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KHAZAN SINGH (D) BY LRS.
v.
GURBJAJAN SINGH AND ORS.

FEBRUARY 23, 2007

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[S.B. SINHA AND MARKANDEY KATJU, JJ.]

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Execution of decree for possession—Possession of agricultural land when sought without expressly mentioning existence of some kothas, after long litigation and by first taking actual possession of small portion (10 biswas) and then taking rest of 2 bighas 7 biswas, decree holder could not belatedly claim that kothas were also included in decree for possession.

Code of Civil Procedure, 1908—ss.100, 115—Second appeal—Held, lies on question of law—Revisional Jurisdiction is also limited.

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One 'S' filed a suit in respect of 2 bighas 17 biswas. The trial Court passed decree for recovery of possession in 1953. The actual delivery taken was of 10 biswas only and only symbolic possession of 2 bighas 7 biswas was taken as it was in possession of Judgment Debtors (JDs).

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The decree holder-respondent (DH) filed a fresh suit for possession of 2 bighas and 7 biswas which was dismissed as not maintainable by the District Judge on 16.1.1960 on the ground that an executable decree was passed in 1953 and hence precluded a fresh suit for the possession of properties. The DH in execution of the decree prayed for delivery of possession on 25.1.1963 of the said lands. Delivery was given pursuant to warrants of possession.

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In the site plan, 2 portions of lands were delineated shown as ABCD and EFGH. The DH had also transferred portions of lands to some vendees. There were some kothas and then dispute arose whether these were in the portions of DH. Executing Court held that delineation of kothas was not in EFGH in the plan. The delineation was done in the presence of parties with their consent and they cannot question the same now. They filed revision against this, which was allowed by the High Court.

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In appeal to this Court, the appellant contended that DHs never sued for possession of kothas and never asked the Executing Court to deliver the

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possession of said kothas and were not entitled to seek their possession belatedly. A

Allowing the appeal, the Court

HELD: 1.1. The subject matter of the dispute is 'kothas'. JD had all along taken the stand that the 'kothas' are outside the decretal land. Even if they had not raised the contention that the decree stood satisfied, it was for the Executing Court to arrive at the said decision. Appellants are admittedly in possession of the 'kothas' in question. In the first execution case, therefore, the DHs were required to file application not only for actual delivery of possession of agricultural lands as also non-agricultural lands as directed in terms of warrant of delivery of possession but also for the said 'kothas'. In the warrant of delivery of possession issued by the executing court no direction was issued while directing the authorities to render all assistance to the bailiff of the court, to evict the JDs from the 'kothas'. [Para 16] B C

[126-G-H; 127-A-B]

1.2. The delivery of possession of the 'kothas' delineated in the plan and marked with the letters 'EFGH' was a contentious issue in the Execution Second Appeal as also in Civil Revision filed before the High Court. It had categorically been held that the 'kothas' did not form part of the decree and, thus, the possession thereof cannot be delivered. It has also been found by the Subordinate Judge in the suit that as actual delivery of possession having been effected, the suit was not maintainable. Appreciation of evidence on the basis of the materials brought on record by the parties was within the domain of the Executing Court. By reason of the Code of Civil Procedure (Amendment) Act, 1976, an appeal thereagainst does not lie. Revisional jurisdiction of the High Court, thus, could be exercised only on limited grounds. D E

[Paras 19 and 20] [127-G-H; 128-A]

1.3. The High Court, therefore, was not correct in interfering with the said findings of fact. It was exercising its revisional jurisdiction. It had not found that the Executing Court committed any illegality or material irregularity in passing the order impugned before it. It proceeded on a presumption that merely symbolic possession had been delivered. [Para 21] F

[128-B-C] G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 920 of 2007.

From the final Judgment and Order dated 21.10.2005 of the High Court of Punjab and Haryana at Chandigarh in CR. No. 1186/1984.

P.N. Mishra, Balbi Singh Gupta and S.K. Gupta for the Appellants. H

A Pradeep Gupta, K.K. Mohan, Suresh Bharati, P.N. Puri, Reeta Diwan Puri and Dhiraj for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

B 2. Interpretation of a decree passed as far back on 14.01.1953 falls for consideration in this appeal which arises out of a judgment and decree dated 21.10.2005 passed by the High Court of Punjab and Haryana in Civil Revision No. 1186 of 1984 whereby and whereunder the order dated 30.01.1984 passed by the Additional District Judge, Patiala was set aside.

C 3. The subject matter of the suit filed by one Sampuran Singh was in respect of 2 bighas 17 biswas in Khasra No. 2057 to 2059. A decree for recovery of possession was passed. The present dispute revolves round the question as to whether actual possession in execution of the said decree was granted or not.

D 4. The contention of the decree holders had been that actual delivery of possession was confined only to 10 biswas only in the execution proceeding and only symbolic possession of 2 bighas 7 biswas on 5.03.1954 was given, and, thus, the actual possession thereof remained with the judgment debtors - appellants. A fresh suit for possession was filed in respect of the said lands which although was dismissed by the learned Trial Judge but a decree for 10 biswas was passed by the learned District Judge on 16.01.1960. It was held that the subsequent suit was not maintainable stating:

F "It would, thus, appear that the plaintiff had not taken possession of the land measuring 2 bighas and 7 biswas in accordance with law under the previous decree and the subsequent suit is, therefore, not competent in accordance with the observations in *Sasi Sakharewar Ray v. Lalit Mohan Maitra*, AIR (1925) Privy Council 34 as held therein that it was on executable decree and precluded a fresh suit for the possession of the properties concerned by one of the parties. Consequently, the subsequent suit is not competent."

G 5. The decree holder in execution of the decree dated 14.01.1953 prayed for delivery of possession of the said lands. The court passed the following order on 25.01.1963:

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"The warrant of possession has been received back. It has been reported that the site plan was not attached with the warrant of possession but this appears to be incorrect. The D.H. is hereby directed to file a fresh site plan of the disputed property excluding the portion of 10 Biswas which may be clearly shown in the site plan that may be got filed and this 10 Biswas is out of land bearing khasra no. 2059 and the Patwari while giving possession according to the decree should ascertain that possession is given to the Decree Holder of the land etc. excluding the 10 Biswas of land. This 10 Biswas of land has been shown in the site plan today filed by the J.D. and has been marked A, B, C & D. The Patwari should ascertain whether this plot of land is out of Khasra no. 2059 or not? Warrant of possession be issued on payment of process fee etc. Now case to come up on 15.2.63. It should also be mentioned that possession of portion marked E, F, G, H be also not given to the D. Holder. Warrant of possession be given dasti also."

6. In terms of the said order, warrant of possession was issued wherein it was directed:

"In respect of possession of land as per site plan attached in the above noted suit by fixing the peshi 6.7.63, you are hereby ordered that the possession of the land bearing khasra numbers except mark A, B, C, D & E, F, G, H be delivered to the decree holder along with the standing crops which are duly shown marked as red in colour with police force and in this respect the report be submitted. For the sanction of help of the police force, the proceedings have been started."

7. Delivery of possession pursuant to the said warrant of possession was given upon publication of notice by beat of drums on or about 29.06.1963.

8. Thereafter, the decree holders - respondents applied for mutation of their names which was said to have been granted. Entire khasras were recorded in the names of the decree - holders. Allegedly, the decree holders had also transferred the lands in question to outsiders and the vendees are in possession of their own purchased lands.

9. The question which arose in the second execution case was as to whether a portion of the property delineated with the words 'EFGH' in the plan formed part of the decretal property or not. The matter came up to the High

A Court in Execution Second Appeal No. 718 of 1967. On an application filed under Section 151 of the Code of Civil Procedure, by an order dated 31.07.1967, Grover, J. while issuing a notice of early date of hearing directed that the judgment debtors should not be dispossessed from the portion marked 'EFGH' in the plan.

B 10. The said Execution Second Appeal was disposed of by Tuli, J. on 13th January, 1971. In the said appeal, correctness of the finding recorded in paragraph 8 of the order of the appellate court was questioned on the ground that the decree holder was not entitled to possession of land shown in 'EFGH' of plan as the 'Kothas' of the judgment debtors were situate therein. In the said Appeal, observations of Mahajan, J. in his order dated 13.10.1965 were noticed in the following terms:

D “In the present execution application, claim is made to some kothas on the ground that they are situate in the land in dispute. According to the judgment - debtor, this claim is made to the kothas which were the subject matter of the earlier suit. It cannot be disputed that the decree-holder is entitled to the possession of 2 bighas 7 biswas under the decree dated 14th January, 1953 and 10 biswas under the decree dated 16th January, 1960. I have already dealt with the total measuring 10 biswas in Execution Second Appeal No. 760 of 1964 today. Possession of this land has been taken by the decree holder. It is not clear whether the possession of land measuring 2 bighas 7 biswas subject matter of the decree dated the 14th January, 1953 has been taken possession of or not. If there is any kotha in the total land of which the decree holder is entitled, namely, 2 bighas 17 biswas, the decree holder will be entitled to any kothas, outside this land.”

F On the basis thereof, it was opined:

G “The learned counsel for the decree-holder respondent states that in accordance with the observations made by Mahajan J. he will only obtain the possession of 2 bighas 7 biswas of land under the decree dated January 14, 1953 and of the kothas, situate on that land. There can be no dispute with regard to this position of the learned counsel but the Executing Court, while giving possession of that land to the decree holder respondent, will keep out the kothas which were the subject matter of the suit which was decided in appeal by Shri H.S. Bhandari, District Judge, by his decree dated January 16, 1960. The possession of those Kothas will not be delivered to the respondents

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in any case as it has already been held that they are not situate on the land which forms the subject matter of the suit which had been decreed in favour of the decree - holder on January 14, 1953 Mahajan J. also made it clear that the decree holder will not be entitled to any kothas outside this land. As it has already been determined by a competent court that the kothas to which the judgment debtors are laying claim as having been rebuilt are not situated on the land measuring 2 bighas 7 biswas which formed the subject matter of the suit decreed in January 14, 1953, it will not be open to the Executing Court to deliver possession of those kothas to the decree - holder while giving him possession of the land which forms the subject matter of the suit decreed on January 14, 1953, the execution of which is being sought.

The appeal is accordingly accepted in part as observed above. The parties are left to bear their own costs."

11. However, a second execution case was filed including the 'kothas' which were, as noticed hereinbefore, delineated with in the area marked with the words 'EFGH' in the plan. An objection to the said execution application was filed by the appellants on 10.06.1971. The Executing Court framed the following issues:

"1. Whether the decree dt. 14.1.53 and decree dt. 16.1.60 have been fully satisfied?

2. Whether the objection petition is not maintainable?

3. Whether the decree holder is estopped by his act and conduct to seek possession of the land after 29.6.63?"

12. The decree holders moved an application for issuance of warrants of possession on 23.06.1971 in the aforesaid execution petition. The Executing Court opined that the possession of the portion of the decretal property marked as 'ABCD' had already been given to the decree holders. By an order dated 30.01.1984, it was held:

"12. Now the sole question is as to whether kothas shown at EFGH are included in the decreed property or not. In that behalf the order of the Hon'ble High Court Ex. 013 would clearly show that these kothas are outside the scope of the decree. The concluding words of His Lordship Mr. Justice Balraj Tuli are that it will not be open to the

A executing court to deliver possession of those kothas while giving him possession of the land which is the subject matter of the suit decreed on 14.1.53, the execution of which is being sought. The kothas have been found to be situated at portion marked EFGH. This portion was excluded by the executing court by the warrant of possession in the presence of both the parties. The line depicted B EFGH was drawn by the court with the consent of the decree holders even. That being the case no claim regarding EFGH can be made by the decree holders now.

C 13. The learned counsel for decree holders states that his decreed land measuring 2 B 17 biswas has not been made good and some portion of land still remains to be delivered to him. That contention is belied by looking to the Jamabandi of 1981-82 which is to the effect that 2 B 17 biswas of land in khasra No. 2057 to 2059 is in possession of the decree holders. In view of these reasons and consideration, I D would hold that both the decrees have been fully satisfied on 29.6.63 when the report of delivery of possession has been made to the court. Therefore, these issues are decided in favour of the objectors."

13. The revision petition filed thereagainst by the decree holders - respondents have been allowed by reason of the impugned judgment.

E 14. Mr. P.N. Mishra, learned senior counsel appearing on behalf of the appellants, would submit that in view of the clear finding of fact arrived at by the executing court, there cannot be any doubt whatsoever that the decree passed in favour of the decree holders was satisfied and as such the fresh execution petition was not maintainable.

F 15. Mr. Pradeep Gupta, learned counsel appearing on behalf of the respondents, on the other hand, would contend that the High Court by reason of the impugned judgment took into consideration the entire aspect of the matter and having come to the conclusion that the 'kothas' form part of the decretal land, and the actual delivery of possession having not been G granted in relation thereto, a fresh execution petition was maintainable.

16. It is not in dispute that the subject matter of the dispute is 'kothas'. Judgment Debtor had all along taken the stand that the 'kothas' are outside the decretal land. Even if they had not raised the contention that the decree stood satisfied, it was for the Executing Court to arrive at the said decision. H Appellants are admittedly in possession of the 'kothas' in question. In the first

execution case, therefore, the decree holders were required to file application not only for actual delivery of possession of agricultural lands as also non-agricultural lands as directed in terms of warrant of delivery of possession but also for the said 'kothas'. The warrant of delivery of possession issued by the executing court has been noticed by us hereinbefore. No direction therein was issued while directing the authorities to render all assistance to the bailiff of the court to evict the judgment debtors from the 'kothas'. It is expected that such a direction would be given by the Executing Court while issuing warrant of delivery of possession.

17. We may also notice the report of Assistant Collector, Patiala dated 29.06.1963 which reads as under:

"It is requested that as per order, I reached the spot today, the land as per site plan attached which was found vacant at the spot, that land after getting it ploughed by the D.H. and the land in which the crops are standing, by getting its round of the D.H. around four sides of that land in satisfaction of the D.H. as per order, the possession of the D.H. with police force under the supervision of Sh. Surjit Singh ASI Incharge Division no. 2 Patiala in presence of Halqa Patwari and the below noted witnesses, was delivered. At the spot only 5 Biswas of land was found vacant, in the remaining land there are crops of tomato, chilies, lobia and torian. Regarding the delivery of possession its Munadi was made in the adjoining land. The Patwari Halqa was directed that the report of this proceeding be made in the Roznamcha. There is a well in this land also on which the machinery for pulling water (Halt) is also fitted. Accordingly, the report is submitted after compliance. Dated 29.6.1963"

18. It was not stated therein that only symbolic possession was delivered. Decree Holder accepted that delivery of possession had been given.

19. We have noticed hereinbefore that delivery of possession of the 'kothas' delineated in the plan and marked with the letters 'EFGH' was a contentious issue in the Execution Second Appeal as also in Civil Revision filed before the High Court. It had categorically been held that the 'kothas' did not form part of the decree and, thus, the possession thereof cannot be delivered. It has also been found by the learned Subordinate Judge in the suit that as actual delivery of possession having been effected, the suit was not maintainable.

A 20. Appreciation of evidence on the basis of the materials brought on record by the parties was within the domain of the Executing Court. By reason of the Code of Civil Procedure (Amendment) Act, 1976, an appeal thereagainst does not lie. Revisional jurisdiction of the High Court, thus, could be exercised only on limited grounds.

B 21. The High Court, therefore, in our opinion, was, thus, not correct in interfering with the said findings of fact. It was exercising its revisional jurisdiction. It had not found that the Executing Court committed any illegality or material irregularity in passing the order impugned before it. It proceeded on a presumption that merely symbolic possession had been delivered. The contentions raised in this behalf by the respondents were not borne out of records.

C 22. There cannot be any doubt whatsoever that if the 'kothas' formed part of the decretal land, the decree holder was entitled to possession thereof but the question was whether the kothas in question were part of the decretal land or not. The High Court had referred to an order dated 13.10.1965 passed in civil revision No. 470 of 1964 wherein it was held:

E “In the present execution application, claim is made to some kothas on the ground that they are situated in the land in dispute. According to the judgment debtor, this claim is made to the kothas which were the subject matter of the earlier suit. It cannot be disputed that the decree holder is entitled to the possession of 2 Bighas 17 Biswas, 2 Bighas 7 Biswas under the decree dated 14th January, 1953 and 10 Biswas under the decree dated 16th January, 1960. I have already dealt with the land measuring 10 Biswas in Execution Second Appeal No. 60 of 1964. Possession of this land has been taken by the decree holder. It is not clear whether the possession of land measuring 2 Bighas 7 Biswas subject-matter of the decree dated the 14th January, 1953 has been taken possession of or not. If there is any Kotha in the total land of which the decree holder is entitled, namely, 2 Bighas 17 Biswas, the decree holder will be entitled to that; but decree holder will not be entitled to any Kotha outside this land.”

H 23. The question was not as to whether the principles of res judicata would be applicable but the question which was required to be posed and answered was as to whether the kothas marked 'EFGH' formed part of the decretal land or not. It, having regard to the orders passed in the earlier proceedings, cannot be said that the Executing Court acted illegally or without

jurisdiction in arriving at the conclusion, it did.

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24. The finding of the Executing Court essentially was a finding of fact. The High Court has not assigned sufficient or cogent reasons to conclude that the finding of the executing court in that behalf was factually incorrect. Revisional jurisdiction as is well-known is very limited. The High Court, in our opinion, in the facts and circumstances of the case, exceeded its jurisdiction in passing the impugned judgment.

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25. The High Court referred to an order dated 13.10.1965 but the effect thereof, as noticed hereinbefore, has not been considered in its true perspective.

26. We may now deal with the application for impleadment as also application for substitution filed by the applicant and the appellant respectively.

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27. Gurbachan Singh, Respondent No. 4 herein died on 19.11.1999. In terms of the Punjab and Haryana High Court Amendment to Order 22, Rule 3 of the Code of Civil Procedure, the appeal shall not abate. A statement was made before the Registrar on behalf of the appellant that the name of Respondent No. 4 be deleted. An order was passed to that effect on 19.09.2006. An application for impleadment has been filed by the legal representatives of Gurbachan Singh, Respondent No. 4. An affidavit has also been filed for revocation of the said order dated 19.09.2006. The relationship between the applicants and the deceased - Respondent No. 4 is seriously denied and disputed. The Executing Court had also in its order dated 5.06.2006 concluded:

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“The best course to be adopted by the L.Rs of Decree-Holder Gurbachan Singh, Gurmukh Singh applicant and the JD/ Objector is to raise the alleged objection by seeking declaration from the court by filing a separate suit or to obtain the succession certificate.”

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28. This Court at this stage does not intend to determine the said question particularly in view of the statement of the respondents and in particular for the reason that it is not necessary for the purpose of disposal of this appeal. These applications for impleadment as also for substitution, therefore, are rejected.

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29. We, for the reasons stated hereinbefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. No costs.

D.G.

Appeal allowed. H