

APPELLATE CIVIL

Before Mehar Singh, J.

GIAN CHAND,—Appellant

versus

TEJA SINGH,—Respondent

Execution Second Appeal No. 1152 of 1963

1965
December 23-d. *Punjab Security of Land Tenures Act (X of 1953)—S. 17-A—Scope and effect of—plea not taken in the suit and decree passed in favour of pre-emptor—Whether can be executed.*

Held that the overall effect and substance of section 17-A of the Punjab Security of Land Tenures Act, 1953, is that where a purchaser is a tenant of the land purchased, no right of pre-emption exists so far as the sale to him is concerned, practically from April 15, 1953, the date of coming into force of Punjab Act 10 of 1953. No decree can be passed in such a suit after July 30, 1958, and in the case of decrees passed before that date, if not executed, the same cannot be executed and if executed, the possession of the land can be recovered by the tenant-purchaser in terms of sub-section (2) of section 17-A. There being a statutory prohibition against the passing of a decree for pre-emption on and after July 30, 1958, and there being no right of pre-emption under the Punjab Pre-emption Act, 1913, in regard to a sale of land comprised in the tenancy of a tenant made to him by the landowner, no Court has jurisdiction to pass a decree for pre-emption in regard to the sale of such land to the tenant. If such a decree is passed, it is a decree without jurisdiction. It is, therefore, a nullity and non-existent. It makes no difference that in ignorance the parties have fought out to the highest Court and have not raised the question of the utter incapacity of the Court to make and pass such a decree. If it was otherwise, it would be open to the parties by conduct or even by the Courts by omission or negligence to effectively act and do things contrary to the provisions of a statute, but this is not so. The decree being a nullity and non-existent the question of its execution does not arise.

Execution second appeal from the order of Shri Sewa Singh, District Judge, Hoshiarpur, dated the 7th August, 1965, reversing that of Shri Salig Ram Bakshi, Senior Subordinate Judge, Hoshiarpur, dated 21st April, 1965, accepting the objection petition of the judgment-debtor and dismissing the execution applications of the decree-holder for execution of the decree for delivery of possession of the land.

Application for execution of a decree.

A. C. HOSHIARPURI, ADVOCATE, for the Appellant.

S. L. PURI AND A. L. BAHRI, ADVOCATES, for the Respondents.

JUDGMENT

MEHAR SINGH, J.—These are decree-holder's second Mehar Singh, J. appeals (Execution Second Appeals Nos. 1152 and 1153 of 1965). He instituted two suits to pre-empt two sales in favour of Teja Singh judgment-debtor. The date of both the sales is November 9, 1960. Although the sale deeds were presented for registration on the same day, but they were actually entered in the registration books on February 9, 1961. The decree-holder instituted the pre-emption suits to pre-empt the two sales on November 13, 1961. One of the defences of the judgment-debtor was that the suits were barred by time and the ground given by him for that was that he was delivered possession of the lands on the date of the execution of the sale deeds, that is to say, on November 9, 1960. If that was so, the suits filed on November 13, 1961, were obviously barred by time. The judgment-debtor made a statement before the trial Court in those suits which were consolidated and tried together, that some 2½ years before November 9, 1960, he was a tenant of the same lands under the vendor but as the vendor represented to him that he wanted to sell the lands and asked him to deliver back the possession of the same, he surrendered the tenancy and gave back the possession of the lands to the vendor. After his surrender of the tenancies and delivery of possession of the lands, he obtained sale deeds with an interval of about 2½ years, and when he did obtain the sale deeds, by that time, he was put in physical possession of the lands by the vendor. The learned trial Judge in both the suits found the issue of limitation against the judgment-debtor and his decision on the issue was based on a finding of fact that the judgment-debtor was a tenant of the lands to the date of the execution of the two sale deeds on November 9, 1960. Having found that the judgment-debtor was a tenant of the lands on that date, he obviously reached the next irresistible conclusion that the judgment-debtor was not given physical possession of the lands on that date. So he proceeded to consider limitation from the date of the entry of the sale deeds in the registration books on February 9, 1961, and from that date the suits having been instituted on November 13, 1961, were obviously within time, the period of limitation for such a suit being one year from the date of such entry. The suits of the decree-holder were decreed against the judgment-debtor and the date of

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the decrees is November 21, 1961. The judgment-debtor went up in appeal and it appears that the appeals of the judgment-debtor were dismissed by the first appellate Court. It appears that there was only one second appeal by the judgment-debtor and that was Regular Second Appeal 658 of 1963 (Teja Singh v. Gian Chand) decided on May 21, 1964, and a learned Single Judge of this Court dismissed that appeal because the only point urged before him in that appeal was the claim by the judgment-debtor with regard to the improvements made by him on the lands. Now, the appeal can be treated either one appeal against the decrees in both the suits or one appeal against the decree in one of the suits and the result will be that in so far as the second suit is concerned, the decree of the first appellate Court, not having been challenged in second appeal became final. In any event, both the decrees of the trial Court having been upheld in appeal became final.

The decree-holder filed execution applications to execute the decrees. The judgment-debtor raised an objection under section 47 of the Code of Civil Procedure that the decrees could not be executed against him because he was in possession of the lands in dispute as a tenant at the time of the sales, and, therefore, the decree-holder could not be delivered physical possession of the lands subject of the decrees. The executing Court dismissed the objection petitions of the judgment-debtor on a finding that he was not a tenant of the lands on the date of the sales, that is to say, on November 9, 1960. The orders of the executing Court dismissing the objection petitions of the judgment-debtor are dated April 27, 1964. It is not clear what happened to the execution applications of the decree-holder between that date and May 1, 1964, probably those execution applications were consigned to the record room either at the instance of the decree-holder or for his non-prosecution. In any event the decree-holder came forward with a second set of execution applications to execute the two decrees on May 1, 1964. In those applications he sought aid of the Court to obtain possession of the lands subject of the decrees. Again the judgment-debtor filed objection petitions under section 47 of the Code of Civil Procedure but this time taking a specific objection that on account of section 17-A (1) of the Punjab Security of Land Tenures Act, 1953 (Punjab Act 10 of 1953) he being a tenant of the lands at the date of the execution of the sales, the decrees

could not be executed against him, there being express prohibition in that provision barring the execution of such decrees. The executing Court in its order of April 21, 1965, dismissed the objection petitions of the judgment-debtor on the ground that the same were barred by the rule of constructive *res judicata* because the judgment-debtor could have raised this very objection in his earlier objection petitions to the first execution applications by the decree-holder. The judgment-debtor filed two appeals against the dismissal of his two objection petitions and the appellate Court has, by its order of August 7, 1965, accepted both the appeals reversing the orders of the executing Court and, on allowing the objection petitions of the judgment-debtor, has dismissed the execution applications of the decree-holder. The learned Judge in the first appellate Court noted that the trial Court, while decreeing the pre-emption suits of the decree-holder, gave a finding of fact that on the date of the sales the judgment-debtor was a tenant of the lands to which the decrees relate and that on the objection petitions of the judgment-debtor in the first execution applications by the decree-holder the executing Court gave a finding of fact that on the date of the sale the judgment-debtor was not a tenant of those lands. He took cognizance of the argument on the side of the decree-holder that the finding of the executing court that the judgment-debtor was not a tenant of the lands on the date of the sales having become final, the question involved in the same cannot be re-agitated because of the operation of the rule of constructive *res judicata* applying to execution proceedings. But in spite of this he has accepted the appeals of the judgment-debtor and consequently his objection petition, resulting in the dismissal of the execution applications of the decree-holder on the ground that section 17-A (1) of Punjab Act 10 of 1953 has an over-riding effect and these considerations do not weigh up against the positive provision in that section prohibiting the passing of a decree against a tenant-purchaser and, if a decree has been passed, prohibiting the execution of such a decree.

The decree-holder has filed two second appeals against the order of the first appellate Court and those are Execution Second Appeal Nos. 1152 and 1153 of 1965. In these appeals there is only one argument that has been advanced by the learned counsel for the decree-holder although he

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has expressed it in two different ways. The one manner in which he has expressed his argument is that the judgment-debtor not having relied upon section 17-A(1) of Punjab Act 10 of 1953 either in his defence at the time of the trial of the pre-emption suits or in opposing the two first execution applications to execute the decrees by the decree-holder, he has waived any such plea available to him under that provision. The other manner in which he has stated the same argument is that in so far as the objection petitions to the second execution application to execute the decrees are concerned, the same are barred by the rule of *res judicata* because this objection was open to the judgment-debtor at the time of his objection to the first execution applications to execute the decrees, and he not having taken this objection at that time, cannot do so in the new objection petitions to the second set of execution applications. This reply of the learned counsel for the judgment-debtor is that the provisions in sub-section (1) of section 17-A of Punjab Act 10 of 1953 are mandatory and under those provisions no pre-emption decrees in the circumstances of these cases could have been passed in favour of the decree-holder and against the judgment-debtor and in any case, even if such decrees have been passed against the judgment-debtor contrary to that provision, according to the very provision such decrees cannot be executed against the judgment-debtor. He says neither the question of waiver nor the rule of *res judicata* operates against the express provisions of the statute. In this respect he has referred to *Surjit Kaur and another v. Jarnail Singh and others* (1), in which P. C. Pandit, J., held 'sub-section (2) of section 17-A of the Punjab Security of Land Tenures Act was enacted to give relief to those tenants who had been dispossessed in execution of a decree for pre-emption from their tenancies before 30th of July, 1958, and a period of one year was given to them, for making the necessary application to the Assistant Collector, First Grade. There was no necessity to provide for cases after 30th of July, 1958, because it was understood that no such decree could either be passed or executed. Where a decree for pre-emption was passed after 30th July, 1958, and possession was delivered to the pre-emptor in execution thereof, the passing of the decree and the delivery of possession being not in accordance with the provisions of the Act, the executing Court could entertain the application for the restoration

(1) I.L.R. (1964)1 Punj. 299=1964 P.L.R. 24.

of possession to them'. The learned counsel presses that in the face of the provisions of section 17-A of Punjab Act 10 of 1953, first, no decrees could be passed against the judgment-debtor and, second, if the decrees were erroneously passed, the same cannot be executed. In reply the learned counsel for the decree-holder again stresses that in spite of what has been provided in section 17-A of Punjab Act 10 of 1953, the fact remains that the finding of the executing Court in the objection petitions of the judgment-debtor at the time of the first execution applications of the decree-holder that the judgment-debtor was not a tenant of the lands on the date of the sales on November 9, 1960, is a finding of fact which has become final and operates as *res judicata* in so far as the objections of the judgment-debtor at the time of the second execution applications are concerned, and if that finding is to stand, the provisions of section 17-A of Punjab Act 10 of 1953 cannot possibly be attracted so far as these cases are concerned.

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On July 30, 1958, was promulgated the Punjab Security of Land Tenures (Amendment) Ordinance, 1958 (Punjab Ordinance 6 of 1958) which by section 30 of it inserted new section 17-A in the Principal Punjab Act 10 of 1953. Subsequently the provisions of the Ordinance were enacted as a statute in the shape of the Punjab Security of Land Tenures (Amendment) Act, 1959 (Punjab Act 4 of 1959) and re-enacted new section 17-A with slight variation, in the principal Punjab Act 10 of 1953. Section 17-A reads thus—

“17-A. Notwithstanding anything to the contrary contained in this Act or the Punjab Pre-emption Act, 1913, a sale of land comprising the tenancy of a tenant made to him by the landowner shall not be pre-emptible under the Punjab Pre-emption Act, 1913, and no decree of pre-emption passed after the commencement of this Act in respect of any such sale of land shall be executed by any Court:

Provided that for the purposes of this sub-section the expression tenant includes a joint tenant to whom whole or part of the land comprising the joint tenancy is sold by landowner.

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(2) Where, after the commencement of this Act, a tenant, to whom the land comprising his tenancy is sold by the landowner, has been dispossessed of such land by a pre-emptor in execution of a decree for pre-emption or otherwise, the tenant so dispossessed shall in the prescribed manner have the option either to purchase the land from the pre-emptor on payment of the price paid to the tenant by the pre-emptor or to be restored to his tenancy under the pre-emptor on the same terms and conditions on which it was held by him immediately before the sale, on an application made by him to an Assistant Collector of the First Grade having jurisdiction within a period of one year from the commencement of the Punjab Security of Land Tenures (Amendment) Ordinance, 1958.

(3) An application received under sub-section (2) shall be disposed of by the Assistant Collector of the First Grade in the manner laid down in sub-section (2) of section 10."

The provisions of this section deal with three situations. The first situation is that the right of pre-emption ceased to exist so far as a sale in favour of a tenant is concerned and obviously on or after July 30, 1958, as such a right ceased to exist, no pre-emption decree could be passed in favour of a pre-emptor where the sale is obtained by a tenant-purchaser. In the case of suits instituted after that date no decree can be passed and in the case of suits pending on that date also obviously no decree could be passed. This is the one situation with which this section deals. There is then another situation that arises in this way that before July 30, 1958, decrees in pre-emption suits had been passed against tenant-purchasers but those decrees were not yet executed, and with regard to such decrees it is provided that the same shall not be executed by any Court. The third situation is of those similar decrees passed before July 30, 1958, in which in execution of the same even possession had been lost by the tenant-purchaser, and with regard to that the provision is that within a year of July 30, 1958, the tenant-purchaser can recover the land subject of such a

decree in terms of sub-section (2) of section 17-A. It is these three situations with which this provision deals. The overall effect and substance of the provision is that where a purchaser is a tenant of the land purchased, no right of pre-emption exists so far as the sale to him is concerned, practically from April 15, 1953, the date of coming into force of Punjab Act 10 of 1953. No decree can be passed in such a suit after July 30, 1958 and in the case of decrees passed before that date, if not executed the same cannot be executed, and if executed, the possession of the land can be recovered by the tenant-purchaser in terms of sub-section (2) of section 17-A as has been held by Pandit, J., in *Surjit Kaur's case*. There being a statutory prohibition against the passing of a decree for pre-emption on and after July 30, 1958, and there being no right of pre-emption under the Punjab Pre-emption Act, 1913, in regard to a sale of land comprised in the tenancy of a tenant made to him by the landowner; no Court has jurisdiction to pass a decree for pre-emption in regard to the sale of such land to the tenant. If such a decree is passed, it is a decree without jurisdiction. It is, therefore, nullity and non-existent. It makes no difference that in ignorance the parties have fought out to the highest Court and have not raised the question of the utter incapacity of the Court to make and pass such a decree. If it was otherwise, it would be open to the parties by conduct or even by the Courts by omission or negligence to effectively act and do things contrary to the provisions of a statute, but this is not so. On a finding by the trial Court in the two suits of the decree-holder in its judgment of November 21, 1962, that the then defendant, subsequently judgment-debtor. Teja Singh was a tenant of the lands sold to him by the landowners on November 9, 1960, immediately the provisions of section 17-A of Act 10 of 1953 were attracted to the sales. The sales were not pre-emptible under the provisions of the Punjab Pre-emption Act, 1913, the Courts have been prohibited from passing any decree of pre-emption in relation to those sales. If in spite of this imperative statutory injunction the Courts have assumed jurisdiction to pass such decrees, the only legal effect of that is that no decrees have been passed and nothing done by the Courts can be recognised as having been done in exercise of jurisdiction vested in them. So the decrees against Teja Singh, judgment-debtor, are nullities and non-existent. Once this conclusion is reached, the argument of the learned counsel for the

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decree-holder that the finding in the first execution applications on the objection petitions of the judgment-debtor that he was not a tenant on the date of the sales is *res judicata* in the second objection petitions of the judgment-debtor in the second execution applications, really does not come in for consideration. The reason is simple, execution applications can only proceed if there are decrees to be executed, and as pointed out in this case, there are no decrees against Teja Singh, judgment-debtor, of which cognizance can be taken in the face of section 17-A of Punjab Act 10 of 1953. It follows that there can be no execution of non-existent decrees. Nothing that has happened affects the right of the tenant-purchaser, Teja Singh, judgment-debtor, under section 17-A of Punjab Act 10 of 1953 and under that provision he takes the lands under the sales to him unaffected by any right of pre-emption in any body and unaffected by any purported exercise of any such non-existent right. In this approach the conclusion reached by the learned District Judge in the two appeals before him is not open to exception.

The consequence is that these appeals of the decree-holder fail and are dismissed but in the circumstances of the case the parties are left to bear their own costs.

B.R.T.

LETTERS PATENT APPEAL

Before Mehar Singh and Prem Chand Pandit, JJ.

NIRTA RAM,— *Appellant*

versus

THE ASSISTANT COLLECTOR, PATIALA AND OTHERS,—
Respondents

L.P.A. No. 79 of 1965

1965
December 23rd.

Punjab Land Revenue Act (XVII of 1887)—Ss. 79 to 96—Auction-sale—Whether Collector can refuse to confirm on the ground that the price offered is not reasonable—Such a condition in the sale of proclamation—Whether valid.