

## APPELLATE CIVIL.

*Before Kapur, J.*

RAM SINGH AND 3 OTHERS,—Appellants.

*versus*

GAINDA RAM AND 4 OTHERS,—Respondents.

1953

November,  
12th

Regular Second Appeal No. 418 of 1952.

*Code of Civil Procedure (Act V of 1908)—Sections 11, 47 and Order XX Rule 14—Pre-emption decree—When does the pre-emptor get title to the property pre-empted—Sale by pre-emptor of the pre-empted property—Whether passes good title to the purchaser—Section 47 whether bars a suit for possession by such transferee—Transferee, whether a representative of the decree-holder—Decision in an execution application that transferee had no right to execute the decree, it being non-transferable—Whether operates as res judicata in a subsequent suit between the same parties—Symbolical possession taken in execution of decree—Effect of—Purchaser, whether bound by anything done by the vendor after sale.*

S. S. obtained a pre-emption decree on 8th November, 1944, and deposited the decretal money in Court on 8th December, 1944. On 8th December, 1944, he sold his rights

to G. and L., the sale being of the land pre-empted by a regular sale-deed. G. and L. filed an application for execution of the decree as transferees of the decree with a view to obtain possession of the land. The execution application was dismissed on 13th October, 1945, on the ground that a decree for pre-emption was not capable of transfer and so G. and L. had no right to execute the decree. Thereupon S. S. applied in execution to obtain possession and obtained actual physical possession of a part of the land and symbolical possession of the rest. The judgment-debtors claimed compensation for their standing crops and S. S. got his execution application dismissed as unsatisfied.

G. and L. then brought a suit for possession in 1948 on the basis of their title under the sale-deed. The defence was that there was no sale of property, but there was mere transfer of a right to execute the decree and as that right could not be transferred, it was void, that S. S. never obtained possession, that section 47 of the Civil Procedure Code, was a bar to the suit and that order, dated 13th October 1945, operated as *res judicata*. The suit of the plaintiffs was decreed by the lower courts. The defendants appealed.

*Held*, (1) that by the sale-deed S. S. transferred to the plaintiffs not only the right to execute the decree but also his rights, title and interest in the property, that is, 39 Bighas, 14½ Biswas and therefore the plaintiffs obtained by this transfer not only the right to execute the decree but also the ownership of the land in dispute.

(2) that under Order XX, Rule 14 of the Civil Procedure Code the pre-emptor gets title to the property pre-empted on deposit of the decretal money and no registered document is necessary to effect that. After such deposit he has the right to sell the property and can pass a good title to the property to the vendee ;

(3) that a transferee from such a pre-emptor is not a representative of the decree-holder within the meaning of that word as used in section 47 of the Civil Procedure Code ;

(4) that the plaintiffs' suit was not barred under section 47 Civil Procedure Code as they could not execute the decree in favour of S. S. ;

(5) that the order, dated 13th October, 1945, operated as *res judicata* irrespective of whether that order was right or wrong ;

(6) that symbolical possession is as effective between the parties to the proceedings as actual physical possession and is sufficient to dispossess a party to the proceedings and effectuate the passing of possession from one to the other ; and

(7) that an acknowledgment made or anything done by the party after he had parted with all his interests would not bind the purchaser.

*Ramasami Pattar v. Chinnan Asari* (1), distinguished; *Nadir Ali Shah v. Wali* (2), *Hadayat Ullah v. Ghulam Mohammad* (3), *Fateh Chand v. Moti Singh* (4), *Mohammad Saddiq v. Ghasi Ram* (5), *Ram Lal v. Harpal* (6), *Ram Kali v. Gowardhan Lal* (7), *Mohammad Saadat Ali Khan v. Punjab National Bank* (8), *Gokal Chand v. Sundar Singh* (9), *Subbarya Goundan v. Samianna Goundan* (10), *Adyanath Ghatak v. Krishna Prasad Singh* (11), *Radha Krishna Chanderji v. Ram Bahadur* (12), *Bank of Upper India, Ltd. v. Robert Hercules Skinner* (13), relied on, *Mehr Khan v. Ghulam Rasul* (14), referred to.

*Regular Second Appeal from the decree of Shri Sansar Chand, District Judge, Karnal, dated the 12th July, 1952, affirming that of Shri Sheo Parshad, Senior Sub-Judge, Karnal, dated the 24th May, 1950, passing a decree for possession of the land in suit as mentioned in the plaint in favour of the plaintiffs against the defendants and further ordering that defendants Nos. 1 to 3 should pay the costs of Plaintiffs.*

TEK CHAND and H. L. SARIN, for Appellants.

SHAMAIR CHAND and F. C. MITAL, for Respondents.

#### JUDGMENT

KAPUR, J. This Second Appeal is brought by the defendants against a judgment and decree of Mr. Sansar Chand Bhandari, District Judge, Karnal, dated the 12th July, 1952, affirming the decree of the trial Court decreeing the plaintiffs' suit.

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- (1) I.L.R. 24 Mad. 449 at p. 463
  - (2) I.L.R. 5 Lah. 486
  - (3) 73 I.C. 544
  - (4) A.I.R. 1935 Lah. 523
  - (5) A.I.R. 1946 Lah. 322 (F.B.)
  - (6) A.I.R. 1929 All. 237
  - (7) A.I.R. 1935 Lah. 612
  - (8) A.I.R. 1941 Lah. 357
  - (9) A.I.R. 1949 E.P. 282
  - (10) A.I.R. 1946 Mad. 529
  - (11) A.I.R. 1949 P.C. 124
  - (12) 22 C.W.N. 330
  - (13) I.L.R. 1942 Lah. 686 (P.C.)
  - (14) I.L.R. 2 Lah. 282

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The facts of this case are rather complicated and may be stated at some length. Chaman Lal sold 39 *bighas* 14½ *biswas* of land on the 5th August 1944 to Asa Ram, Paras Ram and Dalip Singh for a sum of Rs. 10,000. Chaman Lal's sister's son Sham Sarup brought a suit for pre-emption which was decreed on the 8th of November 1944, and on the 18th of December, he sold his rights to Gainda Ram and Ladli Parshad, the present plaintiffs, for a sum of Rs. 15,000 by a document, Exhibit P. 1. The sale was of the land, that is, 39 *bighas* 14½ *biswas*, with all rights appurtenant thereto and of the rights which Sham Sarup had in the pre-emption decree. He stated in the sale deed "I transfer all rights that I possess under the decree" and it was also stated in the sale deed that the ~~session~~ <sup>possession</sup> which Sham Sarup had, had been delivered and actual physical possession might be obtained by execution. Prior to this sale on the 8th December, 1944, Sham Sarup had deposited the amount mentioned in the decree, that is, Rs. 10,000, which was withdrawn by the then vendees Asa Ram and others.

On the 5th of March, 1945, Gainda Ram and Ladli Parshad applied for execution of the decree, which is shown by Exhibit D. 4, but this application was dismissed on the ground that the pre-emption decree was a personal decree and could not be transferred. Reliance was there placed on *Mehr Khan v. Ghulam Rasul* (1), where it was held that a decree for pre-emption is not capable of transfer, so as to enable the transferee to obtain possession of the pre-empted property in execution.

On the 15th of June 1945, Sham Sarup took out execution, and warrant for possession was issued on the 16th June. On the 24th June. the bailiff made a report, Exhibit P. 4, that actual physical possession of a part and symbolical possession of the rest had been given. On the 13th of July 1945, the Court issued an order, Exhibit D. 9, to the judgment-debtors, to show cause why

(1) I.L.R. 2 Lah. 282

actual physical possession of the rest should not be given, and the judgment-debtors showed cause. On the 10th of August 1945, they filed objections in which it was admitted that such possession had been taken, and compensation was asked for on account of the crop which was standing and for manure and also it was stated that physical possession of the rest could not be taken because judgment-debtors' crop was standing. Sham Sarup on the 13th October 1945, made a statement "for the present the file be consigned to the Record Room" and the order of the Court was "according to the statement of the decree-holder dismissed as unsatisfied".

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On the 14th February 1949, Sham Sarup took out another execution. Warrant was issued on the 17th February 1949, but again it was dismissed as unsatisfied on the 12th July 1952.

Another litigation was started on the 31st July 1945. Chhoto wife of Chaman Lal brought a suit for pre-emption in regard to the sale by her husband which was decreed on the 15th July 1946, and on the 18th August she took symbolical possession by Asa Ram and others executing a lease in her favour. An appeal was taken against this decree by the present plaintiffs Ladli Parshad and Gainda Ram which was allowed on the 1st February 1947 and the suit of Chhoto was dismissed. Ladli Parshad and Gainda Ram applied under section 144 read with section 47 of the Civil Procedure Code for restitution, and on the 13th April 1947, actual possession of a part and symbolical possession of the rest was taken by them. On the 9th May 1947, Asa Ram and others made an application under sections 47 and 144 of the Civil Procedure Code for restitution and this application was allowed on the 30th July 1947 by an order of the executing Court. Exhibit D. 14. Thus Asa Ram and others obtained possession "by way of restitution of the land", and obtained actual physical possession on the 5th August 1947, which is clear from Exhibit D. 8.

Gainda Ram and Ladli Parshad then brought a suit for possession on the 13th December 1948 on

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the basis of their title under the deed of sale, Exhibit P. 1. The defence was that there was no sale of property, but there was mere transfer of a right to execute the decree and as that right could not be transferred it was void, that Sham Sarup never obtained possession; that section 47 of the Civil Procedure Code is a bar to the suit and that Exhibit D. 2, order, dated the 13th October 1945, operated as *res judicata*. Both the Courts below decreed the suit. The District Judge has held that defendants Nos. 1 to 3 were no longer judgment-debtors but were trespassers and, therefore, the suit could be brought; that the order, dated the 13th October 1945, did not operate as *res judicata*; that Sham Sarup had obtained actual physical possession of a part of the property and symbolical of the rest and on these grounds he affirmed the decree of the trial Court.

Mr. Tek Chand for the appellants has in the fore-front of his arguments placed the bar of section 47 to the maintainability of the present suit and has submitted that as Shara Sarup's suit would be barred under section 47 the suit of the plaintiffs should also be barred because they are representatives within the meaning of that word as used in section 47 (1) of the Civil Procedure Code. But this argument is unsustainable. By the deed of transfer, Exhibit P. 1, Sham Sarup transferred to the plaintiffs not only the right to execute the decree but also his right, title and interest in the property, that is, 39 *bighas* 14½ *biswas*, and therefore the plaintiffs obtained by this transfer not only the right to execute but also the ownership of the land in dispute.

An objection was taken by Mr. Tek Chand that without getting possession Sham Sarup had no title in the property pre-empted and therefore he had nothing which he could pass by the sale deed to the plaintiffs. In Order XX, rule 14 (1) (b) it is provided—

“ 14 (1). Where the Court decrees a claim to pre-emption in respect of a particular

sale of property and the purchase-money has not been paid into Court, the decree shall—

- (a) \* \* \* \* \*  
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- (b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.”  
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The question arises then as to what is the meaning of the words “whose title thereto shall be deemed to have accrued from the date of such payment”. It had been held in *Ramasami Pattar v. Chinnan Asari* (1), that title could not pass unless there was a document executed in accordance with section 54 of the Transfer of Property Act. These words which I have mentioned and which were added in this rule supersede the opinion expressed by the Madras High Court and therefore the result is that a title of pre-emptor accrues on payment of the purchase-money and no registered document is necessary to effect that. A Division Bench of the Lahore High Court in *Nadir Ali Shah v. Wali* (2), held that these words clearly show that the title to the property vests in the pre-emptor on payment of the purchase-money. Reliance in that case was placed on a judgment of Campbell, J. in *Hadayat Ullah v. Ghulam Mohammad* (3), where it was held that the title of the pre-emptor shall be deemed to have accrued from the date of payment into Court of the purchase-money after the decree. Another Division Bench of the Lahore High Court

(1) I.L.R. 24 Mad. 449 at p. 163

(2) I.L.R. 5 Lah. 486

(3) 73 I.C. 444

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in *Fateh Chand v. Moti Singh* (1), took the same view and a Full Bench of that Court in *Mohammad Saddiq v. Ghasi Ram* (2), held that the title vests in the pre-emptor from the date of payment. The same view was taken by the Allahabad High Court in *Ram Lal v. Harpal* (3), where a Division Bench held that under Order XX, rule 14 (b), the title of the pre-emptor to the property accrues from the date of the deposit. Thus the title of Sham Sarup accrued to the pre-empted property from the date of payment and therefore he had a right to sell the property, and could pass a good title to the property by executing Exhibit P. 1.

The second question which arises in connection with this part of the case is whether the plaintiffs could be held to be the representatives within the meaning of section 47, Civil Procedure Code, of Sham Sarup. Section 47 (1) runs as follows:—

“47 (1). All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit”.

What is barred by section 47 (1) is the decision of any question which arises between the parties to the suit or their representatives and which relates to the execution, discharge or satisfaction of the decree. On the 15th June 1945 in a proceeding which was *inter se*, an order was passed Exhibit D. 3 in which it was held that the present plaintiffs could not execute the decree against the judgment-debtors of Sham Sarup on the ground that the decree was incapable of being transferred as it was a personal right. Reliance there was placed on *Mehr Khan v. Ghulam Rasul* (4). That order itself would operate as *res judicata* irrespective of whether that order

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(1) A.I.R. 1935 Lah. 523  
 (2) A.I.R. 1946 Lah. 322  
 (3) A.I.R. 1929 All. 237  
 (4) I.L.R. 2 Lah. 282



is right or wrong. The finding that the decree in favour of Sham Sarup was incapable of transfer and therefore the present plaintiffs had no right to execute would place the present plaintiffs outside the definition of the word "representatives" and that is also clear from the wording of section 47 of the Code. What is barred is "all questions in regard to execution, discharge or satisfaction", and if a person cannot execute a decree section 47 cannot be bar and, therefore, in my opinion he cannot be a representative within the meaning of that word. The bar of section 47 which was pleaded therefore would on this ground alone be not applicable to the respondents,—the plaintiffs.

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The next question is whether any possession was taken by the plaintiffs and what was the nature of that possession. I have at a previous place given the history of the case in the execution department. That shows that actual physical possession of a portion and symbolical possession of the rest was taken. The finding of the District Judge on this point is also in favour of the plaintiffs. Symbolical possession is as effective between the parties to the proceedings as actual physical possession and is sufficient to dispossess a party to the proceedings and effectuates the passing of possession from one to the other. It was so held in *Ram Kali v. Gowardhan Lal* (1). In *Mohammad Saadat Ali Khan v. Punjab National Bank* (2), Din Mohammad, J., held that the symbolical possession by the decree-holder is sufficient to break the continuity of adverse possession of the judgment-debtor and it is binding on the transferee from the judgment-debtor. In this Court also the same view has been taken in *Gokal Chand v. Sundar Singh* (3). In *Subbarya Goundan v. Samiappa Goundan* (4), a Division Bench held that section 47 is not a bar to the suit as the symbolical possession obtained by the decree-holder amounts to actual physical possession so far as the judgment-debtor and

(1) A.I.R. 1935 Lah. 612

(2) A.I.R. 1941 Lah. 357

(3) A.I.R. 1949 E.P. 282

(4) A.I.R. 1946 Mad. 529

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his representatives are concerned and therefore the suit brought by the purchaser is not barred under section 47. The Privy Council in *Adyanath Ghatak v. Krishna Prasad Singh* (1), held that symbolical possession of property found to be in occupation of a tenant of the judgment-debtor effectively terminates the possession of both the judgment-debtor and the tenant. The same view was taken by their Lordships in *Radha Krishna Chanderji v. Ram Bahadur* (2).

Besides this there is the fact that the defendants asked for compensation on the 10th August 1945, in the executing Court after the report of the possession was made. Taking all these facts into consideration I am of opinion that the possession had passed to the plaintiffs and therefore section 47 cannot be held to be a bar.

The next question raised by Mr. Tek Chand was that Sham Sarup had made a statement as a result of which the execution was dismissed as unsatisfied. Merely because Sham Sarup, who at that time had no rights left as he had sold his ownership in the property to the plaintiffs, stated something which may or may not mean anything, cannot take away the rights of the plaintiffs. In the *Bank of Upper India Ltd. v. Robert Hercules Skinner* (3), it was held that an acknowledgment made by a party after he had parted with all his interests would not bind the purchaser. Applying that principle anything which was done by Sham Sarup after he had parted with his rights would not be binding on the plaintiffs. Even if what was stated by Sham Sarup was binding on the plaintiffs it cannot affect the merits of this case as the possession that had already been taken by the plaintiffs could not thereby be wiped out and it could not be said that there was no possession merely because Sham Sarup had stated that he did not want to proceed with the execution

(1) A.I.R. 1949 P.C. 124

(2) 22 C.W.N. 330

(3) I.L.R. 1942 Lah. 686 P.C.

application and asked that it be dismissed for the time being.

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I therefore hold that—

- (1) On deposit of decretal money the pre-emptor gets title to the property pre-empted under Order XX, rule 14 of the Civil Procedure Code;
- (2) a transferee from such a pre-emptor is not a representative within the meaning of the word "representative" as used in section 47 of the Civil Procedure Code;
- (3) the plaintiffs had obtained actual possession of a portion of the property in dispute and symbolical possession of the rest and it was a sufficient dispossession of the judgment-debtors;
- (4) it has been actually found by the learned Judge that possession had passed to the plaintiffs;
- (5) there was an admission of the defendants that possession had passed in the application which they made for compensation;
- (6) under these circumstances section 47 cannot be a bar to the bringing of the present suit by the plaintiffs; and
- (7) any statement made by Sham Sarup is not a statement made on behalf of the plaintiffs as at that time Sham Sarup had no title in the property.

I would, therefore, dismiss this appeal with costs throughout.