

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CR No.1453 of 2016
Decided on: 05.04.2016**

Dalmir Singh @ Dalmira (since deceased) through his LR's Shish Pal
and others

....Petitioners

Versus

Sant Parkash and others

....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

Present : Mr. Tarunvir Vashisht, Advocate
for the petitioners.

REKHA MITTAL, J.

Challenge in the present petition has been directed against order dated 20.01.2016 (Annexure P-14) passed by the Additional Civil Judge (Senior Division), Naraingarh, allowing the amendment in the execution application filed by the respondents against the petitioner.

The sole submission made by counsel for the petitioners is that the respondents earlier filed an application for execution which was dismissed in default and thereafter, application filed for restoration of the execution was withdrawn and thus, the dismissal order dated 23.09.2011 (Annexure P-7) has attained finality operating as *res judicata* in the fresh execution application dated 26.03.2012 (Annexure P-9).

I have heard counsel for the petitioners, perused the records particularly the order dated 23.09.2011 (Annexure P-7) and the order dated 20.01.2016 (Annexure P-14) but find no merit in the petition being misconceived and devoid of merits.

Perusal of the impugned order dated 20.01.2016 leaves no

manner of doubt that by way of the said order, the Executing Court has disposed of an application for amendment of execution petition whereby the decree-holder has been allowed to amend the execution application to bring it in consonance with the judgment and decree passed by the First Appellate Court i.e. Additional District Judge, Ambala whereby the judgment and decree passed by the trial Court was modified in respect of property mentioned at Serial Nos.2 to 9. The Executing Court has noticed that the judgment and decree dated 12.10.2001 passed by the First Appellate Court has attained finality up to Hon'ble the Supreme Court of India and as per the modified judgment and decree, actual possession of property mentioned at Serial No.1 can be delivered to the decree-holder whereas for the remaining property only symbolic possession can be delivered in compliance with the judgment and decree dated 12.10.2001.

Counsel for the petitioners has not made any submission to assail the order impugned in order to point out any error much less illegality committed by the Court below in allowing amendment of the execution application to bring it in conformity with the judgment and decree passed by the Court in appeal. Further, it is apparent that before the Executing Court, no such issue was raised by the petitioners that fresh execution application dated 26.03.2012 (Annexure P-9) is barred by principle of *res judicata*. As the petitioners did not raise any such plea before the Executing Court, it is otherwise not open for them to raise such an issue before this Court while assailing order dated 20.01.2016 whereby the decree-holder has been allowed to amend the

execution application. Even otherwise, contention of the petitioners that the fresh execution application, in the face of dismissal of the earlier execution application in default is barred by principle of *res judicata* is misconceived and merits outright rejection.

Section 11 of the Code of Civil Procedure (in short 'CPC') deals with *res judicata*. A relevant extract from Section 11 CPC reads as follows:-

“11. Res judicata – No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

The crucial words 'have been heard and finally decided by such Court' are admittedly missing in the present case because the earlier execution application was not heard and finally decided by the Court rather the same was dismissed for non-prosecution. In absence of hearing and decision of the earlier execution application, the provisions of Section 11 CPC are not attracted in the circumstances of the present case. In this context, reference can be made to judgment of this Court **“Reddy Wax Factory vs Lakhvir Singh and another”**, 2015(8) RCR (Civil) 123, wherein it has been held that it is a settled principle of law that dismissal of application for execution in default will not de-bar the filing of second execution application especially when the first application for execution had not been decided on merits upholding any

objections. On the contrary, in the case at hand, the objection petition preferred by the judgment-debtor was dismissed in the earlier execution application. In this view of the matter, there is no merit in contention of the petitioners that the fresh execution application dated 26.03.2012 (Annexure P-9) is not maintainable being barred by principle of *res judicata*. It further appears to the Court that despite the judgment-debtor having lost the litigation up to Hon'ble the Supreme Court of India, he through his legal representatives is putting his best efforts to delay the execution process one way or the other.

To be fair to the petitioners, counsel for the petitioners has referred to judgment of the Kerala High Court “**Somasekharan vs Saraswathi Amma**”, 2014 (Suppl.) Civil Court Cases 302, in support of his contention. The judgment relied upon by the petitioners has got no bearing on the facts of the case in hand rather demonstrates that counsel has relied upon the judgment without appreciating that in the said case, the question before the High Court was in regard to the fresh petition for execution being barred by limitation and not that of *res judicata*. Under these circumstances, the petitioners cannot seek any aid to their contention from the referred authority.

For the foregoing reasons, the petition fails and the same is accordingly dismissed *in limine*.

05.04.2016
yakub

(REKHA MITTAL)
JUDGE