PUNJAB AND HARYANA HIGH COURT

Labh Singh

Vs

Hardayal

Execution Second Appeal No. 121 of 1975

(O. Chinnappa Reddy, S.S. Sandhawalia and, Bhopinder Singh Dhillon, JJ.)

19.04.1977

JUDGMENT

B.S. Dhillon, J.

1. Labh Singh, appellant filed a suit claiming superior right of pre-emption over the land in dispute. The said suit was decreed by the learned trial Court on May 27, 1971, subject to the total payment of Rs. 28,881.50. The learned trial Judge directed that the plaintiff should deposit the pre-emption amount after deducting the 1/5th pre-emption amount already deposited, by 10th July, 1971. The plaintiff-appellant deposited a sum of Rs. 23,481.50 P. on 7th July, 1971. This amount is admittedly short by a sum of Rs. 200/- as he was required to deposit Rs. 23,681.50 P. i.e., Rs. 28,881.50 less 1/5th amount of pre-emption already deposited. The vendees challenged the judgment and decree of the learned trial Court. The appeal was filed on 7th June, 1971. The vendees prayed for stay of dispossession during the pendency of the appeal which prayer was allowed on 8th June, 1971, by the first Appellate Court. The said appeal was dismissed on 18th August, 1972. The appellant then filed an application for the execution of the pre-emption decree and was put in possession of the land in dispute on 2nd December, 1972. When the vendees went to withdraw the pre-emption amount, they came to know that the pre-emption amount was short by Rs. 200/-. They then filed an application on 26th December, 1972, for the restitution of the possession of the land. This application was allowed by the learned Executing Court, vide order dated 15th June, 1974, and the said order was affirmed by the first Appellate Court on 10th January, 1975. This order has been challenged in this Execution Second Appeal. The appeal was got admitted to a Division Bench by making reference to a Bench decision of this Court in *Des Raj and others v. Vinod Kumar*[1], wherein it was held that in case the vendees failed to make out a ground in appeal regarding the non-compliance with the terms of the decree of pre-emption, the said pleas cannot be subsequently taken at the stage of the execution as the same will be barred by the principle of *res judicata* and not having raised the plea in the grounds of appeal against the terms of the decree, the objection will be held to have been waived. The correctness of the view taken by the Bench in Des Raj's case (supra) was doubted by me while sitting in Division Bench with S.P. Goyal, J., and, therefore, the case was referred to the Hon'ble the Chief Justice for constituting a larger Bench. This is how this appeal is before the Full Bench.

2. Shri G.C. Mittal, the learned counsel for the appellant, vehemently contended, that since the stay was obtained by the vendees on 8th June, 1971, therefore, the reciprocal liability of the pre-emptors to deposit the pre-emption amount also automatically got stayed and thus the pre-emptors could deposit the money subsequently. The reliance in this regard has been placed on a decision in *Dattaraya v. Shaikh Mahaboob Shaikh Ali and another*[2], , it is no doubt true that in view of the provisions of Order 20, Rule 14 of the Civil Procedure Code, the decree in a pre-emption suit imposes obligations on both sides and they are so conditioned that performance by one is conditional on performance by the other and if the obligation imposed upon one party is stayed by the appellate Court, there is automatic stay of the reciprocal obligation on the other party, but this principle cannot be invoked in the facts and circumstances of this case. Admittedly, the amount which was deposited for pre-empting the land under the decree is short by a sum of Rs. 200/- and till today that shortfall has not been made good. The first appeal was dismissed on 18th August, 1972. If the sum of Rs. 200/- had been deposited on or immediately after 18th August, 1972, probably the principle referred to above might have been helpful to the appellant but admittedly till today, the said amount has not been deposited, nor did the Appellate Court extend the time for depositing the pre-emption amount. In a given case, if the Appellate Court while deciding the appeal extends the time for depositing the Pre-emption money, no exception can be taken if the amount is thus deposited by the time extended but no such order admittedly was passed in this case nor the amount has been deposited till today. The contention raised is, therefore, without any merit.

3. It was then contended by the learned counsel for the appellant that the deposit of a lesser amount of Rs. 200/- was because of the mistake of the officials of the Court and, therefore, the appellant should not be penalised. Reliance in that regard has been placed on *Jang Singh v. Brij Lal and others*[3], , and *Jatti and others v. Dhani and others*[4],. This contention of the learned counsel for the appellant is again without any merit. In Jang Singh's case (supra) the mistake in the less deposit of the amount of pre-emption by Re. 1/- because of the act of the official of the Court. Jang Singh plaintiff had approached the Court with an application for the deposit of the pre-emption amount as ordered by the Court but the Clerk of the Court made a mistake in making a report and consequently the pre-emption amount deposited by the plaintiff was less by Re. 1/-. In those circumstances, it was held that the responsibility for the less deposit was shared by the Court, therefore, the plaintiff could not be made to suffer due to the mistake of the Court. No exception can be taken to the principle that the litigant cannot be allowed to suffer for the mistake of the Court. Similarly, in Jatii's case (supra) the pre-emption amount sought to be deposited was reduced by the mistake of the Court official. Though the amount sought to be deposited was also less by Rs. 3/-, yet there was still limitation for depositing the same and there was possibility of this mistake having been detected within the time fixed for depositing the amount. In those circumstances, the trial Court allowed the deposit of the amount of Rs. 100/- after the expiry of the limitation. The official of the Court had shared the responsibility in the less deposit of the amount. The order allowing the deposit beyond limitation was upheld. In the present case, it is quite clear that no prayer was made by the appellant to the Court for the verification of the pre-emption amount and the amount which was to be deposited was mentioned in the application along with the challan in duplicate and the amount so mentioned, was ordered to be deposited. It was not the responsibility of the Court to verify from the record and to direct the pre-emptor to deposit the amount as mentioned in the decree. It is a different matter if a litigant seeks the assistance of the Court and while giving such assistance because of the mistake of the Court, less amount is deposited. In that case, probably the litigant may not be

allowed to suffer, for the mistake of the Court but it cannot be held that it is the duty of the Court in every case to verify the actual amount mentioned in the decree before the same is deposited as has been contended by the learned counsel for the appellant.

4. The Bench decision of this Court in Des Raj's case (supra) cannot hold the field. In a given case, the vendees who challenged the pre-emption decree in appeal, may not have the requisite knowledge or information as regards the less deposit of the pre-emption amount or the deposit having been made beyond the time permitted. It cannot, therefore, be held as a matter of law that if the objection is not taken in the appeal as regards the less deposit or the deposit having been made after the time allowed, the said objection cannot be taken at the stage of execution. There is no question of the application of the principle of *res judicata* as there is no earlier binding decision on the parties on the points which can subsequently be taken up at the stage of the execution of the decree, nor does the question of waiver arise. The objections, which can be taken at the time of the execution, need not necessarily be agitated in the grounds of appeal when the decree of pre-emption on merits is sought to be set aside. The Executing Court is duty bound to see that the pre-emption amount for which the decree for possession of the land has been passed, is paid to the judgment-debtor and that the amount is deposited in time in accordance with the terms of the decree. If that is not done, it cannot be held as a matter of law that since no such grievance was made in the grounds of appeal, therefore, the objection cannot be taken at the stage of the execution. The ratio of the decision in Des Raj's case (supra), therefore, cannot be sustained. We, therefore, overrule this authority.

5. No other point has been pressed.

6. For the reasons recorded above there is no merit in this appeal and the same is hereby dismissed with costs.

S.S. Sandhawalia, J.

7. I agree.

Appeal dismissed.

Cases Referred.

11970 PLJ 214
2 AIR 1970 SC 750
31963 PLR 884
41970 PLJ 562