material for this Court to give a just decision, so that for the purposes of the decision of this question alone the matter will have to be gone into by the revenue authorities below. In other words, if the finding of fact is that respondents 2 to 4 had a holding in excess of the permissible limit on January 6, 1961, which holding may be made up of land owned by them and land under mortgage with them, leaving out of course the land already redeemed by that date, then alone will they not be satisfying second part of clause (b) of sub-section (1) of section 7-A, and will fail in their application, but if they establish as a fact that on that date their holding was within the permissible limit of thirty standard acres, made up whether of ownership land alone, or of mortgaged land alone, or of both, then they will succeed in their application. This is the only finding of fact which had to be given by the revenue authorities. The case will be remitted to the learned Financial Commissioner to give a direction to the authorities below to give a finding on this question of fact and then dispose of the application under section 7-A of respondents 2 to 4 in accordance with law.

(12) Consequently, the order of the learned Financial Commissioner and apparently that of the learned Single Judge also are modified to the extent indicated above and with the modification, as stated, the appeal of the appellants only succeeds partly and is otherwise dismissed, but there is no order in regard to costs.

B. R. TULI, J.—I agree.

K. S. K.

APPELLATE CIVIL

Before Mehar Singh, C.J. and Bal Raj Tuli, J.

RAM SARUP ETC.,—*Appellants*

versus

PURAN ETC.,—*Respondents.*

R. S. A. No. 117 of 1960.

April 30, 1970.

Code of Civil Procedure (Act V of 1908)—Order 21 Rule 35(2)—Decree for possession becoming inexecutable by lapse of time—Such decree—Whether obliterated—Obtaining of possession by the decree-holder out of Court

after passing of the decree—Whether amounts to satisfaction of the decree—Dispossession of the decree-holder thereafter—Fresh cause of action—Whether accrues for a second suit.

Held, that if a decree for possession becomes inexecutable by lapse of time, it only means that the executing Court will not render any assistance to the decree-holder in obtaining possession in accordance with the decree if an application is made to it. But it does not obliterate the decree which is validly passed. (Para 3)

Held, that the obtaining of possession out of Court by the decree-holder after the passing of the decree in accordance therewith amounts to satisfaction of the decree for possession. If the decree holder is dispossessed thereafter, he gets a fresh cause of action for filing a second suit on the basis of his dispossession provided the suit is within limitation from the date of his dispossession. The earlier decree can be relied upon in support of the title of the plaintiff. (Para 9)

Case referred by Hon'ble the Chief Justice Mr. Mehar Singh, on 23rd January, 1970 to a Division Bench for decision of an important question of law involved in the case. The case was finally decided by Hon'ble the Chief Justice Mr. Mehar Singh and Hon'ble Mr. Justice Bal Raj Tuli on 30th April, 1970.

Regular Second Appeal from the decree of the Court of Shri Hans Raj, District Judge, Rohtak dated the 18th day of October, 1959, affirming that of Shri S. S. Raikhey, Sub Judge 1st Class, Sonepat, dated the 6th June, 1959, dismissing the plaintiff's suit.

S. P. JAIN, ADVOCATE, for the appellants.

H. L. SARIN, SENIOR ADVOCATE WITH SUNDER LAL AHLUWALA AND V. C. NAGPAL, ADVOCATES, for the respondents.

JUDGMENT

B. R. TULI, J.—This appeal came up for hearing in the first instance before my Lord the Chief Justice and was referred by him to a Division Bench for decision by order dated January 23, 1970. This is how this appeal came up for hearing before us.

(2) The facts of the case have been given in detail in the order of reference but it is necessary to recapitulate them in order to decide the point of law involved. The facts are that the predecessors of the present plaintiff-appellants filed a suit on April 20, 1905, against Kaithal, defendant 4, and predecessors of the other defendants, who

are all respondents to the appeal, for the possession of the entire land left by Smt. Jiwani, widow of Dilsukh, who held the estate before her death for her life as widow's estate. The land measured 224 Bighas 5 Biswas. It was alleged by the plaintiffs of that suit that they were the sole heirs of Dilsukh and Smt. Jiwani and were entitled to inherit the entire land. It may be stated here that the common ancestor of the parties had three branches. The plaintiffs and their predecessors belonged to one branch while the defendants and their predecessors belonged to the second branch. Dilsukh belonged to the third branch and had died issueless. In the revenue records prepared in 1900-1901 Smt. Jiwani was described as being in possession of the said land as the widow of Dilsukh and the land held by her was an occupancy tenancy. She died in 1904 and the Jamabandi of the year 1904-1905, Exhibit P. 3, shows that on her death the land was mutated as Shamlat Thula Pandu, in other words, as the common land of the rightholders of Thula Pandu in the village. This Thula Pandu solely consisted of the plaintiffs and the defendants of the suit of 1905. There was no other co-sharer in that Thula. The entry in the mutation, which was subsequently incorporated in the Jamabandi, was that the rightholders of Thula Pandu had shares in this common land according to their shares in the *Khewat* (*hasab rasad khewat*). This entry was challenged in the suit as the plaintiffs then claimed that they were the sole heirs of Dilsukh but at the trial of the suit they gave up their claim to one-half of the estate and only claimed the possession of one-half of that estate presumably on the basis that the plaintiffs and defendants were equally entitled to succeed to the land left by Dilsukh and his widow Smt. Jiwani. The learned Subordinate Judge passed a decree in favour of the plaintiffs against the defendants in respect of the one-half of the estate of Dilsukh left by his widow Smt. Jiwani, on July 17, 1905. No appeal was taken against that decree and thus it became final. It is also an admitted fact that this decree was never executed through the Court by the plaintiff-decree-holders but it is alleged that in 1909, the plaintiffs had taken possession of more land than fell to their share according to the said decree. Before filing the suit in 1905, the plaintiffs alleged that they were already in possession of 89 Bighas, 18 Biswas and 7 Biswansis of land. The remaining 134 Bighas, 12 Biswas, 6 Biswansis of land was in possession of the defendants according to the entry in Jamabandi *hasab rasad khewat.* The present plaintiffs and their predecessors continued to remain in possession of the land which was more than their share till July, 1954, when

the proceedings for the consolidation of holdings in their village started. In repartition, the Consolidation Officer, in spite of the protest by the plaintiffs, allotted the lands to the plaintiffs and defendants in accordance with the entry in the Jamabandi *hasad rasad khewat* and not in accordance with the decree which had been passed in 1905 and which, being inter-parties, was binding on them. The total area of the holding divisible between the plaintiffs and the defendants on consolidation came to be 286 Kanals 8 Marlas. Out of this area, 62 Kanals 8 Marlas were left joint for Thula Pandu and the remaining 244 Kanals were distributed amongst the plaintiffs and the defendants. The area allotted to the plaintiffs measured 102 Kanals 10 Marlas while 181 Kanals 10 Marlas were alleged to be in the possession of the defendants. The plaintiff-appellants thus claimed that they had been allotted 39 Kanals 10 Marlas of the land less than what was their due in accordance with their half share in the entire joint land. This area of 39 Kanals 10 Marlas was one-half of the difference in the area allotted to the plaintiff-appellants and the defendant-respondents as stated above. Before the District Judge, however, it was made clear that 62 Kanals 8 Marlas of land which had been kept joint and not divided, was out of the entire holding of 286 Kanals 8 Marlas and out of the remaining land measuring 224 Kanals, the plaintiffs were entitled to the allotment of 112 Kanals on account of their one-half share but hey were allotted only 102 Kanals 10 Marlas while the defendants were allotted 121 Kanals 10 Marlas. Thus the plaintiffs were only entitled to recover the area of 9 Kanals 10 Marlas from the defendants out of the area allotted to them in lieu of the joint holding and they were further entitled to one-half area out of 62 Kanals 8 Marlas which was left joint.

(3) It was pleaded by the defendant-respondents that the suit was not maintainable and the plaintiff-appellants were not entitled to any decree in view of the fact that the decree obtained by the plaintiffs' predecessors in 1905 had never been executed through Court as prescribed in Order 21 rule 35(2) of the Code of Civil Procedure. That decree having become inexecutable, the possession of the land cannot be claimed by the plaintiff-appellants under that decree. The learned lower Courts have accepted that argument completely forgetting that the plaintiff-appellants never claimed the possession of the land under that decree. Their allegations in the plaint were that they had taken possession of more land than was decreed to them and

remained in possession of that land till they were deprived of it in consolidation proceedings in 1958 when the possessions were delivered to the parties in accordance with the repartition scheme. It was admitted by the defendants that the plaintiffs had taken possession of more land than fell to their share under the decree of 1905, and, therefore, in our opinion, that decree should be deemed to have been satisfied. The cause of action for the present suit is not the decree of 1905, but the allotment of less area to the plaintiffs in consolidation proceedings than they were entitled to and the claim is that the deficiency in their area should be made good. Reference to the decree obtained in 1905 has been made in support of their claim that they were entitled in consolidation proceedings to have one-half of the area left by Dilsukh and not in accordance with the entry in the Jamabandhi *hasab rasad khewat.* It is true that the decree of 1905 became inexecutable by lapse of time which only means that the executing Court would not have rendered any assistance to the decree-holders in obtaining the possession in accordance with that decree if an application for execution was made to it but it does not obliterate the decree which was validly passed. One of the points determined in that decree was the extent of the share of the predecessors of the present plaintiff-appellants and the predecessors of the defendants as well as defendant No. 4 who was personally a party to that suit. The finding with regrd to the respective shares of the plaintiffs and the defendants in the land left by Dilsukh, is still binding on the parties and the plaintiffs can claim that they are entitled to one-half of the estate left by Dilsukh on the basis of the finding given in the judgment on the basis of which the decree of 1905 was based. We are supported in this view by the judgment of Walsh, J., of the Allahabad High Court, in *Musammat Lakhrani Kaur* v. *Dhanraj Singh and others* (1), which decision was upheld on this point by the Letters Patent Bench whose judgment is reported as *Dhanraj Singh and others* v. *Lakhrani Kaur* (2). The facts of that case were that Lakhrani Kaur brought a suit against the defendant in 1907 for possession of land which was decreed in her favour in November, 1907. Her husband had died in 1904 and the defence put forth by the defendant was that the land had been given to him orally by the husband of Lakhrani Kaur. This defence failed. She filed a second suit on February 26, 1914, for possession of the land on the ground that she

(1) 32 I. C. 634.
(2) (1916) 14 A.L.J.R. 709.

had obtained physical possession in 1908 and was dispossessed again by the defendant. The possession alleged to have been taken by Lakhrani Kaur in 1908 was not by means of execution proceedings through the Court and the defendant pleaded that since the decree in her favour passed in 1907 had become inexecutable, she was not entitled to maintain the second suit for possession and it was also denied that she had in fact obtained physical possession of the land in 1908. The learned Judge referred to evidence and believed the witness for Lakhrani Kaur who stated that she had in fact obtained the physical possession of the land in 1908 and did not believe the defendant when he stated that she never obtained possession of the land. On these facts, the learned Judge held that the obtaining of possession by Smt. Lakhrani Kaur in 1908 amounted to satisfaction of the decree and a fresh cause of action arose to her subsequently when the defendant retook possession. In appeal, the learned Judges endorsed that decision with the following observation:—

> "We find upon the evidence that the plaintiff did get into possession after the decree. On this finding of fact it seems to us that the plaintiff had a cause of action irrespective of the previous decree. The previous decree would no doubt be part of her title. We do not think that the mere fact that she obtained a decree for possession in 1907 would prevent her again from suing for possession if her possession was again interfered with, nor do we think that the doctrine of merger applies to decrees for ejectment."

On the parity of reasoning, we hold in the instant case that when the predecessors of the plaintiffs obtained possession of more land than was decreed in their favour in 1905, that decree was satisfied and when they have now been dispossessed from a part of that land in 1958, a new cause of action arose to the plaintiffs on the basis of which they were entitled to file the suit that they did.

(4) The learned counsel for the respondents has relied on a number of judgments which are, however, not on similar facts and are, therefore, not in point. The first case relied upon by the learned counsel is a Division Bench judgment of the Punjab Chief Court in *Khub Ram and Ram Dhan* v. *Surat and others* (3). The facts in that case were that the plaintiffs had obtained a decree as mortgagees against the defendants on June 29, 1903, for possession of 41 Bighas

(3) 20 P.R. 1917

17 Biswas of land and had filed a *dakhalnama* on July 31, 1903, in the Court stating that they had been given possession of the land in terms of the decree. On July 1, 1911, they instituted another suit, out of which the appeal arose, alleging that some two months after they had been placed in possession of the land in suit, the defendants had forcibly dispossessed them and refused to surrender the land in spite of demands. This allegation of possession and dispossession of the plaintiffs was not accepted by the Court and it was, therefore, held that the plaintiffs had no right to file a second suit for possession on the same cause of action on which the previous suit had been filed in 1903. The learned Judges repelled the argument that even if the plaintiffs had not obtained possession in pursuance of the decree passed in their favour in 1903, they were entitled to file a second suit for possession as mortgagees as the mortgage still subsisted. We are not concerned with that point. In this judgment, it was held:—

> ".....When the law lays down a definite procedure for the delivery of possession, which is to be purely symbolical, that procedure must be strictly followed and no deviation from it can be permitted. Any omission to follow the procedure must, therefore, be regarded as material."

That dictum would have applied if the plaintiffs had sought the possession of the land in pursuance of that decree or had filed a suit on the basis of that decree. This dictum of the Division Bench was followed by Moti Sagar, J., in *Nidhi Ram* v. *Parsa Ram* (4), the second case relied upon by the learned counsel for the respondents. In that case, a decree was passed for possession of a certain number of mango trees growing on the defendant's land in favour of Nandan plaintiff against Udho Ram defendant in 1910. The second suit was filed on October 2, 1922, for the possession of the same trees. This suit was dismissed on the ground that the second suit was not maintainable as the decree obtained in 1910 was never executed in accordance with Order 21 rule 35 of the Code of Civil Procedure. The allegation was that the decree-holder had obtained symbolical possession in October, 1910, in execution of his decree but it was found that no symbolical possession in accordance with the procedure prescribed had been given to the plaintiff. It is thus clear that the

(4) A.I.R. 1923 Lah. 693.

allegation of obtaining symbolical possession in 1910 was not believed or was held not to be in accordance with law. The facts of this case are also distinguishable from the facts of the present case.

The next case relied upon by the learned counsel for the respondents is a Division Bench judgment of the Lahore High Court in *Harnam Singh* v. *Ganda Singh and others* (5) and the learned Judges constituting the Bench were the same who decided *Khub Ram and Ram Dhan's case* (3) (*supra*). The facts are not clear from the reported judgment and we have, therefore, referred to the judgment of the learned Single Judge in that case, reported as *Harnam Singh* v. *Milkhi Ram and others* (6). The facts are also not clear from that judgment, but what appears is that there was a decree for possession of land comprised in three Khasra numbers. Execution proceedings were taken and symbolical possession of two Khasra numbers was delivered by the Girdawar Qanungo which was not strictly in accordance with the provisions of Order 21 rule 35 of the Code of Civil Procedure. The second suit was filed for actual possession on the basis of symbolical possession already delivered. The learned Single Judge found that there was substantial compliance with Order 21, rule 35, as the proceedings for symbolical possession were in the knowledge of Suba Ram who was in possession of two Khasra numbers and thus had notice of the proceedings and, therefore, the suit against him for those two Khasra numbers was held to be within time. With regard to the third Khasra number, it was held that the person, in whose possession the land was, had no notice of the proceedings for symbolical possession and, therefore, no symbolical possession was delivered and the second suit was barred by limitation. A letters Patent Appeal was filed against that judgment of the learned Single Judge which was decided by the Division Bench and the operative part of the judgment reads as under :—

> "Our attention has been invited to the authorities which lay down the rule that symbolical possession given in a case in which the decree provided for the delivery of actual possession operated as actual possession against the judgment-debtor, but not aganist third person, who were not parties to the decree. There is considerable divergence of judicial opinion on this point, but it is unnecessary to

(5) A.I.R. 1933 Lah. 427.
(6) A.I.R. 1929 Lah. 545.

dilate upon it, because in the present case the decree did not provide for actual possession, but only for symbolical possession. But, as pointed out above, symbolical possession was not delivered as required by law. It is, therefore, clear that the limitation did not run from the date on which the decree was executed by the plaintiff's predecessor-in-interest. I would accordingly hold that the suit was barred by limitation and dismiss the appeal."

The facts of that case have not even the remotest resemblance to the facts of the present case.

(6) Reference is then made to a Single Bench judgment of the Lahore High Court in *Bhagat Ram and others* v. *Ali Bakhsh and others* (7). In that case Haveli Ram, the mortgagee, brought a suit for possession of half of the land which was the subject of the mortgage on April 9, 1919. In appeal, the decree was slightly modified with regard to the area of the land. The decree passed was for joint possession and the possession was ordered to be delivered under the provisions of Order 21, rule 35(2) of the Code of Civil Procedure. The document by which the possession was alleged to have been given was a report of the Patwari dated June 27, 1921, to the effect that the possession had been given of the land through Ali Bakhsh *chaprassi* in the presence of Bahawal Bakhsh, Lambardar and the decree-holder Haveli Ram. A formal receipt of possession by the decree-holder was also executed on June 28, 1921, wherein it was stated that the possession had been obtained in the presence of the Patwari and other witnesses by ploughing the land. On June 26, 1933, the plaintiffs, who were the descendants of Haveli Ram, brought a suit for possession of the same land on the allegations that they had been dispossessed within the last five or six years. In order to bring their suit within limitation, the plaintiffs relied upon the *dakhalnama,* dated June 27, 1921, that is, the document containing the report of the Patwari referred to above. On these facts, it was held :—

"There cannot be any manner of doubt that the final decree, dated 29th January, 1920, was for joint possession and such a possession could only be delivered in the particular manner prescribed by the legislature in Order 21, rule

(7) A.I.R. 1936 Lah. 749.

35(2), Civil Procedure Code. It is not within the competence of anybody to attempt to give joint possession in any other manner, and if the Patwari or any other person took it upon himself to deliver such joint possession in a manner contrary to the express language of the legislature, their action would not have any legal effect."

No such question arises in the instant case and, therefore, this judgment is also not relevant.

(7) The two Full Bench judgments of the Allahabad High Court in *Bhairon Rai and others* v. *Saran Rai* (8), and *Hanuman Prasad Narain Singh* v. *Mathura Prasad Narain Singh* (9), do not deal with this point at all and are, therefore, not helpful.

(8) The last case relied upon by the learned counsel for the respondent is *Mt. Rameshri* v. *Mt. Vaishno Ditti* (10), which only holds that if possession is not taken in accordance with the procedure prescribed under Order 21, rule 35(2) of the Code of Civil Procedure by affixing the warrant to the property and by beat of drum, there is no delivery in law and that without executing a decree for possession, a decree-holder cannot become a shareholder with the judgment-debtors and cannot consequently ask for a share in the profits of the property. The facts are entirely different and no help can be derived from this judgment.

(9) The net result is that only two Allahabad judgments reported as *Musammat Lakhrani Kaur* v. *Dhanraj Singh and others* (1) and *Dhanraj Singh and others* v. *Lakhrani Kaur* (2) (*supra*), are helpful in deciding the point before us. We respectfully agree with the observations of the learned Judges to the effect that the obtaining of possession after the passing of the decree in accordance therewith amounts to satisfaction of the decree for possession and if the decree-holder is dispossessed thereafter, he gets a fresh cause of action for filing a second suit on the basis of his dispossession provided a suit is filed within limitation from the date of his dispossession. The earlier can be relied upon in support of the title of the plaintiff.

(8) I.L.R. 1926 All. 588.
(9) A.I.R. 1928 All. 472.
(10) A.I.R. 1941 Peshawar 25.

(10) The only other point argued by the learned counsel for the respondents is that the land of which possession is sought by the plaintiff-appellants has not been stated with particulars in the plaint. On a reference to the plaint, we find that the particulars of the land corresponding to 224 Bighas 5 Biswas originally belonging to Dilsukh and Smt. Jiwani in respect of which the decree was passed in 1909 are given in para 6 of the plaint, as recorded in the Jamabandi for the year 1945-46. The killa numbers allotted to the defendants on account of their share of that joint holding in repartition proceedings have been stated in para 7 of the plaint while the land kept joint measuring 62 Kanals 8 Marlas has been described by Killa numbers in para 8 of the plaint. The land in possession of each of the defendants is mentioned in para 10 of the plaint. In the nature of things, the plaintiff-appellants could not particularise 39 Kanals 10 Marlas of land to which they laid their claim in the plaint. This area has now been found to be only 9 Kanals 10 Marlas. The land kept joint has been separately described in para 8 of the plaint. There is, therefore, no difficulty in decreeing the suit of the plaintiff-appellants for possession of the land described in para 7 of the plaint to the extent of 9 Kanals 10 Marlas and for joint possession of land measuring 62 Kanals 8 Marlas described in para 8 of the plaint to the extent of one-half, as they have been found to be entitled to one-half of the land left by Dilsukh and Smt. Jiwani.

(11) For the reasons given above, this appeal is accepted and the suit of the plaintiff-appellants is decreed as above with costs throughout.

MEHAR SINGH, *C.J.*—I agree.

K.S.K.

APPELLATE CIVIL

Before D. S. Tewatia, J.

ASA NAND,—*Appellant.*

versus

SWATANTARPAUL SINGH, ETC.,—*Respondents.*

R. S. A. No. 136 of 1968.

May 4, 1970.

Punjab Pre-emption Act *(1 of 1913)—Sections 3, 5 and 15—"Village immovable property"—Whether has to be within the limits of* abadi deh—*Construction of a house on waste land—Whether amounts to reclamation thereof.*