Before : M. M. Punchhi and Ujagar Singh, JJ.

KEHAR SINGH,—*Petitioner.*

versus

PIARA SINGH AND ANOTHER,—*Respondents.*

Civil Revision No. 846 of 1988.

July 12, 1989.

Code of Civil Procedure (V of 1908)—S. 153 A, O.21 Rls. 11 and 35—Jurisdiction to amend decree—Execution proceedings—Applicant for amendment of decree for purposes of removal of construction made during the pendency of suit—Decree holder's application allowed by Executing Court—S. 153-A does not confer power on trial Court to amend the decree—Power vests in first appellate Court where Regular Second Appeal is dismissed in limine by the High Court—High Court, however, maintaining amendment under inherent powers—Substantial justice.

Held, that in the instant case the construction was made during the pendency of the suit, the Executing Court could direct removal of the construction and possession to be delivered to the decree-holder, as the defendants—judgment/debtor cannot be allowed to frustrate the result of a suit for possession of immovable property by his own act. The executing Court could also allow the removal of a building material after demolition by the judgment-debtor and if the judgment-debtor was not agreeable to remove the construction and have the building material, it could be left to the decree-holder. In the instant case, the earlier execution petitions were unnecessarily dismissed without reference to the provisions of the Code of Civil Procedure. If we refer to Rl. 11 and O. 21 of the Code, it clearly indicates that the decree-holder, while making an execution petition in writing, could claim the mode of demolition of the construction in which assistance of the Court was required.

(Paras 1, 2).

Held, that a bare reading of S. 153 A of the Code and objects and reasons for the addition of this section, make it clear that the words 'the Court which had passed the decree or order in the first instance' means the first appellate Court in a case where regular second appeal is dismissed in limine by this Court. We fully agree with the view taken in Gurbachan Singh *v.* Maghar Singh, 1983 Revenue Law Reporter, 25.

(Para 4).

Held, that the High Court can and does hereby exercise its own powers to amend the decree. Said section 153 A of the Code is an enabling section and it does not debar the superior Court to exercise its own powers to amend the decree. The amendment made by the trial Court rendered substantial justice and the real relief to the decree-holder. On merit the defendants had failed to prove his ownership to the immoveable property on which he has made the construction. Technicalities as to which Court can allow the amendment should not stand in the way of the decree-holder to get his decree executed for getting him possession of the immoveable property in pursuance of the decree which he obtained. We set aside the order of the trial Court, but maintain the amendment under our own powers.

(Paras 4, 5).

(*This case was referred to a larger Bench by Hon'ble Mr. Justice S. S. Sodhi on 22nd December, 1988 for decision of an important question of law involved in this case. The case was finally decided on 12th July, 1989 by the Division Bench consisting of Hon'ble Mr. Justice M. M. Punchhi and Hon'ble Mr. Justice Ujagar Singh*).

Petition under section 115 C.P.C. for revision of the order of the Court of Shri R. N. Moudgil, PCS, Senior Sub-Judge, Rupnagar, dated 11th November, 1987 allowing the application for amendment of judgment and decree dated 25th October, 1977 passed by the court of Senior Sub-Judge, Rupnagar in civil No. 168 of 17th July, 1986 entitled 'Piara Singh and another v. *Kehar Singh' and ordering that the words "by removal of construction if any" be added to the judgment in the relief clause in the penultimate line of the judgment after the words "Local Commission", and also ordering that these words be also supplied in the decree-sheet after the words "the Local Commissioner" in the last line of the decree sheet.*

CLAIM : Application for amendment of the decree and judgment dated 25th October, 1977.

CLAIM IN REVISION : For reversal of the order of the lower Court.

Manmohan Singh, Advocate, *for the petitioner.*

P. C. Mehta, Advocate and Som Nath Saini, Advocate, *for the respondent.*

JUDGMENT

Ujagar Singh, J.

(1) Piara Singh and Bachan Singh respondents in this revision filed a suit against Kehar Singh, for a permanent injunction, restraining him from interfering in their possession over the Abadi plots

(AIf) 2/1 and (AIf) 2/2, situated in the area of village Gurdaspur or in the alternative for possession of those plots by way of demolition of the construction made over them by Kehar Singh, defendant-respondent. In the plaint it was alleged that Kehar Singh had started stocking building material on his own plot for making encroachment on the disputed plots while the said plaintiffs were away from the village. The plaintiffs claimed an alternative relief that the decree for possession of the said plots be awarded to them by demolition of construction, if any. The trial Court found that Kehar Singh defendant had encroached upon the whole of Abadi plot (AIf) 2/1 and upon 611 sq. ft. of area out of the Abadi plot (AIf) 2/2. In respect of the rest of the area out of (AIf) 2/2, an injunction was granted, but in respect of the area over which Kehar Singh had already encroached upon, decree for possession was granted. It was not specifically mentioned that possession was to be handed over by demolition of the construction. Kehar Singh filed an appeal before the lower appellate Court, but his appeal was also dismissed on 4th March, 1978 and the decree and judgment of the trial Court were affirmed. Kehar Singh filed Regular Second Appeal No. 1345/1978, challenging the decrees and judgments of the Courts below, but the same was dismissed *in limine* by this Court on 25th September, 1978. To enforce this decree for getting possession, the decree-holder moved an execution petition under Order 21 Rule 35 of the Code of Civil Procedure (in short 'the Code') relevant part of which is reproduced as under:

> "R.35. Decree for immoveable property.—
>
> (i) Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjuged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."

As the construction in this case was made during the pendency of the suit, the executing Court could direct removal of the construction and possession to be delivered to the decree-holder, as the defendant-judgment-debtor cannot be allowed to frustrate the result of a suit for possession of immoveable property by his own act. The executing Court could also allow the removal of a building material after demolition by the judgment-debtor and if the

judgment-debtor was not agreeable to remove the construction and have the building material, it could be left to the decree-holder. To support this view, reliance can be safely placed on case : *Mohd. Ismail* v. *Ashiq Husain* (1), wherein the following observation was made :

> "Where the constructions were made before the institution of the suit, the rule laid down in the Rangoon case could be adopted; but where the construction were made during the pendency of the suit, constructions made are against the law and hence, shall be deemed to have been made by the judgment-debtor at his own risk and responsibility namely, that he shall not be able to claim any benefit such constructions during the execution proceeding. When the judgment-debtor had no right to the constructions, he can raise no objection to the removal of the constructions during the execution. Where it appears to the executing court that the costs of removal or demolition of the constructions would exceed the costs of material to be fetched after the demolition and the decree-holder is willing to let the construction stand on the land, the rule laid down in (1872) 18 WR 527 (Cal) (supra) can be adopted, namely, that it can be left open to the decree-holder to decide what he shall do with the constructions after he is given actual possession of the land along with constructions standing thereon. Thereby the judgment-debtor would not be put to any additional expenses. But if costs of demolition shall not exceed the costs of the materials and the judgment debtor is willing to release the materials in favour of the decree-holder free of charges, and the decree-holder is willing to accept the constructions, the executing Court need not direct the demolition of the constructions, the ownership of which would automatically pass to the decree-holder."

(2) In *Ghanaya Lal* v. *Punjab National Bank* (2), it was laid down that any method suggested by the decree-holder for the satisfaction of his decree, which method is not actually prohibited by

(1) A.I.R. 1970 Allahabad 648.
(2) A.I.R. 1928 Lahore 7.

law, falls within the purview of Rule 11(2)(1)(v) of the Order 21 of the Code and an earlier DB judgment reported in AIR 1926 Oudh 616 was referred. In this view of the matter, the course to be adopted by the executing Court in such cases has been clearly indicated in this authority and there was no difficulty in doing so by it. In the instant case, the earlier execution petitions were unnecessarily dismissed without reference to the provisions of the Code. If we refer to Rule 11 of Order 21 of the Code, it clearly indicates that the decree-holder, while making an execution petition in writing, could claim the mode of demolition of the construction in which assistance of the Court was required. In clause (j) (v) of sub-rule (2) of Rule 11 of Order 21 of the Code, it is provided as under:

> "—— Written application.
>
> (2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—
>
> (a) ——
>
> (b) ——
>
> ——
>
> (j) the mode in which the assistance of the Court is required, whether—
>
> (i) ——
>
> (ii) ——
>
> ——
>
> (v) otherwise, as the nature of the relief granted may require ——"

Sub-clause (v) above clearly indicates that the decree-holder may seek the assistance of the Court in a way as the nature of the relief granted may require. In the present case, decree for possession had to be satisfied and for that purpose, delivery of possession of the land decreed was to be made to the decree-holder. For delivering the possession, demolition could be directed by the executing Court. Even otherwise, possession could be delivered alongwith the building with a direction to the judgment-debtor to remove the structure

at his own expense and have the building material himself, or the decree-holder could be asked to have the building and later on demolish it or retain it with him. The judgment-debtor could seek any other remedy if permitted by law, to claim damages or to claim building material (Malba). In any case, this course was not adopted in this case. Ultimately, the decree-holder made an application under section 153A, newly added to the Code before the trial Court, for amendment of the decree and judgment by adding the words "by removal of construction if any" in the penaltimate line of the judgment after the words "local commissioner" in the relief clause and also to insert the same words in the decree-sheet after the words "the local commissioner" in the last line of the decree-sheet. The trial Court, purporting to exercise powers under the said section, allowed the amendment as prayed.

(3) Kehar Singh judgment-debtor filed this revision which ultimately came up for final hearing before S. S. Sodhi, J. *Vide* order, dated 22nd December, 1988, the learned Single Judge referred to section 153A of the Code and judgment in *Gurbachan Singh* v. *Maghar Singh* (3), wherein R. N. Mittal, J. interpreted the words "the Court which had passed the decree in the first instance" occurring in section 153A of the Code as the first appellate Court in case where the regular first appeal is dismissed *in limine*. Finding that *Gurbachan Singh's case* (supra) deserved reconsideration, the learned Judge referred this matter to a larger Bench. This is how the matter has been placed before us.

(4) A bare reading of section 153A of the Code and objects and reasons for the addition of this section, make it clear that the words "the Court which had passed the decree or order in the first instance" mean the first appellante Court in a case where regular second appeal is dismissed *in limine* by this Court. The following part of the objects and reasons do not leave any room for doubt for taking this view:

> "—— There is, however, a doubt as to which Court would be competent to amend, decree or order where an appeal against the decree or order has been summarily dismissed. The Bombay and the Patna High Courts have taken the view that it is the original Court which has the power to amend the decree or order. The High Courts of Allahabad and Andhra Pradesh have taken a contrary view. In

(3) 1983 R.L.R. 25.

> view of the divergence of opinion, new Section 153A is being inserted to empower the Court which had passed the decree or order appealed against, to amend the decree or order where appeal has been summarily dismissed."

We fully agree with the view taken in *Gurbachan Singh's* (supra). In this view of the matter, the order of the trial Court allowing the amendment is set aside. However, we do not want the decree-holder to start afresh for getting the amendment by the first appellate Court which attempt may again consume sufficient time before he gets the relief. Admittedly, the suit was instituted by the decree-holder on 17th July, 1976 and ultimately, the litigation came to an end on 25th September, 1978. Since then the relief has not been made available to the decree-holder and it is now after about 11 years, the decree-holder's attempt to get the relief may end in success. We are, therefore, of the view that this Court can and does hereby exercise its own powers to amend the decree. Said section 153A of the Code is an enabling section and it does not debar the superior Court to exercise its own powers to amend the decree. We are supported in this view by a case : *Ram Bharosey Lal* v. *Rameshwar Dayal* (4), wherein the following observations have been made:

> "—— On its language, this provision enabling in character which permits the court of first instance also to correct an error in the decree irrespective of the fact that the decree had merged in the decree of a superior court. The provision does not divest the superior court, of the jurisdiction to effect correction in the decree itself."

The amendment made by the trial Court rendered substantial justice and the real relief to the decree-holder. On merits, the defendant had failed to prove his ownership to the immovable property on which he has made the construction. Technicalities as to which Court can allow the amendment should not stand in the way of the decree-holder to get his decree executed for getting him possession of the immovable property in pursuance of the decree which he obtained on 25th November, 1977.

(5) With the foregoing discussion in view, although we set aside the order of the trial Court, but we maintain the amendment under our own powers.

R.N.R.

(4) A.I.R. 1984 All. 167.