

APPELLATE CIVIL

Before Shamsher Bahadur, J.

MAL SINGH AND OTHERS,—Appellants.

versus

MOHINDER SINGH,—Respondent.

Regular Second Appeal No. 168 of 1969

August 27, 1969

Code of Civil Procedure (V of 1908)—Section 47—Decree for possession by pre-emption—Decree not executed within statutory period of limitation—Fresh suit for possession on the basis of such decree—Whether maintainable.

Held, that if the nature of the decree requires that it should be executed, a decree-holder cannot, after allowing the limitation period to lapse without issuing process of execution, seek by a fresh suit on the decree to obtain that which he should have sought for by execution. The relief claimed in the suit, in substance, amounts to asking for the fruits of a decree which cannot be executed owing to lapse of time. Such a suit, in effect, raises a question relating to the execution, discharge or satisfaction of the former decree and hence it is not maintainable under section 47 of Code of Civil Procedure. (Para 5)

Regular Second Appeal from the decree of the Court of Shri Diali Ram, District Judge, Ferozepore dated the 30th day of December, 1968, reversing that of Shri A. S. Dhugga, Sub-Judge, IInd Class, Muktsar, dated the 18th July, 1967, and granting the plaintiff a decree for possession of the suit land with costs.

B. S. CHAWLA, ADVOCATE, for the Appellants.

B. S. SHANT, ADVOCATE, for the Respondent.

JUDGMENT

SHAMSHER BAHADUR, J.—This appeal raises a novel and interesting point in the law of pre-emption a question which has to be decided on first principles as there does not seem to be any direct authority on the point.

The property in dispute consists of agricultural land measuring 11 Bighas and 5 Biswas situated in village Jhurar of Muktsar Tehsil. This parcel of land was sold by Mehar Singh to Mal Singh, the first appellant, and his brother Pala Singh, who is dead and is now represented by appellants Nos. 2 to 7, by a registered sale deed of 22nd of June, 1957, for Rs. 10,000. Two pre-emption suits were filed in

respect of this sale, one by Mohinder Singh, respondent in this appeal, and the other by Punjab Singh. There was a compromise between the vendees and Mohinder Singh, who, according to them, was a mere figurehead and was put up by them as a pre-emptor to retain the land in their hands and to keep out Punjab Singh from it. In the suit of Mohinder Singh, which was compromised on 8th of October, 1959, a decree was passed in his favour. Strangely enough, and this supports to some extent the contention of the vendees, Mohinder Singh never cared to take possession of the land for many years and the explanation given by him in the present suit filed for possession of this land by him against the vendees many years later was that he had been involved in a number of cases which had kept him in jail for intermittent periods. It is not disputed that the sum of Rs. 10,000, for which the suit was decreed in favour of Mohinder Singh had been paid by him but no effort was made to get possession of the land. An execution application was filed on the 23rd March, 1966, but it was dismissed on 10th of June, 1966 (Exhibit D. 1) as infructuous (*nakam*). The present suit was filed by Mohinder Singh on 15th of October, 1966 and it is founded on the old pre-emption decree passed in his favour as a compromise on 8th October, 1959. The principal question which was raised in the suit related to its maintainability after the statutory period of limitation had expired and the decision of the trial Court was adverse to the plaintiff's claim. The lower appellate Court, however, took a different view of the matter and decreed the suit of the plaintiff on 30th December, 1968. It is from the appellate decree of the District Judge, Ferozepore, that the vendees have come in appeal to this Court.

(3) On the pleadings of the parties, the following issues were framed :—

- (1) Whether the decree dated 8th October, 1959, is collusive, without jurisdiction and is not binding upon the defendant
- (2) Whether the present suit is maintainable in its present form ?
- (3) Whether the suit is not maintainable in its present form as alleged in preliminary para No. 3 of the written statement?
- (4) Whether the suit is within time?
- (5) Whether the plaintiff is entitled to get the possession of the land on the basis of decree dated 8th October, 1959?

Mal Singh etc., v. Mohinder Singh (Shamsher Bahadur, J.)

- (6) Whether the suit is barred by *res judicata*?
- (7) Whether the plaintiff is estopped from filing the suit for his acts and conduct as alleged in preliminary para No. 5 of the written statement?
- (8) Relief.

I have purposely mentioned the various questions in controversy on which the parties joined issue. The ground on which the judgment of the trial Court was reversed, to which I would advert shortly, does not form a part of the subject-matter of the issues or pleadings.

(4) On the question of collusion, the finding of the trial Judge is in favour of Mohinder Singh respondent. Though there was evidence to show that the vendees themselves had provided Mohinder Singh with the zar panjam and also the balance of Rs. 8,000, the trial Court has not accepted this testimony and the matter being decided in favour of the plaintiff-respondent is no longer at large. On the second issue also the decision is in favour of the plaintiff-respondent. The decisions of the Courts below on the third and fourth issues are of crucial importance. The decree in favour of Mohinder Singh respondent was passed on 8th October, 1959. It should have been executed within three years. The order (Exhibit P. 1) of 8th October, 1959, is clear and unambiguous. The plaintiff Mohinder Singh was to get possession of the suit land on payment of pre-emption money. When the application for execution was filed in 1966, it had become barred by time and in fact was dismissed as infructuous. On this reasoning the trial Court decided both 3 and 4 in favour of the defendant-vendees. The trial Judge, further held that the plaintiff not having got his decree executed within the statutory period of limitation, no fresh decision in respect of it could be claimed in another suit on the principle envisaged in section 47 of the Code of Civil Procedure. The present suit, therefore, did not lie, in the view of the trial Judge, and was barred by the principle of *res judicata*. On the question of estoppel covered by issue No. 7, the decision was in favour of the plaintiff.

(5) Under sub-section (1) of section 47 of the Code of Civil Procedure:—

“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."

In a Bench decision of the Allahabad High Court of Sulaiman, J., (later Chief Justice Sulaiman) and Gokul Prasad, J., in *Ramanand and others v. Jai Ram and others* (1), the plaintiffs had obtained a decree in a suit for pre-emption conditional on their paying Rs. 1,000 within three months from the date of the decree. The money was paid, but for one reason or another, the plaintiffs did not get possession of the property either by process in execution, or by private arrangement. Eventually, a suit was brought by the plaintiffs on 25th April, 1917, for possession of the property awarded to them by the decree of 1905. The Bench found that the suit was barred by time under the principle of section 47 of the Code of Civil Procedure. It was argued before the Allahabad Bench, on basis of an earlier decision of that Court, that it was always open to a decree-holder to bring a suit on the decree at any time within twelve years, notwithstanding that the decree had become incapable of execution by lapse of time. This dictum, in the view of that Bench deciding the case of *Ramanand* (1), "would mean that suit after suit could be brought upon barred decrees. If this is correct law, it is a very alarming situation". If the nature of the decree requires that it should be executed, a decree-holder cannot, after allowing the limitation period to lapse without issuing process of execution, seek by a fresh suit on the decree to obtain that which he should have sought for by execution. Towards the end, the Bench in the Allahabad case observed thus:—

"We have given our best consideration to the question before us and we are of opinion that, both on authority and on a correct interpretation of section 47 of the Code of Civil Procedure, the present suit was not maintainable. Stripped of all unnecessary details, the relief claimed by the plaintiffs, in substance, amounts to asking for the fruits of a decree which they are unable to execute owing to lapse of time. The suit, in effect, does raise a question 'relating to the execution, discharge or satisfaction' of the former decree and cannot be determined by a separate suit."

The analytical reasoning of the Bench, if I may respectfully say so, is unanswerable and is equally applicable to the facts of the present

(1) I.L.R. 43 All. 170.

Mal Singh etc., v. Mohinder Singh (Shamsher Bahadur, J.)

case. Though not in a pre-emption case, the same principle was set out by a Division Bench of Leslie Jones and Dundas, JJ., in *Harchand Singh v. Narain Singh and others* (2). Here, a mortgagee had obtained a decree for possession and it was held that no further suit for possession could be maintained unless it is shown that possession had been taken under the decree and the judgment-creditor had been subsequently dispossessed.

(6) The learned District Judge, Ferozepore, while realising the force of the argument that the provisions of section 47 of the Code of Civil Procedure would bar a subsequent suit on the same cause of action, has sought to distinguish the decision of the Allahabad Bench in *Ramanand's case* (1), on the ground that Mohinder Singh plaintiff could not get possession of the suit land as the shares of the *khatas* in respect of which the decree was granted in his favour on 8th October, 1959, were jointly owned. Now, for one matter, this plea had never been taken by the parties and no issue was framed. Relying on the observation of Achhru Ram, J., in *Duni Chand v. Jagdev* (3), that a decree for joint possession is more or less only of a declaratory nature, the co-sharers in possession not being liable to be ejected or dispossessed from any portion of the joint property, the lower appellate Court has reached the conclusion that a fresh suit could be maintained by Mohinder Singh within twelve years. Now, what Achhru Ram, J., said *Duni Chand v. Jagdev* (3), related to partition decrees between co-sharers. In the preamble to the order Exhibit P. 1 of 8th October, 1959, it is mentioned that the suit is for possession by pre-emption. In the plaint Exhibit P.A., pre-emption is sought in respect of *khasra* numbers mentioned therein. The shares are specified and if there was any difficulty, the pre-emptor should have taken proper steps to have the areas demarcated. To say now that possession could not be obtained because of this inherent imperfection is to plead a difficulty which was neither envisaged nor insurmountable. It has not been shown how the transference by the Consolidation authorities of the land in lieu of the one which had been sold to the vendees was in any way fraudulent *qua* Mohinder Singh plaintiff. As I have already premised, the long period of inactivity of Mohinder Singh showed his ready acquiescence of the *fait accompli* in the shape of possession having been retained by the vendees. It may or may not establish collusion but the circumstances certainly support the position taken up by the appellant-vendees.

(2) A.I.R. 1921 Lah. 394.

(3) A.I.R. 1949 E.P. 243.

(7) I regret to have to differ from the learned District Judge, whose judgments generally are held in high esteem. I would allow this appeal, set aside the judgment and decree of the lower appellate Court and restore that of the trial Judge. There would be no order as to costs of this appeal.

N.K.S.

FULL BENCH

*Before Prem Chand Pandit, S. S. Sandhawalia and
Man Mohan Singh Gujral, JJ.*

BALWANT SINGH AND OTHERS,—Appellants.

versus

UNION OF INDIA AND OTHERS,—Respondents.

Letters Patent Appeal No. 541 of 1968

November 20, 1970

Punjab Security of Land Tenures Act (X of 1953)—Sections 2 and 10-A and 10-B—Punjab Reorganisation Act (XXXI of 1966)—Sections 88 and 89—Declaration of surplus area of land-owner in Joint Punjab—Order of declaration neither implemented nor the surplus area utilised for tenants—Such order—Whether continues to be effective after the re-organisation of Punjab on 1st November, 1966.

Held, that under the Punjab Security of Land Tenures Act, 1953, alongwith the liability of the land to be declared surplus, a corresponding right accrues to the Government to utilise the said surplus area for the resettlement of tenants. The result is that when an order declaring the surplus area becomes final under the Act, the Government gets an indefeasible right to resettle tenants thereon. No time limit is given in the Act, during which the Government has to utilise the land for that purpose. It is also not provided that if the utilisation is not made by the Government within a specified period, the landowners can claim that the land has ceased to be surplus and should be restored to them. It is, therefore, clear that if the surplus area has not been utilised by the Government, that fact does not affect its right to the said area and the same can be utilised by it for the resettlement of the tenants. The non-utilisation of the surplus area by Government does not clothe the landowner with any rights. The resettlement of the tenants is the duty of the Government and if due to one reason or the other the said duty has not been performed, that circumstance does not, under the Act, afford a ground to the landowner to say that the declared surplus area ceases to be so and comes back to him, especially when no time is fixed in the Act for doing so. Under section 88 of the