts of the instant case. In most of these cases, decree-holder appeared and filed a receipt acknowledging the possession of the land and on the strength of this acknowledgement the execution application was consigned to the record as having been fully satisfied. No such situation has arisen in the instant case.

(13) For the reasons stated supra, this revision petition is accepted. The District Judge, Ferozepur, is directed to withdraw the execution of file from the successor Court of Shri Udey Singh Gera,

(7) AIR 1957 Pb. 17.

(8) AIR 1955 Nagpur 79.

(9) AIR 1974 Raj. 232.

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(12) AIR 1982 Orissa 86.

Sub Judge, II Class, Ferozepur, and entrust it to the Senior Subordinate judge, Ferozepur, and I hope the learned Senior Subordinate Judge will expedite the execution of the decree without any further delay. In the circumstances of this case, I leave the parties to bear their own costs.

S.C.K.

Before G. R. Majithia, J.

KISHAN AND ANOTHER,—Appellants.

versus

NARAIN DASS AND OTHERS,—Respondents.

Regular First Appeal No. 3365 of 1987

October 14, 1988.

Code of Civil Procedure (V of 1908)—O. 41, Rl. 27—Leave to lead additional evidence—Power of Court to grant such leave, Punjab Tenancy Act (XVI of 1887)—Ss. 4(3), 5 and 8—Rent—Meaning of the term.

Claim—Claim in suit for declaration of Occupancy tenancy rights—Setting up of such a claim—Whether results in forfeiture.

Held, that the appellate Court has the power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for any other substantial cause and even in cases where it considers that in the interest of justice something which remains obscure should be filed up so that it can pronounce judgment in a more satisfactory manner and the defect may be pointed out by a party or that party may move the Court to supply the defect. In this view of the matter, I allow the application filed under O. XLI, Rl. 27 of the Code of Civil Procedure, 1908 and allow the copies of jamabandis.

(Para 9).

Held, that the history of rent in the Punjab is that it owes its origin mainly to fiscal arrangements, and not directly to economic causes. In large number of cases tenants-at-will have been paying land revenue or cesses with or without a small additional payment on account of *Malkana*. Payment of rent and cesses to the State on behalf of the land owners will be in lieu of rent. The term land in sub-section (3) of section 4 of the Act is wide enough to include the payment of land revenue and cesses on behalf of the landlord.

(Paras 12 and 13).

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(6) In the instant case, the original warrants of possession issued by the executing court could not be produced as the file containing the warrants of possession was not traceable. The report *roznamcha* is the only document which reveals that only symbolic possession was delivered, may or may not with the consent of the decree-holder. Even if the symbolic possession was given with her consent, it will not amount to the satisfaction of the decree. In this view of the matter, I hold that there was no bar to the maintainability of the second execution application. The learned executing court has refused the prayer relying upon a judgment given by this Court reported as *Niranjan Singh v. Rameshwar Singh and another*, (2). The brief

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(7) The ratio of this case is fully attracted to the facts of the instant case.

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(13) For the reasons stated supra, this revision petition is accepted. The District Judge, Ferozepur, is directed to withdraw the execution of file from the successor Court of Shri Udey Singh Gera,

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Sub Judge, II Class, Ferozepur, and entrust it to the Senior Subordinate judge, Ferozepur, and I hope the learned Senior Subordinate Judge will expedite the execution of the decree without any further delay. In the circumstances of this case, I leave the parties to bear their own costs.

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Held, that the appellate Court has the power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for any other substantial cause and even in cases where it considers that in the interest of justice something which remains obscure should be filed up so that it can pronounce judgment in a more satisfactory manner and the defect may be pointed out by a party or that party may move the Court to supply the defect. In this view of the matter, I allow the application filed under O. XLI, Rl. 27 of the Code of Civil Procedure, 1908 and allow the copies of jamabandis.

(Para 9).

Held, that the history of rent in the Punjab is that it owes its origin mainly to fiscal arrangements, and not directly to economic causes. In large number of cases tenants-at-will have been paying land revenue or cesses with or without a small additional payment on account of *Malkana*. Payment of rent and cesses to the State on behalf of the land owners will be in lieu of rent. The term land in sub-section (3) of section 4 of the Act is wide enough to include the payment of land revenue and cesses on behalf of the landlord.

(Paras 12 and 13).