

* **HIGH COURT OF DELHI : NEW DELHI**

+ **FAO (OS) No. 66/2002**

Judgment reserved on: January 06, 2010

% Judgment delivered on: February 19, 2010

Mohinder Kumar Gupta
S/o Shri Din Dayal
Resident of C-3
House Cooperative Society
South Extension, Part-I
New Delhi.

...Appellant

Through Mr. Rohit Kumar, Advocate.

Versus

1. Sh. Kuldeep Singh
S/o Sh. Hara Singh
R/o 20, Rajindra Park
New Delhi.
Through his General Attorney
Sh. Harkirat Singh.
2. Sh. Banarsi Dass
S/o Sh. Nand Lal
R/o M-49, Greater Kailash-I
New Delhi.
- 3A. Sh. S.K. Gupta
S/o Late Sh. Dhanpat Rai
R/o 9, Sunder Nagar, New Delhi.

- 3B(i) Smt. Sudha Gupta
Widow of Late Shri R.K. Gupta
S/o Late Sh. Dhanpat Rai
R/o R-23, N.D.S.E., Part-II
New Delhi.
- (ii) Ms. Bhawna Gupta
D/o Late Shri R.K. Gupta
S/o Late Sh. Dhanpat Rai
R/o R-23, N.D.S.E., Part-II
New Delhi.
- (iii) Miss Sunita Gupta
D/o Late Shri R.K. Gupta
S/o Late Sh. Dhanpat Rai
Through her mother Smt. Sudha Gupta
R/o R-23, N.D.S.E., Part-II
New Delhi.
- (iv) Miss Ruchika Gupta (Minor)
D/o Late Shri R.K. Gupta
S/o Late Sh. Dhanpat Rai
Through her mother Smt. Sudha Gupta
R/o R-23, N.D.S.E., Part-II
New Delhi.
- (v) Master Bharat Gupta (Minor)
S/o Late Shri R.K. Gupta
S/o Late Sh. Dhanpat Rai
Through her mother Smt. Sudha Gupta
R/o R-23, N.D.S.E., Part-II
New Delhi.
- 3C Sh. N.K. Gupta
S/o Late Sh. Dhanpat Rai
R/o R-23, N.D.S.E., Part-II
New Delhi.

- 3D Sh.Rajesh Gupta
S/o Late Sh. Dhanpat Rai
R/o R-23, N.D.S.E., Part-II
New Delhi.
- 3E Smt. Kanta Gupta
W/o Sh. Anand Gupta
D/o Late Sh. Dhanpat Rai
R/o R-77, Sukhdev Vihar
New Delhi.
4. Smt. Gaindo Devi
W/o Late Sh. Paras Ram
S/o Sh. Nand Lal
R/o N-21, N.D.S.E. Part-I
New Delhi.
5. Smt. Sushila Devi
W/o Late Sh. Din Dayal
Resident of C-3
House Cooperative Society
South Extension, Part-I
New Delhi.
6. Sh. Surinder Dayal
S/o Late Sh. Din Dayal
Resident of C-3
House Cooperative Society
South Extension, Part-I
New Delhi.
7. Sh. Narinder Dayal
S/o Late Sh. Din Dayal
Resident of C-3
House Cooperative Society
South Extension, Part-I
New Delhi.

8. Miss Vijay Lakshmi
D/o Late Sh. Din Dayal
Resident of C-3
House Cooperative Society
South Extension, Part-I
New Delhi.

9. Sh. Rajinder Kumar
S/o Late Sh. Din Dayal
Resident of C-3
House Cooperative Society
South Extension, Part-I
New Delhi-49.
Through his legal guardian and maternal
Grand father Sh. Nand Kishore Mittal
S/o Sh. Sagar Mal Mittal
746, Gali Bhagwan
Kotla Mubarakpur, New Delhi.

...Respondents.

Through Mr. P.S. Patwalia, Sr. Advocate with
Mr. R.K. Agarwal, Mr. Aman Preet
Rahi and Mr. Sashwat Acharya,
Advocates.

AND

2. EFA (OS) No. 4/2002

Shri Rajinder Kumar
S/o Late Shri Din Dayal
R/o C-3, Housing Cooperative Society
New Delhi Sout Extension Part-I
New Delhi-110049

...Appellant

Through Ms. Shobhna Takiar, Advocate

Versus

1. Shri Kuldeep Singh
S/o S. Hara Singh
R/o 20, Rajindra Park
New Delhi.
Through his General Attorney
Shri Harkirat Singh.
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Resident of C-3
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South Extension, Part-I, New Delhi.
6. Sh. Mohinder Kumar Gupta
S/o Shri Din Dayal
R/o C-3 House Cooperative Society
South Extension, Part-I
New Delhi.

7. Sh. Surinder Dayala
S/o Late Sh. Din Dayal
Resident of C-3
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9. Miss Vijay Lakshmi
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...Respondents

Through Mr. P.S. Patwalia, Sr. Advocate with
Mr. R.K. Agarwal, Mr. Aman Preet
Rahi and Mr. Sashwat Acharya,
Advocates.

Coram:

HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

MADAN B. LOKUR, ACJ

By this judgment and order we propose to dispose of two appeals arising out of a common judgment and order passed in EA Nos.110-111/1991 in Ex. No.164/1990 decided on 1st February, 2002.

The Facts

2. Nand Lal was the perpetual lessee of the Land and Development Officer (L&DO) in property bearing No.9, Sunder Nagar, New Delhi (the suit property). When he passed away, he left behind as his heirs Banarsi Dass, Dhanpat Rai, Din Dayal and Gaindo Devi (widow of a pre-deceased son Paras Ram). Each had a 1/4th share in the suit property. Din Dayal passed away later leaving behind his widow Sushila Devi, son Mohinder Kumar Gupta, son Surinder Dayal, son Narinder dayal and daughter Vijay Lakshmi. The legal heirs of Din Dayal had 1/20th share each in the suit property.

3. The eight heirs of Nand Lal (compendiously called the Judgment Debtors) entered into an agreement to sell the suit property with Kuldeep Singh on 29/30th July, 1980. In terms of the agreement, Kuldeep Singh was to pay to the Judgment Debtors a total sum of Rs.14

lakhs as the sale consideration. He paid to them an amount of Rs.1,40,000/- against a receipt dated 30th July, 1980. Admittedly, possession of one garage in the suit property was handed over to Kuldeep Singh when the agreement to sell was executed. The balance amount of Rs.12,60,000/- was to be paid by Kuldeep Singh on the execution and registration of the sale deed and delivery of possession of the suit property. The agreement to sell was not signed by Rajinder Kumar the Appellant in EFA (OS) No.4/2002 and said to be the minor son of Din Dayal. There is no dispute about this fact, but it is disputed by Kuldeep Singh that Rajinder Kumar is the son of Din Dayal.

4. On their part the Judgment Debtors were obliged to make an application to the L&DO (principal lessor) seeking permission to sell the suit property to Kuldeep Singh. Such an application was made by them and the requisite permission was granted on 12th November, 1981 subject to the Judgment Debtors paying an unearned increase of Rs.7,17,330/- to the principal lessor besides some ground rent and interest thereon.

5. According to Kuldeep Singh, he offered to pay the unearned

increase from the balance sale consideration but the Judgment Debtors did not respond to this offer. He also says that the Judgment Debtors did not deposit the unearned increase nor did they apply for obtaining clearance for sale of the suit property from the Income Tax authorities. According to Kuldeep Singh, he was always ready and willing to execute the sale deed and to abide by the terms of the agreement to sell but there was no positive response from the Judgment Debtors.

6. Faced with this situation, Kuldeep Singh alleged breach of contract and filed Suit No.280/1982 in which several prayers were made, more particularly for a decree for specific performance of the agreement to sell dated 29/30th July, 1980 in respect of the entire suit property bearing No.9, Sunder Nagar, New Delhi in favour of Kuldeep Singh and against the Judgment Debtors for the total agreed consideration of Rs.14 lakhs.

7. In the suit, Kuldeep Singh impleaded the Judgment Debtors as defendants. Rajinder Kumar, who claimed to be the minor son of Din Dayal when his father executed the agreement to sell, was impleaded as defendant No.9.

8. At this stage, it needs mention that Kuldeep Singh stated in paragraph 15 of the plaint that Rajinder Kumar had filed Suit No. 1428/1981 on the original side of this Court stating that he has succeeded to 1/24 share in the suit property on the death of his father Din Dayal and as such, he was not bound by the agreement to sell dated 29/30th July, 1980. It was also stated in paragraph 15 of the plaint that he (Kuldeep Singh) does not admit Rajinder Kumar to be a son of Din Dayal or a shareholder in the suit property but if it is so proved, then Kuldeep Singh would be entitled to enforce specific performance of the agreement to sell only in respect of 23/24 share in the suit property.

9. The two prayers in the plaint that we are concerned with read as follows:

I(A) A decree for specific performance of the Agreement of sale dated 29/30.7.80 in respect of entire property being No.9, Sunder Nagar, New Delhi be granted in favour of the plaintiff against Defendants 1 to 8 against the total agreed consideration of Rupees Fourteen Lakhs.

III. (A) That in the event that this Hon'ble Court holds that defendant no. 9 is the owner of an undivided 1/24th right, title and interest in the said property, then a decree for specific performance of the agreement of sale dated 29/30.7.80 in respect of an undivided 23/24th right, title and interest in the said property No. 9, Sunder Nagar, New Delhi belonging to defendants no. 1 to 8 be granted in favour of the plaintiff against the defendants against the payment of the

agreed total consideration of Rs.14,00,000/-.”

10. None of the defendants contested the suit filed by Kuldeep Singh, although they had entered appearance. Numerous adjournments were sought on their behalf and on 1st February, 1984 the learned Single Judge trying the suit granted one last opportunity to the defendants in the suit to file a written statement. Since no written statement was filed, the learned Single Judge proceeded to pronounce judgment under the provisions of Order VIII Rule 10 of the Code of Civil Procedure (CPC) and decreed the suit “as prayed for with costs against defendants 1 to 8 only [Judgment Debtors] as there is no relief prayed for against defendant No.9 [Rajinder Kumar]”. No determination was made by the learned Single Judge about the status of Rajinder Kumar and no decree was passed him. A decree sheet was accordingly drawn up in terms of the judgment delivered by the learned Single Judge on 30th April, 1984.

11. Feeling aggrieved by the judgment and decree dated 30th April, 1984 the Judgment Debtors preferred an appeal before the Division Bench being RFA(OS) No.14/1985. This appeal was dismissed by an order dated 22nd March, 1985.

12. In the meanwhile, the Judgment Debtors filed an application before the learned Single Judge under the provisions of Order IX Rule 13 of the CPC to set aside the decree but this application was dismissed by an order dated 15th July, 1985.

13. As already mentioned above, Rajinder Kumar had filed a separate suit being Suit No.1428/1981 claiming 1/24 share in the suit property and also praying for a declaration that he was not bound by the agreement to sell dated 29/30th July, 1980 executed by the Judgment Debtors. This suit was not prosecuted by Rajinder Kumar and was dismissed in default on 5th December, 1983. It was subsequently restored on 30th January, 1984 and again dismissed on 22nd May, 1984. It was not restored till November, 1990 when Kuldeep Singh filed for execution of the judgment and decree dated 30th April, 1984.

14. On or about 7th November, 1990 Kuldeep Singh filed for execution of the decree dated 30th April, 1984. This execution petition was registered as Ex. No. 164/1990. In opposition thereto, Judgment Debtor No. 5 (Mohinder Kumar Gupta) and Rajinder Kumar filed objections which were registered as EA No.110-111/1991 in Ex.

No.164/90.

15. Insofar as the objections filed by Mohinder Kumar Gupta are concerned, they were filed under Section 47 of the CPC. The objections were registered as EA No.110/1991. The principal argument urged on his behalf before the Executing Court was that the decree is not a decree and if it is held to be a decree, then it is not an executable decree. Both these contentions were negated by the Executing Court. Feeling aggrieved, Mohinder Kumar Gupta is before us in appeal [FAO (OS) No.66/2002] wherein learned counsel appearing on his behalf reiterated the submissions made before the Executing Court.

16. Insofar as Rajinder Kumar is concerned, he filed his objections under Order XXI Rule 58 of the CPC read with Sections 94 and 151 of the CPC. The objections filed by Rajinder Kumar were registered as EA No.111/1991. His principal argument was that there was no decree against him and, therefore, the execution petition was not maintainable. The Executing Court was of the view that the claim of Rajinder Kumar should be investigated under Section 47 of the CPC and the following three issues were framed:-

1. Whether objector Rajinder Kumar has any right title interest in the suit property? If so, to what extent?
2. What is the effect of filing/dismissal of the earlier suit No.1428/81?
3. Relief?

17. Feeling aggrieved, Rajinder Kumar is before us in EFA(OS) No.4/2002.

First Submission and Discussion

18. As already mentioned, the principal submissions of learned counsel for Mohinder Kumar Gupta are that in fact there is no valid decree passed by the learned Single Judge and even if there is such a decree, then it is not executable.

19. A decree is defined in Section 2(2) of the CPC and the definition reads as follows:-

“2(2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of the suit. It may be partly preliminary and partly final”

20. Learned counsel for Mohinder Kumar Gupta cited a Full Bench decision of the Lahore High Court in *Niranjan Nath v. Afzal Hussain*, AIR 1916 Lahore 245 wherein it was held that to constitute a decree the decision must fulfill the following conditions:-

- (i) it must have been arrived at in a suit;
- (ii) it must have been expressed on the rights of the parties with regard to all or any of the matters in controversy;
- (iii) it must be a conclusive determination of those rights so far as the Court expressing the adjudication is concerned.

21. In *Diwan Brothers v. Central Bank of India*, AIR 1976 SC 1503, the Supreme Court held that the definition of a decree contains three essential ingredients. They are as follows:-

- (i) that the adjudication must be given in a suit;
- (ii) that the suit must start with a plaint and culminate in a

decree; and

- (iii) that the adjudication must be formal and final and must be given by a civil or revenue court.

22. As far as the facts of the present case are concerned, all the ingredients of a decree have been met. The adjudication made by the learned Single Judge was in a suit which started with a plaint and culminated in a decree. The decision of the learned Single Judge ended with a conclusive determination of the rights of the parties on the issues in controversy. There is nothing to suggest that the adjudication was not formal or final or that the learned Single Judge was not performing the functions of civil court. Since all the ingredients of a decree have been met insofar as the Judgment Debtors are concerned, the first submission made by learned counsel for Mohinder Kumar Gupta in this regard must be rejected.

23. It was then submitted by learned counsel that the decree did not completely adjudicate the rights of Rajinder Kumar, which rights were in controversy in the suit. It was argued that, therefore, no decree as defined in Section 2(2) of the CPC was passed. It is not possible to accept this contention, which needs to be split up into two separate

parts. As far as the Judgment Debtors are concerned, their rights have been conclusively determined by the decree, namely, their right, title or interest over the suit property. This is regardless of whether their share in the suit property is 23/24 or their share is 100%. So far as Rajinder Kumar is concerned, it is true that his rights have not been determined, but that does not affect the Judgment Debtors in any manner whatsoever, nor is it their concern. It is not (and it cannot be) the case of the Judgment Debtors that a decree should have been passed against Rajinder Kumar. If Rajinder Kumar's rights have not been determined, it is for him to take up this issue (if at all) and he has rightly chosen not to take it up because he is satisfied with the fact that no decree has been passed against him. Additionally, if the learned Single Judge had decided the rights of Rajinder Kumar without his having contested the suit, it would have prejudiced him in the independent and earlier suit filed by him. Under these circumstances, in our opinion, nobody can complain that the decree passed by the learned Single Judge is not a valid or proper decree within the meaning of Section 2(2) of the CPC.

24. It was also submitted by learned counsel that the judgment dated 30th April, 1984 passed under Order VIII Rule 10 of the CPC is

not a judgment within the meaning of that expression as used in Section 2(9) of the CPC. This Section reads as follows:

“2(9) “Judgment” means the statement given by the Judge on the grounds of a decree or order;”

25. Firstly, in our opinion, this contention is not open to learned counsel for the reason that the appeal filed against the judgment and decree was dismissed by the Division Bench in RFA(OS) No.14/1985 decided on 22nd March, 1985. Secondly, we have gone through the judgment and order dated 30th April, 1984 passed by the learned Single Judge and find that the facts of the case have been considered in detail and reasons have been given why judgment was pronounced in favour of Kuldeep Singh and against the Judgment Debtors. There is no doubt that what was pronounced on 30th April, 1984 by the learned Single Judge was a judgment as defined in Section 2(9) of the CPC.

26. Learned counsel relied upon *Balraj Taneja v. Sunil Madan*, (1999) 8 SCC 396 to contend that a judgment

“... should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit

should be reflected clearly in the judgment.” (paragraph 42 of the Report).

Reliance was also placed on the following passage in paragraph 45 of the Report:

“Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex parte and is ultimately decided as an ex parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved.”

27. The above passages cannot be read in isolation and must be read in conjunction with what the Supreme Court said earlier in paragraph 29 of the Report. This is what is said:

“As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court’s satisfaction and, therefore, **only on being**

satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression “the court may, in its discretion, require any such fact to be proved” used in sub-rule (2) of Rule 5 of Order 8, or the expression “may make such order in relation to the suit as it thinks fit” used in Rule 10 of Order 8.” (emphasis supplied).

A reading of the plaint before the learned Single Judge shows that there is no fact that needed proof despite a deemed admission. The only fact that could be in dispute was whether Rajinder Kumar is the minor son of Din Dayal or not. But this issue was not decided by the learned Single Judge, as indeed it was not necessary to decide, given the facts of the case and the prejudice that may be caused to Rajinder Kumar where this controversy decided notwithstanding the earlier suit filed by Rajinder Kumar. On the deemed admission of the Judgment Debtors, facts that did not need to be proved were accepted and a judgment passed against them – without getting into the controversy relating to the question whether Rajinder Kumar is the minor son of Din Dayal or not. Looked at in this light, the parameters laid down by the Supreme Court in **Balraj**

Taneja were met by the learned Single Judge and his judgment cannot be faulted on this count.

28. Learned counsel for Mohinder Kumar Gupta also contended that no 'new' decree could have been 'created' as has been done by the Executing Court in the order in appeal. The contention is that the Executing Court impermissibly expanded the scope of the original decree as passed on 30th April, 1984. For this purpose reliance was placed on *V. Ramaswami Aiyengar & Others v. T.N.V.Kailasa Thevar*, *AIR 1951 SC 189*. In paragraph 8 of the Report, the Supreme Court observed as follows:-

“The learned Judges appear to have overlooked the fact that they were sitting only as an executing Ct. & their duty was to give effect to the terms of the decree that was already passed & beyond which they could not go. It is true that they were to interpret the decree, but under the guise of interpretation they could not make a new decree for the parties.”

29. We do not see how this decision can support the case of Mohinder Kumar Gupta. The Executing Court has not 'created' any new decree nor has it made any change, substantial or otherwise in the decree as originally framed on 30th April, 1984. All that the Executing Court has done is to enforce the decree already passed in terms of the

prayer made by Kuldeep Singh.

30. In *Radhey Shyam Gupta v. Punjab National Bank & Another*, 2008 (15) SCALE 24 the Supreme Court held, relying upon *Rajasthan Financial Corporation v. Man Industrial Corporation Ltd.*, (2003) 7 SCC 522, that though the Executing Court cannot go beyond the decree yet it must take the decree according to its tenor. In doing so, the Executing Court may look at the pleadings and the judgment in the suit. In *Topanmal Chhotamal v. Kundomal Gangaram & Ors.*, AIR 1960 SC 388 (paragraph 4 of the Report) it was observed by the Supreme Court that even if the decree is ambiguous (which is not the situation in the present case) then it is the duty of the Executing Court to construe the decree and for this, the Court would certainly be entitled to look at the pleadings and the judgment. Reliance for this was placed on *Seth Manakchand v. Chaube Manoharlal*, AIR 1944 PC 46.

31. For the above reasons, we reject the first submission of Mohinder Kumar Gupta that the decree dated 30th April, 1984 was not a valid decree.

Second Submission and Discussion

32. The second principal submission made by learned counsel for Mohinder Kumar Gupta was that the decree was incapable of being executed. For this, reliance was placed on the allegation that insofar as 1/24 share of Rajinder Kumar is concerned, that is not determined and is, in any event, not severable from the rest of the suit property and, therefore, the decree cannot be executed. We are unable to accept this contention. The determination of Rajinder Kumar's share is now the subject of Suit No. 1428/1981 filed by him. The decision in that suit cannot be pre-empted by anybody today. As far as the Judgment Debtors are concerned (particularly Mohinder Kumar Gupta, the only objector) there is nothing to suggest that the decree cannot be executed against them in respect of the suit property subject to the rights of Rajinder Kumar in the suit filed by him. No decree has been passed against Rajinder Kumar and his claim for 1/24 share in the suit property can be kept out of the purview of the execution of the decree. The issue of the impossibility of executing the decree can be raised, if at all, only by Rajinder Kumar and only qua his rights and not by the Judgment Debtors against whom the decree can certainly be executed.

33. Moreover, the submission really amounts to Mohinder Kumar Gupta firing his gun by placing it on the shoulder of Rajinder Kumar. This is impermissible, more particularly since Rajinder Kumar did not stake any such claim for 1/24 share in the suit property by filing a written statement in the suit before the learned Single Judge. Even thereafter, Rajinder Kumar did not bother to pursue his suit being Suit No.1428/1981, which was dismissed in default and not restored till the impugned decision of the Executing Court. [That the suit was restored subsequently is a different issue altogether and we propose to deal with it at an appropriate stage].

34. Mohinder Kumar Gupta cannot have any independent grievance against the decree on the basis of the suit filed by Rajinder Kumar. It is well settled that the decree has to be executed as it is and it is really between Kuldeep Singh and Rajinder Kumar to take a call on the 1/24 share of Rajinder Kumar. Mohinder Kumar Gupta does not come to the picture at all and cannot be allowed to speak on behalf of Rajinder Kumar particularly since Rajinder Kumar has filed independent objections to the decree.

35. We reject the second contention advanced by Mohinder Kumar Gupta.

Conclusions and Directions

36. We, therefore, find no substance in the objections raised by Mohinder Kumar Gupta and dismiss his appeal.

37. During the course of hearing, it was stated by learned counsel for Kuldeep Singh that his client was prepared to deposit not only the balance consideration towards purchase of the suit property in this Court but also any unearned increase claimed by the L&DO. Since the quantum of unearned increase may have escalated (due to interest and arrears of ground rent etc.) an offer to deposit Rs.10 lakh on account was made. Kuldeep Singh has since deposited a sum of Rs.12,60,000/- in this Court being the balance consideration due to the Judgment Debtors for the sale of the suit property and also an amount of Rs.10 lakh towards unearned increase on account. This amount of Rs.10 lakh may be withdrawn or appropriated and adjusted by the L&DO towards its demand of the unearned increase and other dues.

38. Kuldeep Singh and the Judgment Debtors should now complete all formalities and execute the sale deed in terms of the agreement to sell dated 29/30th July, 1980. In case the Judgment Debtors do not do so, Kuldeep Singh will at liberty to move an appropriate application before the appropriate Court for the appointment of a Local Commissioner to act for and on behalf of the Judgment Debtors. It is made clear that the execution of the sale deed will be subject to the orders of the Court in Suit No.1428/1981 in respect of the rights (if any) only of Rajinder Kumar.

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39. Insofar as EA No.111/1991 filed by Rajinder Kumar is concerned, the main contention urged is that there is no decree against him and so its execution does not even arise. There is no doubt about this. The decree dated 30th April, 1984 says that it has been passed only against Judgment Debtors and no decree is passed against Rajinder Kumar. Even in the execution petition, it is stated that execution of the decree is sought only against Defendants Nos. 1 to 8, that is, the Judgment Debtors and not against Rajinder Kumar. As such, there is no question of any decree being executed against Rajinder Kumar nor is the

execution petition filed against him maintainable.

40. How did the Executing Court deal with this issue? In the execution petition, it is clearly stated that the suit filed by Rajinder Kumar was dismissed in default on 5th December, 1983; it was then restored on 30th January, 1984; it was again dismissed in default on 22nd May, 1984 and not restored till the date of filing the execution petition. It may be mentioned, *en passant*, that even on the date when the Executing Court passed its impugned order on 1st February, 2002 the suit stood dismissed. Under these circumstances, it was averred by Kuldeep Singh that since the suit filed by Rajinder Kumar stands dismissed, he has no right or claim in the suit property and the decree in respect thereof is liable to be executed against the Judgment Debtors.

41. It appears to us that the Executing Court was more than considerate to Rajinder Kumar in as much as by framing the issues mentioned above in paragraph 16, an opportunity was given to him to establish his claim notwithstanding the dismissal of his suit. Instead of taking advantage of the opportunity given by the Executing Court, Rajinder Kumar has chosen to challenge the order passed by the

Executing Court. In any event, as of today, the right and claim of Rajinder Kumar in the suit property is only of academic interest to us because we are told that the suit filed by him has since been restored to its original number.

42. The consequence of restoration of Suit No.1428/1981 filed by Rajinder Kumar is that he will now have to establish his right and claim over 1/24 share in the suit property in that suit. In so far as the present appeal being EFA (OS) No.4/2002 is concerned, it has been overtaken by subsequent developments, as a result of which we have no option but to allow it and hold that the execution petition filed against Rajinder Kumar was not maintainable. However, we make it clear that the allowing of this appeal and dismissal of the execution petition filed against Rajinder Kumar will not come in the way of Kuldeep Singh contesting Suit No. 1428/1981 filed by Rajinder Kumar, nor will it prejudice his rights in any manner in that suit or come in the way of the execution of the sale deed by the Judgment Debtors in terms of the order made by us above. In other words, due to subsequent developments, the right claimed by Rajinder Kumar in the suit property is preserved for the time being but he will have to establish it in the suit filed by him.

44. FAO (OS) No. 66/2002 is dismissed and EFA (OS) No. 4/2002 is allowed. No costs.

(MADAN B. LOKUR)
ACTING CHIEF JUSTICE

February 19, 2010
vk

(MUKTA GUPTA)
JUDGE

Certified that the corrected
copy of the judgment has been
transmitted in the main Server.