on the first three issues being erroneous, are reversed and these issues are decided in favour of the decree-holder-appellant.

In the result, the execution first appeal succeeds and is allowed with costs throughout. The executing Court is directed to execute the decree in accordance with law. Parties are directed to appear before the executing Court on 18th April, 1960.

SHAMSHER BAHADUR, J.—I agree.

B.R.T

REVISIONAL CIVIL

Before G. L. Chopra, J

RAM NATH AND ANOTHER,—*Petitioners*

versus

MESSRS RAM NATH-CHHITAR MAL,—*Respondents*

Civil Revision No. 266-D of 1958

1960

March, 1st

Delhi Ajmer Rent Control Act (XXXVIII of 1952)—Section 15—Decree for ejectment passed against tenants on condition that they deliver possession to the landlord within two months and landlord will re-deliver possession to them after reconstruction—Possession delivered by the tenants and accepted by the landlord after the time fixed—Whether amounts to waiver on the part of the landlord—Landlord refusing to re-deliver possession to tenants after reconstruction—Remedy of the tenants to get back possession—Whether by way of suit or application for execution or restoration of possession—Practice—Mention of a certain provision of law in the pleadings for relief—Whether debars the litigant from claiming relief under some other provision of law.

Held, that the landlord was entitled to possession because of the decree in his favour and he could get the

possession through court after the specified date. The mere fact that he accepted it, without taking any objection or pointing out that he reserved the right to refuse re-delivery of the premises to the tenants on the completion of the construction, cannot be regarded as sufficient to establish the plea of waiver; there being nothing more the plea has to be rejected. Under section 15(2) of the Act the tenants were entitled to be placed in occupation of the premises on the completion of the work or re-building only if they had delivered possession on or before the date specified in the decree; application of the sub-section has, therefore, been rightly ruled out.

Held, that the tenants, after the expiry of the period fixed for re-delivery of possession to them, could apply to the court to enforce the terms of the decree and restore possession of the premises to them, which had temporarily been given to the landlord. The application could be treated as one for execution of the decree or in any case for restoration under the intended powers of the court. The mere fact that the tenants delivered possession to the landlord a few days later than the specified date would not disentitle them to enforce the terms of the decree in their favour, whether in execution or for restoration. The landlord may reasonably be heard to say that for that reason he was entitled to retain possession for a similar period after the expiry of the second specified date but he cannot be allowed successfully to plead that the tenants had lost their right absolutely to claim back the possession from him.

Held, that mention of a certain provision of law in the pleadings does not debar the litigant from claiming the same relief on the same set of facts by having recourse to some other provision of law.

Petition under section 35 of Act 38 of 1952 and section 115, C.P.C., and Article 227 of the Constitution of India for revision of the order of Sh. R. K. Baweja, Senior Sub-Judge, Delhi, dated the 26th March, 1958, confirming that of Sh. O. P. Garg, Sub-Judge, 1st Class, Delhi, dated the 2nd March, 1957, dismissing the petition.

R. S. NARULA, and M. M. ANDLEY, for the Petitioner.

S. N. CHOPRA, for the Respondent.

JUDGEMENT

Chopra, J.

CHOPRA, J.—These petitions for revision (Nos. 166-D of 1958, 168-D of 1958 and 168-D of 1958) can be disposed of by one order as they arise out of the same facts.

2. The petitioners, Ram Nath and another, filed separate suits for the eviction of three sets of tenants occupying different portions of the same building under clause (g) of the proviso of section 13(1) of the Delhi and Ajmer Rent Control Act, XXXVIII of 1952 (hereinafter to be referred as the Act), on the ground that the premises were required for reconstruction. On 27th February, 1953, the parties arrived at a compromise and the same was embodied in a decree by which each of the three suits was disposed of. The decree was for ejectment and it provided that 'the defendants would deliver possession of the premises to the plaintiff on 4th March, 1953, and the plaintiff would, after reconstructing the premises, deliver back the premises to the defendants by 4th September, 1953. The defendants would be liable to pay rent to the plaintiff at the rate to be fixed by the Court.' The premises were re-built and as the landlord did not give back possession to the tenants they, on 7th October, 1953, submitted the present applications under section 15(2) of the Act for the re-delivery of possession to them. In the application it was stated that the possession was delivered to the landlord on the due date and that the landlord has wilfully delayed the completion of the construction so as to delay the restoration of possession to the tenants. The landlord resisted the applications on various grounds, but those with which we are now concerned were (i) that possession was not delivered by the tenants on the stipulated date, viz., 4th March, 1953, and, therefore, the tenants

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were not entitled to restoration of possession under Section 15(2) of the Act and (ii) that the premises having been constructed after 1st June, 1951, and before 8th June, 1955, the premises were exempted from the operation of the Act, as provided by Section 39 of the Act. In the replication the tenants re-affirmed what they had already stated and further pleaded that even if the possession was in fact delivered to the landlord a few days later than 4th March, 1953, they were entitled to the re-delivery of possession under the terms of the decree and independently of the provisions of Section 15(2) of the Act. On the evidence led by the parties the Court of first instance arrived at the conclusion that possession of the premises was delivered to the landlord by their respective tenants not on the due date but between 7th and 15th March, 1953, and, therefore, the tenants were not entitled to restoration under Section 15(2). However, the alternative plea of the tenants was accepted and their prayer was allowed. Section 39 was not held to be applicable as it was not a case of original construction, but one of reconstruction under the Act. The findings were affirmed on appeal preferred by the landlord, and he has now come in revision to this Court.

3. Sub-section (2) of Section 15 lays down:—

> "If the tenant delivers possession on or before the date specified in the decree or order, the landlord shall, on the completion of the work of repairs or building or re-building, place the tenant in occupation of the premises or part thereof."

On behalf of the respondents, it is contended that the Courts below were wrong in excluding the application of the Sub-section on the ground of

the tenant's failure to deliver possession on or before the date specified in the decree, viz., 4th March, 1953, because the landlord had, by accepting possession offered by tenants after the due date, waived the right that accrued to him on the default. The plea of waiver was not taken by the tenants in their applications, they rather insisted that the possession had in fact been delivered to the landlord on or before the specified date. The Courts below also do not appeal to have gone into the question of waiver or given clear finding on it, although while discussing the alternative ground on which the relief was claimed they have expressed the view that time was not the essence of the contract between the parties or the terms of the decree based on that contract.

4. The landlord was entitled to possession because of the decree in his favour and he could get the possession through court after the specified date. The mere fact that he accepted it, without having recourse to Court and without taking any objection or pointing out that he reserved to himself the right to refuse re-delivery of the premises to the tenants on the completion of the construction, cannot be regarded as sufficient to establish the plea of waiver ; there being nothing more the plea has to be rejected. Under Section 15(2) of the Act the tenants were entitled to be placed in occupation of the premises on the completion of the work or re-building only if they had delivered possession on or before the date specified in the decree ; application of the sub-section has, therefore, been rightly ruled out.

5. As regards the alternate ground on which the relief is granted, Mr. R. S. Narula, learned counsel for the petitioner, in the first place, contends that the ground having not been specifically taken in the application it could not be entertained

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and no relief on the basis of it could be granted. It is submitted that a replication cannot be regarded as a part of the 'pleadings' and the alternate plea which was inconsistent with the points raised in the application could be legally allowed only by way of amendment and could not be set up for the first time in the replication. The contention, in my view, is without substance. The parties went up for trial and fought out the case on the clear understanding that the plea taken in the replication was one of the grounds on which the relief was claimed. The Court of first instance did grant the relief on that ground. No exception to it was taken in the memorandum of appeal or at any time before the Senior Subordinate Judge who heard the appeal. Nor has any such objection been taken now in the grounds of revision. The objection cannot be allowed to be raised for the first time during arguments. Apart from it, I do not think there is any inconsistency in the plea with what was stated in the application. In the application all the necessary facts, including the decree having incorporated the direction for re-delivery of possession to the tenants on a specified date, were narrated. The relief claimed, on the basis of these facts, was that the applicants be placed in occupation of the premises. The fact that the application was headed as one under Section 15(2) of the Act or that in the prayer clause reference to that section was again made would not dis-entitle the tenants to claim possession on the basis of the decree itself. Mention of a certain provision of law in the pleadings does not debar the litigant to claim the same relief on the same set of facts by having recourse to some other provision of law. The replication in the present case only furnished further and better statement of the nature of the claim as ordered by the Court and there appears to be nothing wrong in it.

6. Reference to the order of this Court in *Shri Ashok Kumar and others* v. *Shri Chhittar Mal and others* (1), decided on 29th October, 1956, in which the present applications were treated as applications under Section 15(3) of the Act, has also been made by Mr. Narula during his arguments. The tenants had presented these applications directly to the Court which passed the decree. An objection was taken by the landlord on the ground that the applications should, in the original instance, have been filed in the Court of the Senior Subordinate Judge, who alone was authorized to entertain suits and other original actions and to distribute them among the various Subordinate Judges within his jurisdiction. The Subordinate Judge allowed the objection and returned the applications to the tenants. The order was set aside by the Senior Subordinate Judge on appeal and the revision preferred by the landlord was dismissed by this Court. G. D. Khosla, J. (as he then was), held the view that proceedings under Section 15 are analogous to execution proceedings and the intention in such a case is 'to keep the matter alive for the benefit of the tenant, and that being so, an application under Section 15(3) would be an application in the original proceedings and would, therefore, be entertainable by the Court which disposed of the original application for eviction.' I fail to understand how the above observations stand in the way of the tenants to take up the alternate plea in the present proceedings. If anything, the observations support the tenants' plea that the matter was kept alive for the benefit of the tenants and that the present proceedings were in the nature of execution proceedings.

7. It is then contended that independently of Section 15, the tenants could not claim any relief in these proceedings on the basis of the agreement

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or the decree passed in terms of that agreement. The decree was in favour of the landlord and it was he alone who could get it executed. The decree could not be regarded as one in favour of the tenants, who were defendants in the suit, and could not be got executed by them. The fact that the agreement between the parties was embodied in a decree did not create any material difference and did not improve upon its status. The only way by which the tenants could enforce the terms of the agreement was by filing a suit for the specific performance of the contract and not by taking out execution of the decree. It is further submitted that the decree being one under clause (g) of the proviso to Section 13 (1) of the Act the only relief that could be claimed by the tenants was the one provided by Section 15, and independently of that section no relief could be granted to the tenants. I have devoted a considered thought to the contention and am of opinion that it cannot be accepted. The opening part of Section 13(1) lays down :—

> "Notwithstanding anything to the contrary contained in any other law or any contract, no decree or order for the recovery of possession of any premises shall be passed by any court in favour of the landlord against any tenant (including a tenant whose tenancy is terminated):"

Then follows the proviso saying that nothing in this section shall apply to any suit or other proceeding for such recovery of possession if the Court is satisfied *inter alia* 'that the premises are *bona fide* required by the landlord for the purpose of re-building the premises or for the replacement of the premises by any building or for the erection of other buildings and that such building or re-building cannot be carried out without the premises being vacated.'

8. The opening part of the section takes away the jurisdiction of the courts to pass a decree or order for the eviction of a tenant in favour of the landlord, but the proviso revives that jurisdiction if the Court is satisfied of the facts and circumstances enumerated in the proviso. To be precise, the Court will have the jurisdiction to pass a decree or order for eviction of the tenant in any manner and on any terms it thinks fit, if the Court is satisfied that the premises are *bona fide* required by the landlord for the purpose of re-building the premises and that such re-building cannot be carried out without the premises being vacated. That satisfaction having been arrived at, on the basis of the agreement between the parties, it was open to the Court to pass a decree for eviction of the tenants on any terms and in any form it thought fit. There was nothing unlawful in the agreement arrived at between the parties and there was no inhibition to the undertaking given by the landlord. There could, therefore, be nothing wrong in the decree passed in the terms of the agreement. Certainly, it cannot be said that the decree comprised any matter which was not the subject-matter of the suit.

9. The question then arises whether the tenants could enforce the terms of the decree in these proceedings or they should have filed a suit for that purpose. The decree allowed the landlord to obtain possession of the premises from the tenants for a specified purpose and for a specified period. The landlord was to get possession of the premises for the purpose of reconstruction and he was to keep possession of the premises till 4th September, 1953, when he was to re-deliver the re-constructed premises to the tenants. It is immaterial whether the landlord obtained possession of the premises through Court in execution of the decree or with consent of the tenants in

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pursuance of the decree ; he was to retain possession only up to 4th September, 1953, and not thereafter. The tenants after the expiry of that period could, in my view, apply to the court to enforce the terms of the decree and restore possession of the premises to them, which had temporarily been given to the landlord. The application could be treated as one for execution of the decree or in any case for restoration under the inherent power of the Court.

10. If a decree provides for possession to be delivered to the plaintiff for six months and the plaintiff obtains possession by execution, or in pursuance, of the decree, it would be most unreasonable to force the defendant to take recourse to a regular suit to seek possession from the plaintiff after the expiry of six months. The matter being one relating to the execution, discharge or satisfaction of the decree and arising between the parties to the suit shall have to be decided by the executing Court. The decree cannot be said to be fully satisfied till the possession is restored back to the defendant. A suit in such a case would in fact be barred under section 47 of the Code of Civil Procedure.

11. In *Gurbax Rai* v. *Man Singh* (1), the compromise decree in an ejectment suit provided that the defendant would vacate the premises if the plaintiff delivered to the defendant certain other premises, which were not the subject-matter of the suit. The plaintiff decree-holder took exception to the executing Court's authority to order delivery of possession of the other premises to the defendant. It was held that the executing court has no power to discuss the validity of the terms of the decree and cannot refuse to execute the decree as it was given on the ground that one of the terms of the decree was outside the scope of

(1) A.I.R. 1952 Punj. 155

the suit. The facts of the context case are much stronger. Here, none of the terms of the compromise or the decree passed thereon went beyond the subject-matter of the suit.

12. Section 144, Code of Civil Procedure, provides for restitution in cases where a decree or order is varied or reversed. The section does not confer any new substantive rights which a successful party did not possess under the general law. The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands it. The power may be discretionary, but it is there and has to be exercised in appropriate cases.

13. Mr. Narula next contends that the power, whether in execution or for restoration, even if it was there, should not have been exercised because the tenants had failed to deliver possession to the landlord on the specified date. I do not see force in this contention either. The decree cannot be read in as meaning to provide that the tenants would not be entitled to possession of the re-constructed building if they failed to deliver the premises to the landlord on the specified date, viz., 4th March, 1953; one is not made a condition precedent of the other. The mere fact that the tenants delivered possession to the landlord a few days later would not dis-entitle them to enforce the term of the decree in their favour. The landlord may reasonably be heard to say that for that reason he was entitled to retain possession for a similar period after the expiry of the second specified date, viz., 4th September, 1953, but he cannot be allowed successfully to plead that the tenants had lost their right absolutely to claim back the possession from him. This is particularly so because time does not appear to be the essence of the agreement between the parties or the terms of

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the decree. The mere fact that a time was specified for the performance of a certain act would not be sufficient to lead to the conclusion that time was of the essence. The Court in such a case has to look at the substance and not merely at the letter of the agreement or the decree and ascertain whether the parties or the Court passing the decree really and in substance intended more than that the act should be performed within a reasonable time. The fact that the landlord accepted possession of the premises willingly and without any protest when it was offered to him a few days after the specified date, also leads to inference that time was not of the essence.

14. It is last contended that the re-constructed premises were exempted from the operation of the Act by virtue of the provisions of section 39. Section 39 says: —

> "All premises, the construction of which is completed after the 1st day of June, 1951, but before the expiry of three years from the commencement of this Act, shall be exempt from the operation of all the provisions of this Act for a period of seven years from the date of such completion".

Since section 15(2) of the Act has not been found to be applicable and possession is not being re-delivered to the tenants because of anything contained in the Act, the question of the application of section 39 does not arise. It may, however, be observed that the section seems to relate to premises constructed for the first time on vacant sites and does not cover cases of re-construction permitted under clause (g) of the proviso to section 13(1). To hold otherwise would render the provisions of Section 15 nugatory.

15. In the result, the petitions fail and are dismissed, but in view of the facts of the case the parties are left to bear their own costs throughout.

B.R.T.

REVISIONAL CIVIL

Before D. Falshaw, J.

SHMT. CHANDER WATI ALIAS BATTO,—*Petitioner.*

versus

HARI CHAND AND OTHERS,—*Respondents.*

Civil Revision No. 114-D 1957.

1960

March, 3rd

Court-fees Act (VII of 1870)—Section 7(1) and (2)—Respective scope of—Suit for arrears of maintenance—How to be assessed for court-fee—Court—Whether can go beyond the way the plaintiff's claim has been stated in the plaint.

Held, that the statutes must be interpreted as a whole and in such a way that parts of them are not rendered superfluous or nugatory. The obvious interpretation of sub-sections (1) and (2) of section 7 of the Court-fees Act is that sub-section (2) applies in all cases where a claim to a right to maintenance is being sought to be set up and that sub-section (1) applies to claim for arrears of maintenance where the right to such maintenance has already been established.

Held, that the plea that in matters of Court-fee the Court cannot go beyond the way in which the plaintiff's claim has been stated in the plaint is true only to a limited extent and whatever form of words is used by the plaintiff the Court has to look at the case and see what is the real nature of the plaintiff's claim. In the present case the plaintiff has first to establish her right to receive maintenance from the defendants before she can claim the sum claimed by her as arrears and so must pay *ad valorem* court-fee as provided in sub-section (2) of section 7 of the Court-fees Act.