

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

**CR No.6215 of 2016 (O&M)
Decided on: 22.09.2016**

Dewan Chand (deceased) through Santosh Rani

....Petitioner

Versus

Miyan Singh (since deceased) through LRs Bimla Devi and others

....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

Present : Mr. Arvind Singh, Advocate
for the petitioner.

REKHA MITTAL, J.

The present petition has been directed against order dated 06.09.2016 (Annexure P-2) whereby objections filed by the petitioner in execution titled *Miyan Singh vs Dewan Chand* pending in the Court of Additional Civil Judge (Sr. Division), Gulha, District Kaithal have been dismissed and warrant of possession has been issued.

Counsel for the petitioner has submitted that the respondent/plaintiff filed a suit for possession on the premise that he is owner of residential house constructed in Killa No.21/2, Rectangle No.38 consisting of a room, verandah, stairs and open space described in Para 1 of the judgment and decree dated 11.12.2001 (Annexure P-1). The respondent filed petition No.23 of 2012 for execution of the decree. The petitioner being the legal representative of Dewan Chand (since deceased) filed an objection petition *inter alia* on the grounds that the decree is not executable for want of proper and complete identity of the property. The decree is regarding house constructed in Killa No.21/2 of Rectangle No.38 which cannot be executed *qua* any

other house situated in other killa number. The suit property cannot be identified by description of boundaries when killa number does not tally. Earlier execution petition regarding the same decree has been dismissed as withdrawn vide order dated 05.12.2006.

Counsel for the petitioner further argues that on the warrants of possession issued by the Executing Court, a report dated 21.09.2006 was received that house of JD – Smt. Santosh Rani wife of Dewan Chand is in Khasra No.38/22 and not in Khasra No.38/21/2. Later, the respondent – decree-holder filed an application under Sections 151 to 153 of the Code of Civil Procedure (in short 'CPC') seeking permission for amendment of the plaint as well as the decree-sheet. The application was contested by the JD and was ultimately dismissed vide order dated 07.08.2012 and a relevant extract from the said order has been reproduced by the Executing Court in the order impugned, in para 8. It is argued with vehemence that as the respondent – decree-holder obtained a decree of possession *qua* a house situated in Killa No.21/2, he cannot execute the decree in respect of a house situated in Killa No.22, more particularly in the circumstances that application filed by the respondent seeking correction of the decree by way of amendment of the plaint as well as decree-sheet by invoking Sections 151 to 153 CPC has already been dismissed.

Another submission made by counsel is that as the previous execution petition was ordered to be dismissed as withdrawn vide order dated 05.12.2006 without any liberty to file a fresh execution petition for the same relief, the present execution petition is barred by

the principles of *res judicata* under Section 11 Explanation VII CPC. In support of his contention, he has relied upon judgment of this Court **“Manohar Lal vs Sunder Lal”, 2016(2) PLR 261.**

I have heard counsel for the petitioner, perused the paperbook and the various annexures appended with the petition.

The respondent/plaintiff, no doubt, in the plaint has mentioned that the house in question is located in Killa No.21/2 of Rectangle No.38 but he has given a detailed description of the suit property describing the existing construction and open space, duly reflected in Red colour in the site plan dated 25.05.1999 and the same being bounded by a street on North, property of Shera on South and Galis (streets) on East and West, situated in the revenue estate of Cheeka. It has further been pleaded that possession of suit property is with the defendant and the plaintiff permitted the defendant to use the same being a friend with a condition to hand-over its possession whenever the plaintiff demanded it.

A perusal of the judgment (Annexure P-1) would make it evident that the defendant did not dispute identity of the suit property rather raised a plea that possession of defendants and their predecessor-in-interest is for the past more than 15 years adversely, openly and in a hostile manner without payment of anything to anybody. The judgment and decree passed by the trial Court has attained finality.

In pursuance of the execution process initiated at the instance of the decree-holder and warrants of possession issued by the Court, a report was received that the house in possession of Smt.

Santosh Rani widow of late Sh. Dewan Chand exists in Khasra No.22 in place of Khasra No.21/2 of Rectangle No.38. There is no such report that no house of the description detailed in the site plan Ex.P2 is existing at the spot or a house with different description is there in Killa No.21/2. As a matter of fact, there is no report that any other house in occupation of the JD or his family is in existence either in Killa No.21/2 or 22 of Khewat No.38. On a pointed query raised by the Court, counsel for the petitioner has not disputed that the respondent – JD is one of the co-owners in both Khasra Nos.21/2 and 22 and both these Khasra numbers are a part of Khewat No.38. In view of the aforesaid discussion, it can be safely held that the petitioner wants to take advantage of a technicality and frustrate the decree that was passed in favour of the respondent – DH after a full-fledged trial by a competent Court. As per the settled position in law, technicalities cannot be allowed to stand in the way of substantive justice, therefore, the petitioner cannot get any advantage of the same.

The respondent – decree-holder filed an application for amendment of the plaint as well as the decree-sheet that was decided by the trial Court vide order dated 07.08.2012. In para 8 of the said order reproduced in para 8 of the impugned order, the Court has held, reads as follows:-

“Further, a property can be identified either by the boundary or by any other specific description. Plaintiff has given specific boundaries of the suit property in the plaint and the same are not denied by defendants in written statement. Therefore, the suit property can be easily identified on the spot even if its killa number is

wrong. Moreover, both killa numbers are in same rectangle and in case of any discrepancy, boundaries should prevail. Therefore, on this ground also present application is not maintainable”.

That being so, I do not find any merit in contentions of the petitioner that the decree obtained by the respondent is either unexecutable or the execution petition is not maintainable.

This brings the Court to the plea with regard to the execution petition being barred by *res judicata*. No doubt, Explanation VII to Section 11 CPC says that the provisions of Section 11 shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree. It appears that while relying upon Explanation VII appended to Section 11 CPC, counsel has forgotten to appreciate the provisions of Section 11 itself. In order to attract the principle of *res judicata* envisaged under Section 11 CPC, it is one of the essential ingredient that the issues which have been raised in the subsequent suit must have been heard and finally decided by such Court in the former suit. As in the case at hand, no such issue was heard and finally decided in the earlier execution petition and the earlier execution petition was admittedly dismissed as withdrawn, the petitioner cannot invoke the provisions of Section 11 to contend that the present execution is barred by principle of *res judicata*. The petitioner cannot derive any advantage to her contention from the judgment ***Manohar Lal's case (supra)*** as

neither any such question was raised in the said case nor any such proposition of law has been laid therein. On the contrary, the controversy before the Court was as to whether the decree-holder can save limitation as the earlier execution application had been withdrawn by him with liberty granted by the Court to file a fresh application for execution. This Court held that liberty granted by the Court cannot enlarge period of limitation and such a liberty is against the statute as valuable right of the other side has been taken away.

No other point has been raised.

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

22.09.2016
yakub

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No