

assail the lease in favour of Magha Ram. Her own subsequent suit for injunction against the present plaintiff-appellant challenging the lease in his favour also appears to have been dismissed and even the appeal was also dismissed. The dismissal of the defendant's suit at various times are themselves factors that prove that the lessee Magha Ram and sub-lessee—the present plaintiff are persons, who are in possession and, therefore, that possession was required to be protected. Although reasoning, as found in the court order, is unsatisfactory, I have noticed on overall consideration of all facts that the Court has come to a correct conclusion, although through poor reasoning. I still maintain the ultimate decision and find no reason to interfere with the same. The revision petition is dismissed.

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**S. Gupta**

**Before S.S. Saron & Navita Singh, JJ.**

**SURENDER—Petitioner**

*versus*

**VIJAY SINGH AND ANOTHER—Respondents**

**FAO No. 5265 of 2013**

March 10, 2014

***Family Courts Act, 1984 - S. 7(1) Explanation (g) - Code of Civil Procedure, 1908 - O. 21 - Execution proceedings - Custody of children - Appellant-father filed petition for custody of his minor children - Family Court decided in his favour - Respondents did not hand over custody - Appellant filed execution petition - Executing Court refused to hand over custody of children to appellant - Visitation rights given - Held, that Executing Court had no power to go behind the decree and decide whether or not custody of children was to be given to appellant or not - Executing Court acted beyond jurisdiction and in an illegal manner - Impugned order set-aside - Case remanded with the direction that the Executing Court shall proceed in accordance with law.***

*Held, that the executing court had no power to go behind the decree and to decide whether or not custody of the children was to be*

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(*Navita Singh, J.*)

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given to the appellant or not. Since the order had already been passed by the competent Court that the custody was to be given to the appellant, the task of the executing Court was simply to execute the order and hand over the custody of the minor children to their father *i.e.* the present appellant. The executing Court, therefore, acted beyond jurisdiction and in an illegal manner in handing over the custody back to the respondent and in not executing the order which had already been passed in favour of the appellant and had attained finality. The custody of the minor children was to be handed over to the appellant and executing Court had to limit itself to that and was not competent to refuse custody of the minors to the appellant and to grant him visiting rights.

(Para 9)

Surya Kant Gautam, Advocate, *for the appellant.*

Sumit Gupta, Advocate, for respondent No. 1.

**NAVITA SINGH, J.**

(1) The present appeal has been filed by the father of minors Suksham and Simrati, who had earlier filed a petition for custody of the said minor children and the same was decided in his favour on 29.05.2013. Despite passing of the order by the District Judge, Family Court, Sonapat, the respondents did not hand over the custody of the minor children and the appellant was compelled to file an execution petition. In the execution proceedings, the respondents produced the children in Court who said that they wanted to continue to live with the respondents and as such, the executing Court refused to hand over the custody of the children to the appellant. Only visitation rights were given to him. It was also mentioned in the order that the respondents had brought the children to the Court for handing over their custody to the father *i.e.* the present appellant.

(2) The present appeal has been filed against the order passed by the executing Court on 04.10.2013.

(3) It may not be out of place to mention here that initially the appellant filed the petition for custody of the minors on the ground that his wife had left the matrimonial home on 15.03.2008 along with the children and later on the wife-Kiran Rani had been murdered. The

respondents had assured that they would hand over the children to him, but they did not do so.

(4) The respondents, on the other hand, pitted all fault on the appellant and even accused him of killing their daughter Kiran Rani. They stated that the appellant was not interested in getting the custody of the minor children as he had not made any effort in that direction. After taking evidence and hearing the parties, the petition was allowed and custody of the minor children was ordered to be handed over to the appellant being the father and natural guardian.

(5) Since the respondents did not comply with the order dated 29.05.2013 regarding handing over the custody of the minor children, the appellant filed an execution petition. In that petition, the children were produced in Court by the respondents and statement of both the respondents was recorded stating that they had brought the children in Court for handing them over to the appellant. The Court, however, recorded joint statement of both the children, Suksham and Simrati, who stated that they did not want to live with their father and wanted to remain with their maternal grandparents. Holding that the welfare of the children was paramount, the executing Court said that the custody could not be handed over to the decree-holder *i.e.* now appellant, against the will of the children. The children were sent back with the respondents and visiting rights were given to the father. The execution petition was dismissed in that light.

(6) The appellant, who is the father of the children and in whose favour the original order was passed, came up in appeal against the order of the executing Court on the ground that the Court could not have refused to hand over the custody of the children to him and the order was illegal.

(7) Learned counsel for the appellant argued that the executing Court could not travel beyond the decree and set at naught the order of the District Judge, Family Court, passed on 29.05.2013, whereby the custody of the children was ordered to be handed over to the father. Learned counsel for the appellant argued that since no appeal was filed by the respondents, the order dated 29.05.2013 had attained finality and, therefore, the limited task of the executing Court was to implement the

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same. The executing Court could not have acted as the Court before whom a petition for custody of the children was filed so as to either allow it or decline it.

(8) Learned counsel for respondent No. 1 (respondent No. 2 died during the pendency of the appeal) argued to the contrary that at every stage it is the welfare of the children which had to be kept in mind by the Court and since the executing Court was of the view that the children were grown up enough to understand where they wanted to live and where they would be happy, the Court rightly handed over the custody back to the respondents.

(9) We have given our thoughtful consideration to the matter. We are in agreement with the arguments advanced by learned counsel for the appellant that the executing Court had no power to go behind the decree and to decide whether or not custody of the children was to be given to the appellant or not. Since the order had already been passed by the competent Court that the custody was to be given to the appellant, the task of the executing Court was simply to execute the order and hand over the custody of the minor children to their father *i.e.* the present appellant. The executing Court, therefore, acted beyond jurisdiction and in an illegal manner in handing over the custody back to the respondent and in not executing the order which had already been passed in favour of the appellant and had attained finality. The custody of the minor children namely, Suksham and Simrati, was to be handed over to the appellant and executing Court had to limit itself to that and was not competent to refuse custody of the minors to the appellant and to grant him visiting rights.

(10) The appeal is, therefore, allowed and the order dated 04.10.2013 passed by the learned District Judge, Family Court, Sonapat, is set aside. The case is remanded with the direction that the executing Court shall proceed in accordance with law.

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***J.S. Mehndiratta***