courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.
Website: www.courtkutchehry.com
Printed For:
Date: 09/01/2026

(2004) 11 P&H CK 0015

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 221 of 1979

Karnail Singh and Others — APPELLANT

Vs

Bhajan Singh (Died) through LRs. — RESPONDENT

Date of Decision: Nov. 22, 2004

Acts Referred:

- Civil Procedure Code Amendment Act, 1976 - Section 100
- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 58, Order 23 Rule 1, 47
- Punjab Courts Act, 1979 - Section 41

Citation: AIR 2005 P&H 207 : (2005) 140 PLR 170 : (2005) 1 RCR(Civil) 806

Hon'ble Judges: Viney Mittal, J

Bench: Single Bench

Advocate: V.K. Jain and Divya Sharma, for the Appellant; K.S. Cheema, for the Respondent

Final Decision: Allowed

Judgement

Viney Mittal, J.
The plaintiffs have approached this Court through the present regular second appeal. The challenge is to the judgment and decree passed by the learned Courts below whereby the suit for declaration filed by them has been dismissed.

2. The plaintiffs filed a suit for declaration claiming that they are owners in possession of land measuring 8 bighas 8 biswas 6 biswansis. The details of the land have been given in the plaint. They claimed that defendant Nos. 1 and 2 Bhajan Singh and Kirat Singh should not dispossess them in execution of decree dated April 6, 1959 passed against defendant No. 3, Lal Singh.

3. The plaintiffs claimed that Bishan Singh, their father, had purchased the land in dispute from the original owners through various sale deeds and came into possession of the same as owners on the basis of the aforesaid sale deeds. Earlier, the present defendant Nos. 1 and 2, namely, Bhajan Singh and Kirat Singh filed a

suit on March 6, 1958 for possession of land measuring 2 bighas 14 biswas 3 biswansis against Lal Singh, who was arrayed as defendant No. 1 Bishan Singh father of the plaintiffs was arrayed as defendant No. 2 in the said suit. The said defendants filed the aforesaid earlier suit claiming that they were the owners of the aforesaid land on the basis of a sale deed dated May 3, 1951. Lal Singh the present defendant No. 3 (defendant No. 1 in the earlier suit) chose not to appear and was proceeded against ex parte in that suit. However, a written statement was filed by Bishan Singh, father of the plaintiffs. He claimed that he had purchased the land from the original owner Lal Singh and, as such, could not be dispossessed from the land sold to him. Subsequently, the plaintiffs in the aforesaid suit namely, Bhajan Singh and Kirat Singh, made a statement withdrawing their claim against aforesaid defendant, Bishan Singh. On the aforesaid statement of the said plaintiffs, name of Bishan Singh was struck off from the array of defendants. On abandonment of the claim of the said plaintiffs against Bishan Singh, the suit against him was consequently dismissed. Proceedings continued against remaining defendant No. 1, Lal Singh. An ex parte decree was passed against Lal Singh on April 6, 1959.

4. The said decree dated April 6, 1959 was sought to be executed by the said decree holders Bhajan Singh and Kirat Singh (present defendant Nos. 1 and 2). Bishan Singh claimed that the execution of the aforesaid decree was sought against the land owned by him as well. Accordingly he filed an objection petition before the executing court. The said objection petition was dismissed in default by the executing Court on October 20, 1962. Subsequently, another objection petition was filed by sons of Bishan Singh on November 10, 1962 (since Bishan Singh had died in the meantime). The maintainability of the aforesaid objection petition was questioned by the decree-holders, Bhajan Singh and Kirat Singh, on the ground that earlier objection petition filed by Bishan Singh having been dismissed in default, the second objection petition was not maintainable. The decree-holder also claimed that the decree was validly being executed with regard to the land described in the decree sheet. Vide order dated February 24, 1965, the executing Court held that the second objection petition filed by sons of Bishan Singh (the present plaintiffs) was not maintainable. Additionally, the executing Court also held that the decree was sought to be executed with regard to Khasra Numbers as mentioned in the decree. Accordingly, the objection petition filed by the objectors (the present plaintiffs) was dismissed. A copy of the said order dated February 24, 1965 is available on the record of the case as Ex.D-3.

5. The objectors took up the matter in appeal. The appellate Court upheld the objection of the decree holders with regard to the maintainability of the objection petition. Accordingly, the appellate Court also held that the objections filed by sons of Bishan Singh were not maintainable since the earlier objection petition filed by Bishan Singh had been dismissed in default. The appellate Court also held that the decree was sought to be executed by decree holders with regard to the khasra numbers mentioned in the decree. Consequently, the appeal filed by the objectors

(the present plaintiffs) was also dismissed vide order dated October 22, 1965. A copy of the aforesaid order is available on the record as Ex.D-5.

After the rejection of the aforesaid objections, the plaintiffs have filed the present suit seeking the declaration as noticed above.

6. It has been pleaded by the plaintiffs that Bishan Singh, father of the plaintiffs, although was originally arrayed as defendant No. 2 in the earlier suit filed by Bhajan Singh and Kirat Singh but subsequently on a statement by the said plaintiffs, his name was ordered to be struck off and the suit against him was withdrawn. On that basis, the plaintiffs have maintained that the decree dated April 6, 1959 which had been merely passed against defendant Lal Singh could not be executed against Bishan Singh or the land owned by him.

7. The suit has been contested by defendant Nos. 1 and 2. The defendants have admitted that they filed earlier suit against Bishan Singh but he was given up subsequently and an ex parte decree was passed against Lal Singh alone. However, they have maintained that the decree was obtained with regard to the land which belonged to Lal Singh and, therefore, they had a right to execute the said decree qua the land which was covered under the decree. The defendants have also taken a preliminary objection with regard to the maintainability of the suit. It has been pleaded by the defendants that the suit was barred under the provisions of Section 47 of the CPC (hereinafter referred to as the ''Code'') and was also barred by the principles of res judicata, inasmuch as the plaintiffs had earlier filed objections which had been dismissed and even an appeal filed by them had failed and, therefore, the present suit was not maintainable.

8. The suit was originally decreed by the learned trial Court vide judgment and decree dated March 16, 1969. The defendants took up the matter in appeal. During the course of appeal they sought amendment of the written statement, though the amendment, defendants wanted to take up an additional plea of the bar of res judicata. The aforesaid amendment was allowed by the first appellate Court. After allowing the amendment the judgment and decree of the trial Court was set aside and the matter was remanded back to the learned trial Court for fresh decision. On remand, the trial Court merely chose to redecide the issue with regard to res judicata without giving any fresh findings on the other issues i.e. with regard to the ownership of the plaintiffs of the land in dispute and with regard to the maintainability of the suit u/s 47 of the Code. With regard to the plea of res judicata the learned trial Court found that the suit filed by the plaintiffs was barred by the principles of resjudicata inasmuch as the objections filed by the plaintiffs had earlier been dismissed by the executing Court and even an appeal filed by them had failed before the appellate Court. Consequently, the suit filed by the plaintiffs was dismissed by the learned trial Court.

9. The plaintiffs took up the matter in appeal. The learned first appellate Court found that the learned trial Court should have recorded finding on all issues and should not have confined itself only to the findings on additional issue of res judicata. Accordingly, the learned first appellate Court summoned a report from the learned trial court with regard to the remaining two issues. The report was sent by the learned trial Court on February 8, 1978. The learned trial Court in the aforesaid report held that the plaintiffs are proved to be owners of Khasra numbers 463 and 464 only out of the total suit land but were not proved to be the owners of remaining khasra numbers. The learned trial court also held that suit filed by the plaintiffs was barred under the provisions of Section 47 of the Code, since the plaintiffs were bound in law to take all objections u/s 478 of the Code and could not have filed a separate suit.

10. In addition to the grounds taken in the main appeal, filed earlier by the plaintiffs, the plaintiffs also filed objections to the report dated February 8, 1978 submitted by the learned trial court, the matter was re-examined by the learned first appellate Court. The learned first appellate Court did not agree with the findings recorded by the learned trial court with regard to the ownership of the plaintiffs but held that the plaintiffs are shown to be owners of the entire suit land except khasra Nos. 463, 464, 465 and 466. However, the learned first appellate Court upheld the objections raised by the defendants and accordingly affirmed the findings recorded by the learned trial Court with regard to the non-maintainability of the suit. It was held that the suit filed by the plaintiffs was barred under the provisions of Section 47 of the Code. On the basis of the aforesaid findings, the learned first appellate Court dismissed the appeal filed by the plaintiffs.

11. The plaintiffs have now approached this Court through the present regular second appeal.

12. At the outset, it may be noticed that the present appeal was filed in the year 1979 under the provision of Section 41 of the Punjab Courts Act. A Full Bench of this Court in the case of Ghanpat v. Ram Devi (1978)80 P.L.R. 1 (F.B.) had taken a view that in view of the aforesaid local law (Punjab Courts Act), the amended provisions of Section 100 of the Code of Civil Procedure, as amended in 1976, were not applicable to the second appeal filed in this Court. Accordingly, no substantial question of law was framed nor the aforesaid regular second appeal was admitted on any such substantial question of law. However, the Hon''ble Supreme Court of India in the case of Kulwant Kaur and Ors. v. Gurdial Singh Mann (dead) by LRs and Ors. (2001)128 P.L.R. 492 (S.C.) has held that after the amendment of the CPC in the year 1976, thereby amending Section 100, Section 41 of the Punjab Courts Act had become redundant and repugnant to the Central Act i.e. CPC and, therefore, was to be ignored and, therefore, the second appeal shall only lie to this Court u/s 100 of the amended CPC on a substantial question of law.

Accordingly, during the course of arguments, it was found that the following substantial questions of law arise in the present appeal.

(a) Whether a person against whom a suit has been withdrawn and claim abandoned remains a party to the suit?

(b) Whether a decree passed against persons other than the person against whom the suit had been withdrawn or the claim abandoned, is still executable against such a person against whom the said suit had been withdrawn and claim abandoned?

(c) Whether, a finding on merits of the controversy recorded in proceedings which have been held to be not maintainable, can be treated to be res judicata in any subsequent proceedings.?

Both the learned counsel for the parties have addressed arguments on the aforesaid substantial questions of law.

13. I have heard Shri V.K. Jain, the learned senior counsel appearing for the plaintiffs-appellants and Shri K.S. Cheema, the learned counsel appearing for the defendant-respondents and with their assistance have also gone through the record of the case.

14. Shri V.K. Jain, the learned senior counsel appearing for the plaintiffs has vehemently argued that originally, the present defendants Bhajan Singh and Kirat Singh had filed a suit on March 6, 1958, seeking possession of the land measuring 2 bighas 14 biswas and 3 biswansis claiming that they had purchased the aforesaid land from Lal Singh, the present defendant No. 3 Lal Singh was arrayed as defendant No. 1 in the aforesaid suit. Father of the present plaintiffs, namely, Bishan Singh was arrayed as defendant No. 2 in the said suit. Bishan Singh field a written statement and claimed that he had purchased the land in his possession from Lal Singh and as such, was the owner in possession thereof. Subsequently, during the pendency of the said suit, the aforesaid plaintiffs (Bhajan Singh and Kirat Singh) made a statement withdrawing the suit against Bishan Singh and abandoning their claim against him. On the aforesaid statement made by the said plaintiffs, the name of Bishan Singh was struck off from the array of defendants and as such, the aforesaid plaintiffs got the suit dismissed against Bishan Singh. Thereafter, an ex parte decree was passed against Lal Singh alone, on April 6, 1959. On that basis, the learned senior counsel has maintained that the said decree could not be treated to be a decree passed against Bishan Singh in any manner and, therefore, could not have been executed against Bishan Singh or his legal heirs i.e. the present plaintiffs under any circumstances. It has further been argued by the learned counsel that the entire approach of the learned Courts below in non-suiting the plaintiffs with regard to the maintainability of the present suit was erroneous in law inasmuch as the suit filed by the plaintiffs could not be held to be barred under the provisions of Section 47 of the Code nor could it be held that the same was barred under the principles of res judicata. Shri Jain has made a pointed reference to Ex.D3, the order dated

February 24, 1965, passed by the learned Executing Court, vide which objections filed by the present plaintiff had been dismissed as non-maintainable, on account of the fact that earlier objections filed by Bishan Singh, father of the plaintiffs had been dismissed in default. On the basis of the aforesaid fact, it has been vehemently contended by the learned counsel that once the objections had been held to be not maintainable then any subsequent observation made in the aforesaid order on merits of the controversy was totally irrelevant and not binding on the rights of the parties, similarly, the learned counsel has also pointed out that in the appellate order Ex.D-5, dated October 27, 1965, the teamed appellate Court had also held that objection petition filed by the objectors (present plaintiffs) was not maintainable. It was again held that since the earlier objection petition filed by Bishan Singh had been dismissed in default, therefore, the fresh objection petition was not maintainable. It has again been contended that after holding that the objection petition was not maintainable, the learned appellate Court had also made observations with regard to the fact that the decree in question was sought to be executed with regard to the numbers mentioned in the decree and as such the execution was maintainable. Accordingly, the learned counsel contends that even the findings recorded in the appellate order could not be treated to be findings on merits of the controversy and a bar to the present suit.

15. Shri Jain has further argued that provisions of Section 47 of the Code show that objection under aforesaid section were only available to a party to the suit in which the decree was passed or their representatives. Elaborating the aforesaid argument, learned counsel has maintained that since Bishan Singh ceased to be a party to the suit after withdrawal of the said suit by the said plaintiffs against him abandoning their claim, therefore, the provisions of Section 47 of the Code could not be held to be applicable to the facts and circumstances of the case at all. The learned counsel has, however, contended that permitting the defendant Nos. 1 and 2 to execute the aforesaid decree dated April 6, 1959 against Bishan Singh and his estate would actually amount to treating the said suit as having been decree against Bishan Singh when as a matter of fact that said suit was withdraw and claim abandoned against aforesaid Bishan Singh. On that basis, the learned counsel has argued that the judgments and decree of the two courts below were totally erroneous in law, judicially perverse and were liable to be set aside.

16. The aforesaid contentions of the learned counsel for the appellants have been refuted by Shri K.S. Cheema, the learned counsel appearing for the defendant-respondents. Shri Cheema has, with equal vehemence, supported the various findings recorded by the learned courts below. It has been contended by Shri Cheema, that originally Bishan Singh had filed objections against the decree dated April 6, 1959. The aforesaid objections were dismissed in default on October 20, 1962. Subsequently, objections were again filed by sons of Bishan Singh (the present plaintiffs) since Bishan Singh had died by that time on November 10, 1962. The aforesaid objections were also dismissed by the executing Court vide order

Ex.D-3 on February 24, 1965. Shri Cheema has argued that although it was held that second objection petition was not maintainable but as a matter of fact the learned executing court had rejected the aforesaid objections on merits as well. Even an appeal filed by the objectors had been dismissed by the appellate Court vide order Ex.D-5 on October 22, 1965. Even the appellate Court besides holding that the objections were not maintainable had returned a finding with regard to the validity of the execution proceedings. On the basis of the aforesaid fact, Shri Cheema has argued that the present suit filed by the plaintiffs was barred by the principles of res judicata. It has been contended that because of the fact that a court of competent jurisdiction had returned findings on merits of the controversy against the present plaintiffs, the plaintiffs were precluded from raising the same controversy all over again, through the present suit.

17. Learned counsel appearing for the defendant-respondents has further argued that the suit filed by the plaintiffs is also not maintainable in view of the bar contained in Section 47 of the Code. Shri Cheema has maintained Section 47 of the Code specifically provides that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution of the decree shall be determined by the executing Court and not by a separate suit. Accordingly, it has been contended by the learned counsel that the plaintiffs having raised the objections in the earlier proceedings through objection petition and having failed in the said proceedings, the present separate suit filed by them was clearly hit by the bar contained in Section 47 of the Code. In support of the aforesaid contention the learned counsel has relied upon a judgment of the Lahore High Court in Babu Ram alias Bishan Sarup v. Shafi-ul-Zaman and Anr. AIR 1944 Lah 273.

18. I have given my thoughtful and due consideration to the rival contentions raised by the learned counsel for the parties.

19. The first and foremost question which arises for consideration is whether Bishan Singh, father of the plaintiffs could be treated to be a party to the suit which had been filed by the present defendant Nos. 1 and 2 on March 6, 1958, even after a statement had been made by the said plaintiffs for striking off the name of aforesaid Bishan Singh from the array of parties and even when after the aforesaid statement, the suit was continued against Lal Singh, the present defendant No. 3 alone. It is not in dispute that such a statement was made by the aforesaid plaintiffs in the earlier suit. It is also not in dispute that on the basis of the aforesaid statement, the court passed an order striking off the name of Bishan Singh from the array of defendants. Thereafter, the suit was continued against remaining defendant, Lal Singh and was consequently decreed ex parte against him alone. In these circumstances, in my considered view, after the statement of aforesaid plaintiffs in the earlier suit. Bishan Singh could no more be treated to be a party to the suit. Rule 1 of the Order 23 of the Code specifically provides that at any time after the institution of a suit the plaintiff, may as against all or any of the defendants withdraw his suit or abandon a

part of his claim. The aforesaid right given to a plaintiff is absolute. No permission is required for that purpose. The Court can only award such costs as it may deem fit against the defendant against whom the claim has been abandoned or suit withdrawn. Thereafter the plaintiff is precluded from instituting any fresh suit against the aforesaid defendants against whom the claim has been abandoned. In such a situation, once the plaintiffs in the earlier suit had withdrawn their suit against Bishan Singh and abandoned their claim qua him then they could not subsequently claim that the decree which was ultimately passed in their favour and against the remaining defendant. Lal Singh, was also liable to be executed, in any manner whatsoever, against Bishan Singh or with regard to the property which was under his possession. The plaintiffs also could not file any subsequent suit against Bishan Singh claiming the aforesaid relief. It is, thus, clear that once the plaintiffs were precluded from filing any fresh suit against Bishan Singh qua the property which Bishan Singh had claimed as his own in the said litigation then of course the plaintiffs could not be permitted to execute the said decree against Bishan Singh or his property. The plaintiffs of the aforesaid suit cannot be permitted to adopt a circuitous method of withdrawing the claim against Bishan Singh on the one hand and executing the decree against him on the other. In such circumstances, in my considered view, Bishan Singh could not be treated as a party to the said suit any further. Thus viewed, the provisions of Section 47 of the Code would no more be attracted to the rights and entitlements of Bishan Singh or his successors. Therefore, the present suit filed by the sons of Bishan Singh cannot be held to be barred in any manner u/s 47 of the Code.

20. The reliance placed by Shri Cheema on the authority of Babu Ram''s case (supra) is also not justified. The question in the aforesaid judgment was as to whether objections filed by a party, against whom the claim had been withdrawn were to be treated as filed u/s 47 or under Order 21 Rule 58 of the Code. It was in the facts and circumstances of that case that it was held that the aforesaid objections were to be treated as filed u/s 47 of Code and, therefore, the appeal against the order passed by the executing Court was maintainable before the appellate Court. However, from the perusal of the judgment, I find that the provisions of Order 1 Rule 23 of the Code had not been taken into consideration at all nor any finding recorded with regard to the operation of the said rule. Thus, I find that the said judgment has no application to the facts and circumstances of the present case.

21. A full Bench of Lahore High Court in the case of Surinder-Nath v. Ram Sarup and Ors. AIR 1944 Lah 294 also considered a similar questions. On the interpretation of Section 47 of the Code, this was held that the principle underlying the aforesaid provisions was that all controversial questions between the judgment debtor and the decree holder must be determined by the executing Court and whether actually determined or constructively determined, they cannot be agitated by a separate suit. It was further held that the judgment debtor is bound to raise all such questions which relate to execution, discharge or satisfaction of the decree in that

forum and the law affords him ample opportunities to do so. However, it was held that the aforesaid principles cannot be extended to the case of a party to the suit which has been exonerated from all liability under the decree and who is not a judgment debtor. It was further observed that the Code nowhere provides that to such a person notice should be given at the time of drawing up the sale proclamation or that he should be informed of the pro proceedings taken by the decree holder towards realising his decree by attachment and sale of the property of the judgment debtor. Such a person was entitled to assume that neither the decree holder will attach the property belonging to him nor the Court will permit the property belonging to the exonerated party to be sold. In these circumstances, it was held that such a person could either choose to go before the executing Court u/s 47 of the Code or could choose to file a separate suit and such a separate suit if filed by him was not barred under the provisions of Section 47 of the Code.

In the case of Katragadda Chine Ramayya v. Chiruvelia Venkanraju and Anr. AIR 1954 Mad 864, a Full Bench of the Madras High Court held that a defendant who was exonerated from the suit on the ground that he was neither necessary nor proper party to the suit could not be treated to be a party to the suit any further.

Certain observations made by the Hon''ble Supreme Court of India in the case of Seth Hiralal Patni Vs. Sri Kali Nath, may also be noticed with advantage:

The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seized of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it."

The Apex Court in the case of Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, observed as follows :

"Under Section 47 C.P.C. all questions arising between the parties to the suit in which the decree was passede or their representatives relating to the execution, discharge or satisfaction of decree have got to be determined by the Court executing the decree and not by a separate suit. The powers of the court u/s 47 are quite different and much narrower than its powers of appeal, revision or review.

The exercise of powers u/s 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus, it is plain that executing Court can allow objection u/s 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provisions of law or the law was promulgated making a decree inexecutable after its passing."

In view of the aforesaid authoritative pronouncements it is apparent that it only a judgment debtor who is obliged in law to take objection to the execution of a decree u/s 47 of the Code and an executing Court has only limited powers to adjudicate upon such objections raised by the judgment debtor.

22. In the case in hand, it is apparent that after Bishan Singh had been given up by the plaintiffs in the earlier litigation and his name was ordered to be struck off, then the subsequent decree dated April 6, 1959 passed against Lal Singh could not be treated to be binding in any manner on Bishan Singh or his property. As a matter of fact, Bishan Singh could not be held to be a judgment debtor qua the aforesaid decree. In this view of the matter also, Bishan Singh was not bound in law to raise any objection u/s 47 of the Code. Accordingly, it could not be held that the present suit filed by the legal heirs of Bishan Singh in barred under any circumstances.

23. With regard to the objection taken by the defendants that the suit filed by the plaintiffs is barred by the principles of res judicata, in my view, the aforesaid objection is also without any merit. Before the principles or res judicata can be invoked, it has to be essentially seen as to whether the matter had earlier been heard and finally decided and as to whether the decision in the former proceedings was given on the merits.

24. Some observations made by the Apex Court in the case of Sheodan Singh Vs. Smt. Daryao Kunwar, may be noticed:

"In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial Court for want of jurisdiction, or for default of plaintiff''s appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res judicata in a subsequent suit."

Again in the case of Shri Inacio Martins, Deceased through LRs. Vs. Narayan Hari Naik and others, , the Apex Court observed as follows:-

"The first suit was dismissed on a technical ground that the suit for a mere declaration without seeking consequential relief of possession could not lie. In that suit the issue regarding status of the plaintiff as a lessee was not settled once and for all and hence that issue could not be stated to barred by res judicata in the

subsequent suit brought by the lessee for possession of the demised property. Therefore, the second suit was not barred by res judicata."

25. It may also be relevant to notice that the first objection petition filed by Bishan Singh was dismissed in default. Thus, there was no decision on merits. After the death of Bishan Singh when his sons (the present plaintiffs) field an objection petition, the executing court vide order Ex.D-3, held that the said objections were not maintainable. Even after holding the objections to be not maintainable, it was held that the execution of the decree dated April 6, 1959 by the decree holders was with regard to the numbers mentioned in the decree. The appellate Court through order Ex.D-5 had decided similarly. The finding with regard to non-maintainability of the objection petition was even confirmed by the appellate Court. In these circumstances, when the aforesaid objection petition was held to be not maintainable, then any findings recorded on merits of the controversy cannot have any binding force and in any case cannot be treated to be res judicata. It has been held in Ganeshprasad Badrinarayan Lahoti (D) by LRs. Vs. Sanjeevprasad Jamnaprasad Chourasiya and Another, that the doctrine of res judicata could not be applied when the Court felt that the application were not maintainable.

In view of the aforesaid fact also, it apparent that the observations made on the merits of the controversy in the orders Exs.D-3 and D-5 cannot be treated to be such findings which would create a bar of resjudicata with regard to the filing of the present suit. 26. At this stage, the findings recorded by the learned first appellate Court on merits of the controversy i.e. the title of the plaintiffs to the suit property, may also be noticed :

"7. In this case the cause of litigation is the charge of khasra numbers during consolidation. Lal Singh sold land measuring 2 bighas 15 biswas 3 biswansis to defendant Nos. 1 and 3 comprised by khasra numbers as given in para No. 1 of the plaint on 3.5.1951. The sale was effected of khasra numbers recorded in the jamabandi of 1943. In 1951 consolidation took place in the village. The vendor or the purchaser who are defendant Nos. 1 and 2 did not care to get the mutation sanctioned of the land under the said sale deed. This piece of land sold to defendant Nos. 1 and 2 was consolidated with other land of Lal Singh vendor and Tej Kaur and Ram Kaur in consolidation proceedings. All this land was allotted in the name of the vendor alone and no land was allotted in the names of defendant Nos. 1 and 2 in consolidation proceedings. The father of the plaintiff purchased land from Lal Singh and Tej Kaur, which was allotted to them during consolidation. Later on defendant Nos. 1 and 2 filed a suit in 1958 with regard to land which they had purchased giving old khasra numbers of jamabandi for the year 1943-44. The suit was also filed against Bishan Singh father of the plaintiffs, but he was left and the suit was dismissed against him and an ex parte decree was passed against Lal Singh for possession of khasra numbers, which were given in the sale deed in favour of the defendants pertaining to jamabandi for the year 1943-44. The confusion was caused

because the defendant Nos. 1 and 2 were not allotted any specific khasra numbers. The land purchased by them had already been consolidated in the name of their vendor. In fact the proper procedure for the defendant Nos. 1 and 2 was to file a suit for declaration of the land out of the khasra numbers allotted to the vendor in consolidation proceedings. The present litigation started because, a suit filed with regard to old khasra numbers was decreed ex parte.

8. The contention of the learned counsel for the plaintiff is that he is the owner of khasra numbers which he purchased from the vendors. These khasra numbers contained the land which had already been sold to defendant Nos. 1 and 2. The plaintiffs could acquire ownership to the extent to which the vendors were the owners on the date when a particular sale was made. If the vendor had no title, it would convey no title to the plaintiff. The plaintiff had filed the suit with regard to khasra numbers 463, 464, 465 and 466 as well but in the body of the plaint they have not shown how these khasra numbers came to be owned by the plaintiffs. So the suit with regard to these khasra numbers has to be dismissed. The learned counsel for the appellants has argued that khasra numbers 463, 464 were sold to the father of the plaintiffs by Lal Singh vide mutation Ex.P-3. The mutation does not create title. It is given in mutation Ex. P3 that it was sanctioned on the basis of a registered sale deed. There is no mention of that sale deed in the plaint as such, the plaintiffs cannot be deemed to be owners of khasra numbers 463 and 466.

9. With regard to the rest of the khasra numbers, the contention of the learned counsel for the appellant is that the father of the plaintiffs purchased these very khasra numbers from the owners who were then recorded in jamabandi as owners in possession. A sale deed made by a vendor who is recorded as an owner will convey full title to the vendee. It is for the other side to prove that the vendor at the time of sale had no title left in the land sold to them.

The eventuality has arisen in this case on account of the negligence of defendant Nos. 1 and 2 not to get the mutation entered in their favour with regard to khasra numbers which were purchased before consolidation. If they would have taken care to get the mutation sanctioned, a separate parcel of land would have been allotted in their names and the vendor could have no right to make a sale nor any vendee would have purchased those very khasra numbers. So prima facie the contention of the present appellants is correct that they are presumed to be the owners of the said khasra numbers.

10. The learned counsel for the respondents has tired to show that he is the owner of the khasra numbers. In my opinion, he has not been able to do so. The area measuring 2 bighas 14 biswas3 biswansis pacca was sold to defendant Nos. 1 and 2 by Lal Singh defendant No. 3. The said khasra numbers were out of khata Nos. 159(1), 159(8th) 159 and 161 min, 159 min (2nd) and 159 min (6th) as given in the khatauni Istemal Ex.DC.

These very khasra numbers along with the other khasra numbers belonging to the vendor were consolidated and new khasra numbers were allotted to them. In the Naksha Hakdarwar, copy of which is Ex.DB, the land was priced according to the khatas and its various valued were assessed with regard to various pieces of lands in the very khatas. We do not know at this stage the value given to a particular khasra number. Vide sale deed Ex.D-1 the land in one khata was not sold. The land which was sold was out of various khatas and the price had been determined of the khatas. The price of the particular khasra number out of the khata cannot be determined. So the defendants at this stage cannot say as to what was the share of the defendants in the land in these khasra numbers, which have been sold to the father of the plaintiffs. So the plaintiffs are deemed to be the owners of khasra numbers in suit except 463, 465 and 466."

From the aforesaid findings recorded by the learned first Appellate Court, it is clear that the plaintiffs have been held to be the owners of the suit land except khasra numbers 463, 464 and 465. The said findings of fact have not been assailed by any of the parties during the course of the present appeal. In fact no arguments were addressed by the learned counsel for the parties on that point. Accordingly, the said findings are firmed and it is held that the plaintiffs are owners of the entire suit property except khasra Nos. 463, 464, 465 and 466.

As a result of the aforesaid discussions, the substantial question of law (a) and (c) are answered in the negative and in favour of the plaintiffs and consequently against the defendants.

Accordingly, the present appeal is allowed. The judgment and decree of the learned courts below are set aside. Consequently, the suit filed by the plaintiff-appellants is partly, decreed, as prayed, qua the suit land, except khasra Nos. 463, 464, 465 and 466. Suit of the plaintiffs qua the aforesaid khasra numbers is, however, dismissed. There shall be no order as to costs.