

APPELLATE CIVIL

Before Prem Chand Pandit, J.

SURJIT KAUR *alias* SANTO AND ANOTHER,—Appellants

versus

JARNAIL SINGH AND OTHERS,—Respondents

Execution Second Appeal No. 1353 of 1962.

Punjab Security of Land Tenures Act (X of 1953)—Section 17-A—Scope of—Decree for pre-emption passed on 3rd July, 1959 and possession delivered to pre-emptor in execution of decree—Tenants-vendees—Whether can be resorted to possession by Executing Court—Executing Court whether becomes functus officio after executing decree—Failure to raise objection before decree is passed or executed—Whether acts as estoppel on principle of constructive res judicata—Executing Court—Whether can go behind the decree where the decree could not have been passed or executed.

1963
August, 6th.

Held, that sub-section (2) of section 17-A of the Punjab Security of Land Tenures Act, 1953, was enacted to give relief to those tenants who had been dispossessed from their tenancies before 30th 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 July, 1958, because it was understood that no such decree could either be passed or executed. In this case, the decree was passed on 3rd July, 1959, and possession was delivered to the pre-emptors on 7th June, 1960. The passing of the decree and the delivery of the possession being not in accordance with the provisions of the Act, the Executing Court was well within its rights to entertain the application, dated 31st August, 1960, of the tenants for the restoration of possession to them. The decree and the delivery of the possession in execution thereof being contrary to law, the Executing Court, which in this case was also the Court which had passed the decree in question was quite competent to rectify the error made by it, when its attention was drawn to the provisions of section 17-A of the Act and it cannot be said that it became *functus officio* after the decree had been executed.

Held, that the decree, being contrary to law from its very inception, could not be executed in view of the provisions of section 17-A of the Act. The failure of the tenants-vendees to raise any objection based on the provisions of section 17-A of the Act, prior to the passing of the decree or its execution does not estop them from raising that objection while applying for restoration of possession on the principle of constructive *res judicata*.

Held, that ordinarily the Executing Court cannot go behind the decree, but if it is shown that it could not have been passed or even executed, as it was contrary to law from its inception then in such a case there is no manner of doubt that the Executing Court could entertain such an objection and give effect to it.

Execution Second Appeal, from the order of Shri Jagwant Singh, Senior Sub-Judge, Ferozepore, dated the 18th November, 1962, affirming that of Shri C. D. Vasishtha, Sub-Judge, 1st Class, Moga, dated the 4th November, 1961, ordering the applicants to deposit the sale price of Rs. 10,000 in his Court on or before 18th November, 1961, for payment to the decree-holders and further ordering that on such deposit the applicants shall be entitled for the possessions of the land in dispute by restoration and the warrants of possession will be issued; in case the amount is not deposited the application will be dismissed with costs.

S. L. PURI AND MUNESHWAR PURI, ADVOCATES, for the Appellants.

J. S. CHAWLA, ADVOCATE, for the Respondents.

JUDGMENT

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PANDIT, J.—On 13th August, 1957 Smt. Bishni sold the land in dispute to four brothers Bikkar Singh, Jarnail Singh, Lahora Singh and Pashora Singh for Rs. 10,000. This led to the filing of a suit by Smt. Surjit Kaur and Smt. Chanan Kaur, appellants and their father Natha Singh for a declaration that this sale was without consideration and legal necessity and

would not affect their reversionary rights. In the alternative, it was claimed by the appellants that they were entitled to the possession of this land by pre-emption on payment of Rs. 6,000, because they were the heirs of the deceased husband of Smt. Bīshnī. It was alleged by them that Rs. 10,000 were fictitiously entered in the sale-deed, which amount was never paid or fixed in good faith. The suit for declaration was, however, later on withdrawn by the plaintiffs.

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With regard to the suit for possession by pre-emption, Bikkar Singh made a statement that the appellants were the daughters of Natha Singh and his counsel admitted that they had a superior right of pre-emption. Counsel for the plaintiffs also made a statement that the entire consideration of Rs. 10,000 was paid and fixed in good faith. As a result of these statements on 3rd July, 1959, a decree for possession of the land in dispute was passed in favour of the appellants against the defendants on payment of Rs. 10,000 to the vendees. It was further held that this amount had to be deposited on or before 31st May, 1960, failing which the suit would stand dismissed. It was also ordered that till 31st May, 1960, the defendants would not be dispossessed from the land in dispute.

It is common ground that the amount of Rs. 10,000 was deposited by the pre-emptors before the due date and in execution proceedings the possession of the land in dispute was delivered to them on 7th June, 1960, by the vendees after withdrawing this amount.

On 31st August, 1960, the vendees filed an application in the Executing Court under sections 47/144 and 151 Civil Procedure Code, and section 17-A of the Punjab Security of Land Tenures Act, 1953 (hereinafter referred to as the Act), praying that the possession of the land in dispute be restored to them on

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payment of Rs. 10,000 to the pre-emptors. Their allegations were that they had been cultivating the land in dispute under Smt. Bishni for the last about six years and, therefore, the sale of this land in their favour by her was not pre-emptible under the provisions of section 17-A of the Act. The pre-emption decree was passed on 3rd July, 1959, while section 17-A of the Act had come into force from 19th January, 1959, and, therefore, such a decree could not be executed and they were entitled to the restoration of this land.

This application was opposed by the pre-emptors, who pleaded that the Court had no jurisdiction to entertain the same on the ground that it was maintainable in the Court of the Assistant Collector of the First Grade under the provisions of section 17-A (2) of the Act; that the application was barred by limitation; that the Executing Court had become *functus officio* after the decree had been executed in its entirety and that the applicants were not the tenants of the land in dispute.

On the pleadings of the parties, the following issues were framed:—

- (1) Has this Court jurisdiction?
- (2) Is the petition competent?
- (3) Were the judgment-debtors tenants as alleged and its effect?
- (4) Are the petitioners entitled to possession?
- (5) Is the petition within time?
- (6) Relief.

The Executing Court held that the applicants were the tenants of Smt. Bishni at the time of the sale in question; that the Court had jurisdiction to entertain this application; that the application was competent and maintainable in the present form;

that this application was within time; and that the applicants being tenants of Smt. Bishni were entitled to restoration of the possession of the land in dispute on payment of the sale price to the decree-holders. On these findings, it was ordered that the applicants should deposit the sale-price of Rs. 10,000 in Court on or before 18th November, 1961, for payment to the decree-holders. If this amount was deposited within time, then the applicants were entitled to the possession of the land in dispute and, if not, then the application was to be deemed to have been dismissed with costs.

On appeal by the decree-holders, the above order was maintained by the learned Senior Subordinate Judge, Ferozepore. Against this, the present execution second appeal has been filed.

The first contention raised by the learned counsel for the appellant was that the Court below had not correctly understood the provisions of section 17-A of the Act. According to him, the Executing Court had no jurisdiction to entertain the present application, which should have been filed before the Assistant Collector, First Grade, under sub-section (2) of this section, as the alleged tenants had been dispossessed from this land by the pre-emptors and they wanted that the possession be restored to them.

[His Lordship read section 17-A and continued.] Sub-section (1) of this section prescribes that a sale of land comprising the tenancy of a tenant by a land-owner to him shall not be pre-emptible under the provisions of the Punjab Pre-emption Act, 1913. Further, if such a decree for pre-emption had already been passed after the commencement of the Act, the same shall not be executed by any Court. Sub-section (2) relates to a case where a tenant to whom the land comprising his tenancy was sold by the land-owner and he had been dispossessed therefrom by the pre-emptor. It has been provided therein that such a

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tenant could either purchase the land from the pre-emptor on payment of the price paid to him or 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. This option he could exercise by making an application to the 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 (6 of 1958). It is undisputed that this Ordinance came into force on 30th July, 1958. It, therefore, follows that the application contemplated by sub-section (2) could be made to the Assistant Collector by 30th July, 1959, at the latest. According to Punjab Ordinance No. 6 of 1958, no such decree for pre-emption could either be passed or executed after 30th July, 1958. This Ordinance was replaced by the Punjab Security of Land Tenures (Amendment), Act, 1959, (Punjab Act 4 of 1959) on 19th January, 1959. By this, section 17-A was inserted in the Act. It is, thus, clear that sub-section (2) of section 17-A of the Act was enacted to give relief to those tenants who had been dispossessed from their tenancies before 30th 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 July, 1958, because it was understood that no such decree could either be passed or executed. In the present case, the decree was passed on 3rd July, 1959, and possession was delivered to the pre-emptors on 7th June, 1960. The passing of the decree and the delivery of the possession being not in accordance with the provisions of the Act, the Executing Court was well within its rights to entertain the application dated 31st August, 1960, of the tenants for the restoration of possession to them. There is, thus, no force in this contention.

Learned counsel then contended that the Executing Court had become *functus officio* on 7th June, 1960, after the decree dated 3rd July, 1959, had been executed by delivering the possession of the land to the pre-emptors who had paid Rs. 10,000 to the vendee-tenants. It could not then order restoration of possession to the tenants.

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This point was not taken before any of the Courts below. Moreover, the decree and the delivery of the possession in the present case being contrary to law, the Executing Court, which in the present case was also the Court which had passed the decree in question, was quite competent to rectify the error made by it, when its attention was drawn to the provisions of section 17-A of the Act.

It was then argued that the Punjab Ordinance 6 of 1958 had been promulgated on 30th July, 1958 and the provisions of section 17-A of the Act had also come into force on 19th January, 1959. The decree was passed on 3rd July, 1959, and the possession was delivered to the pre-emptors on 7th June, 1960. The tenants never raised any objection based on the provisions of section 17-A of the Act at any stage. They were now estopped from doing so by the principle of constructive *res judicata*.

This objection again was not taken in any of the Courts below. It is not mentioned even in the grounds of appeal filed in this Court. Besides, as already mentioned above, the decree was contrary to law from its very inception and it could not have been executed according to the provisions of section 17-A of the Act. In such a situation, the question of constructive *res judicata* does not arise.

The next contention of the learned counsel was that the Executing Court could not go behind the decree and was bound to execute the same as it stood.

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There is no substance in this contention. Ordinarily, the Executing Court cannot go behind the decree, but if it is shown that it could not have been passed or even executed, as it was contrary to law from its inception, then in such a case there is no manner of doubt that the Executing Court could entertain such an objection and give effect to it.

Lastly, it was submitted that there was no proof on the record that all the vendees were the tenants of Smt. Bishni and the land sold comprised their tenancy. According to the learned counsel, at the most, only Bikkar Singh was shown to be a tenant and he had one-fourth share in the land in dispute and, therefore, he could be given possession of his share.

It is true that in the revenue records Jarnail Singh, Lahora Singh and Pashora Singh have not been entered as the tenants of the land in dispute before its sale on 13th August, 1957, but Bikkar Singh has come into the witness-box and deposed that he along with his three brothers was jointly cultivating the land in dispute. This statement of his has been believed by both the Courts below and it has been held that all the four brothers were the joint tenants of Smt. Bishni at the time of the sale of the land in their favour. This is a finding of fact, which, not being vitiated cannot be interfered with in second appeal. There is, therefore, no merit in this contention.

In view of what I have said above, this appeal fails and is dismissed. In the circumstances of this case, however, I will leave the parties to bear their own costs in this Court as well.

B.R.T.