

# ALLAHABAD HIGH COURT

Ghanshiam Singh

Vs.

Har Piarey

Civil Revision No. 741 of 1972, against Judgement and Order of S.D. Sharma,  
Dist. J. Moradabad

(Satish Chandra, H.N. Seth and N.D. Ojha, JJ.)

24.05.1972. 06.03.1974

## JUDGMENT

**N.D. OJHA, J.**

1. One Smt. Parvati owned three shops. One of these shops was let out to one Khursheed and the other to Shambhoo opposite party No. 2. Smt. Paryati obtained a decree for ejection against Khursheed. Before the decree could be executed Smt. Parvati died. Ghanshiam Singh the applicant, made an application for execution of the decree on the ground that Smt. Parvati had executed a will in his favour and he was thus her legal representative. Another application was made by opposite party No. 1 Smt. Har Piarey claiming to be the step daughter of Smt. Parvati. A question accordingly arose on the execution side as to which of the two rival claimants was the representative of Smt. Parvati. This question was heard and finally decided by the execution Court in favour of Ghanshiam Singh. Smt. Harpiarey, treating the decision given by the execution Court as a decree, filed an appeal and thereafter a second appeal, both of which failed. Subsequently, Shambhoo, opposite party No. 2 who, as already pointed out above, is tenant of the other shop filed an interpleader suit impleading Ghanshiam Singh and Smt. Har Piarey as defendants. The rent which was due from him was deposited in Court. Shambhoo thereafter went out of the picture. Smt. Har Piarey was treated as plaintiff and Ghanshiam Singh as defendant to the suit. Ghanshiam Singh inter alia pleaded that the decision given by the execution Court in the earlier case in his favour to the effect that he was the legal representative of Smt. Parvati operated as res judicata between him and Smt. Harpiarey, and the claim of Smt. Harpisrey was liable to be repelled on this ground alone. The trial Court, however, did not agree and

relying upon the decision of a Division Bench of this Court in *Shanker Lal v. Shyam Sunder Lal*,<sup>1</sup> took the view that the suit was maintainable notwithstanding the decision of the execution Court. The issue about the bar of res judicata was decided as a preliminary issue and against the decision of the trial Court a revision was filed before the District Judge. The revision having been dismissed, Ghansham Singh has filed the present revision in this Court.

2. When this revision came up for hearing before a learned Single Judge he came to the conclusion that another Division Bench had taken a decision contrary to that taken in Shanker Lal's case supra AIR 1934 Allahabad 730 in the case of *Ram Autar Sahu v. B. Bate Krishna*,<sup>2</sup> On this view he was of the opinion that the revision could not be decided unless this conflict was resolved. He accordingly directed the papers to be laid before the Hon'ble the Chief Justice to constitute a Full Bench. The revision was listed thereafter before a Division Bench which too took the same view as was taken by the learned Single Judge. That is how the present revision has been listed before this Full Bench.

3. Learned counsel for the applicant urged that the decision given by the execution Court in the earlier case amounted to a decree and operated as res judicata. He pointed out that it was a case in which not only there was a dispute between two persons on the same side and claiming to be representatives of the decree-holder but also between these two persons on the one side and the judgment-debtor on the other whose stand was that neither of the two was the representative of the decree-holder. The question that was raised before the execution Court was one coming within Section 47 and since the question was heard and finally decided by the execution Court, the decision given by the said Court was a decree operated as res judicata.

4. Learned counsel for opposite party No. 1, however, contended that the decision given by the execution Court was of a summary nature and could not as such operate as res judicata. He pointed out that the said decision was essentially one deciding a dispute between two persons claiming on the same side and could not, therefore, be treated to be "between the parties to the suit in which the decree was passed, or their representatives" within the meaning of Section 47. He also urged that the decision did not have the force of a decree.

5. Having heard learned counsel for the parties, I am, of opinion that the decision given by the execution Court in the earlier case will operate as constructive res judicata. It is true that Ghansham Singh and Smt. Harpiarey were claiming to be the representatives of the decree-holder and were thus in the position of co-plaintiffs. But it cannot be lost sight of that the judgment-debtor too had raised a specific issue that neither of two contenders was the representative of the decree-holder. That a decision operates as a res judicata between co-defendants if certain conditions are fulfilled is well settled. These conditions are :-

1. There was conflict of interest between the defendants,
2. That it must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and
3. That the question between the defendants must have been finally decided.

6. In this connection reference may be made to *Munni Bibi v. Triloki Nath, Kishun Prasad v. Durga Prasad*,<sup>3</sup> *Maung Sein Done v. Ma Pan Nyun*,<sup>4</sup> *Kedar Nath v. Munshi Ram*,<sup>5</sup> *Pooran Chand v. Radha Raman*,<sup>6</sup> and *Chandu Lal v. Khalilunr Rahmao*,<sup>7</sup> *S.P. Misra v. Babuaji*,<sup>8</sup> (para 4); *Dhan Singh v. Joint Director of Consolidation*,<sup>9</sup> The law which applies to a case of co-defendants applies equally to a case of co-plaintiffs. See *Shyama Bhai v. Purshothamdass*,<sup>10</sup> *Bachint Kaur v. Karam Chand*,<sup>11</sup> *Bhudeo Pandey v. Guptaeswar Missir*,<sup>12</sup> *Deoki Amma v. Raghavan*,<sup>13</sup> On the facts of the instant case, as already pointed out above, all the three requirements for a decision to operate as constructive res judicata, between co-plaintiffs or co-defendants, are made out. There was a conflict of interest between Sri Ghansham Singh and Smt. Harpiarey, each of whom was claiming to be the representative of the decree-holder. In judgment-debtor did not take a neutral stand. He specifically pleaded that neither of the two was the representative of the decree-holder. In this way the question as to who was the representative of the decree-holder was necessary to be decided before a relief could be given to either of the two claimants; and the question was heard and finally decided by the execution Court.

7. In my opinion the decision by the execution Court was a decree within meaning of the said term in Section 2(2) of the Code of Civil Procedure which defines a decree as follows :-

" "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 47 or Section 144, but shall not include.....

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

(b) an order of dismissal for default.

Explanation ....."

8. It cannot be disputed that a decree can be executed only at the instance and in favour of someone who could satisfy the requirements of being the decree-holder or his representative. Such person must be one who is capable in law of giving a valid discharge to the decree. A stranger or an importer cannot do so and as such there seems to be no escape from the conclusion that the plea raised by the judgment-debtor in opposition to the claim of Ghansiam Singh and Smt Har Piarey, was one relating to the execution, discharge or satisfaction of the decree within the meaning of Sub-Section (1) of Section 47.

9. In *Khem Singh v. Raghubir Singh*,<sup>14</sup> a Division Bench of this Court held that where a Court in execution adjudicates on the question of rights of the applicant to be brought on record as the legal representative of the deceased judgment debtor the decision is a decree. It was held that such a decision comes under clause (3) of Section 47 of the Code of Civil Procedure and that an appeal lies against it. Same was the view taken by another Division Bench in *Ram Antar's* case AIR 1936 Allahabad 479 (supra). In *N. E. Engineering Co. v. Birmo Devi*,<sup>15</sup> it was reiterated that under clause (3) of Section 47 the question whether a certain person is representative of the parties to the execution case or not is a question which has to be decided by the execution Court under Section 47 and such a decision is appealable under the provisions of the Code.

10. Some controversy was raised at the Bar as to whether a decision under Order 21, Rule 5, Civil Procedure Code could or could not operate as res judicata in a Sub-Sequent suit but I am of opinion that it is not necessary to go into that question in the instant case because of the specific provisions of Sub-

Section (3) of Section 47 which provide that where a question arises as to whether any person is or is not representative of a party such question shall, for the purposes of this section, be determined by the Court. Rules 3 and 4 of Order 22 do not apply to execution proceedings as laid down in Rule 12. Rule 5 of Order 22 is really dependant on Rules 3 and 4. Moreover, when specific provision has been made in Sub-Section (3) of Section 47 itself for the determination of the question as to whether any person is or is not the representative of a party, it cannot be said that the decision made by the execution Court on such a question can be treated to be one under Order 22, R.5. It is for this reason that I find it unnecessary to decide the controversy referred to above as to whether a decision under Order 22, Rule 5 would operate as res judicata or not in a subsequent suit.

11. In *Rama Maruti v. Mallappa Krishna*<sup>16</sup>, it was held that where an order was passed by the execution Court under Section 47(3) after hearing both sides as to whether a person was representative of a party the principle of res judicata applies even though the subject-matter of the two proceedings may be different provided the issue is the same. In this connection it was urged for opposite party No. 1 that in view of the phrase "for the purposes of this Section" occurring in Section 47(3) the decision given by the execution Court in the said Sub-Section was only for the purposes of Section 47 and could not operate as res judicata in a subsequent suit. I am, however, unable to agree with this submission. To me it appears that the phrase aforesaid was really used in order to bring a decision under Sub-Section (3) squarely within the definition of decree as contained in Sub-Section (2) of Section 2. As already pointed out above the definition of decree includes "the determination of any question within Section 47." It was with a view to exclude all speculations on the point as to whether a question which arose and was decided as contemplated by Section 47(3) was or was not within Section 47 that the phrase "for the purposes of this section" was used. In order to ascertain the purpose of Section 47 one has to turn to Sub-Section (1) thereof. The said Sub-Section is to the effect that all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. This Sub-Section left to itself does not provide for any procedure to determine as to whether a person is or is not the representative of a party. Even if Sub-Section

(3) had not been there, the question as to who was a representative of a party would have been necessary to be decided before the execution could proceed. How this question was to be decided, namely, by a separate suit or in a collateral proceeding, would have been a matter of controversy. It was to exclude the possibility of such a controversy that Sub-Section (3) was enacted. If a decision is given under Section 47(3) "for the purposes of this section" the question on which such a decision is given would at once be one within Section 47. As already pointed out above unless the decree-holder or his representative is party to the execution proceedings the decree cannot be executed for there will be no one who could give a valid discharge to the decree. Consequently whether or not a person is the representative of a party necessarily becomes a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of Sub-Section (1) of Section 47. If such a question has been heard and finally decided it will be a decree within the meaning of Sub-Section (2) of Section 2 and would consequently operate as constructive res judicata in a subsequent suit where the same question is raised. In *Rangappa v. Rindawa*,<sup>17</sup> a Division Bench of the Bombay High Court had to construe the phrase "for the purposes of this section" occurring in Section 47(3). Chainani, J., as he then was, held :-

"The object of the provision is to enable execution proceedings to go on and to prevent their abrupt termination by reason of death of one or the other party." Words "for the purposes of this section" in my opinion mean for the purposes of determining the question referred to in Sub-Section (1), that is, all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree. The Court will no doubt decide the question as to who is the representative of a party for the purposes of the proceedings before it but this decision will have the same effect as its decision on any other question and would be binding on the parties to the execution proceedings or their representatives."

**Chainani, J.,**

after referring to the contention of learned counsel for the appellant that the words 'for the purposes of this section' mean that the decision of the Court will

be binding on the parties only in the proceedings in the Section i.e. in the execution proceedings and not in any other proceedings and that it would be open to the parties to reargue the same question in some other proceedings, held -

"Something can undoubtedly be said in support of this view but after careful consideration I consider that the better view is the one indicated by me above for once the executing Court has decided who is the representative of a party its decision on this question will have the same effect as its decision on any other question. It is a general principle of law that the same question should not be litigated twice for otherwise there would be no end to litigation or to use the words of Lord Coke "great oppression might be done under colour and pretence of law."

12. Bavdekar, J., the other learned Judge constituting the Bench held that even though the words "For the purposes of this section" make it clear that when the determination is made the determination is to hold only for the purpose of the section but they do not secure that if the principle of res judicata can be applied in any subsequent suit its operation would be excluded because of those words. The observations made by Chainani, J., in the aforesaid case were followed by a Division Bench of the Madras High Court in *A. Pillai v. Vijayambal*,<sup>18</sup> Relying upon the decision of the Bombay High Court in the cases of *Ram Maruti and Rangappa* (supra), AIR 1942 Bombay 309; AIR 1954 Bombay 139 a learned Single Judge of this Court in *Ram Saroop v. Dy. Director*,<sup>19</sup> held that the decision given by a Court in execution proceedings under Section 47(3), Civil Procedure Code would operate as res judicata between the parties in subsequent consolidation proceedings.

13. The fact that the earlier decision was given in execution proceedings is in my opinion of no consequence. The provisions of Section 11, Civil Procedure Code are not exhaustive. In order to attract the general principle of res judicata, the nature of the proceedings in which the previous decision was given is immaterial : See *Gulab Chand v. State of Gujarat*,<sup>20</sup> It is also well established that the principle of constructive res judicata is applicable to execution proceedings (See *Mohan Lal v. Benoy Kishana*,<sup>21</sup> *Prem Lata Agarwal v. Lakshman Prasad Gupta*,<sup>22</sup> and *Kani Ram v. Kazani*,<sup>23</sup>

14. Likewise the fact that the shop which was the subject matter of dispute in the execution proceedings was different than the one which is in dispute in the suit giving rise to the present revision, would also not present any difficulty. The test of res judicata is the identity of title in the two litigations and not the identity of the actual property involved. See *Raj Lakshmi Dasi v. Banmali Sen*,<sup>24</sup> *Ram Govind v. Bhakta Bala*,<sup>25</sup> and *Smt. Banto v. Smt. Yashoda*<sup>26</sup>

15. Learned counsel for the opposite parties urged that Section 47 does not apply to a case where the dispute arises between a party and his own representative or between the two persons who both represent the same party. In support he placed reliance on *Annamalai Mudali v. Ramasami Mudali*,<sup>27</sup> *Bapanna v. Jaggiyah*,<sup>28</sup> and *Sankaratingam v. Ramaswami*,<sup>29</sup> None of these cases, however, were such where any order had been passed by the execution Court under Section 47(3), Civil Procedure Code and the point as to whether an order passed under Section 47(3), resulted in the "determination of a question within Section 47" or that such an order was one "relating to the execution, discharge or satisfaction of the decree" neither came up for consideration nor was decided in any of the cases referred to above. These cases, therefore, afford no assistance in determination of the question involved in the instant case.

16. Our attention was also invited to *Venubai v. Damodar Vyasrao*<sup>30</sup> *Mst. Sunder v. Sita Ram*,<sup>31</sup> and *Ithack Isaac v. Krishna Kurup*,<sup>32</sup> where it was held that Section 47(3) comes into, operation only where there is a question arising between the parties to the suit or their representative relating to the execution, discharge or satisfaction of the decree and it has no application to a case in which the dispute is between two rival representatives of one party only. In *Anant Prakash v. Dharman Nand*,<sup>33</sup> it has been held that Section 47(3) is meant for cases where both parties are claiming to be the legal representatives of the deceased decree-holder.

17. In my opinion it is not necessary in the instant case to go in detail into these cases inasmuch as here the judgement-debtor had also specifically raised the issue that neither Ghansham Singh nor Smt. Har Piarey was the legal representative of Smt. Paryati and as such the dispute which was decided by the execution Court was between both the parties to the suit or their representatives within the meaning of Section 47.

18. Learned counsel for the opposite parties then relied upon certain observations of a Division Bench of this Court in *Moti Chand v. Mahabir Prasad*,<sup>34</sup> In that case a question had arisen as to whether, an earlier order stating that the mortgage debt had been split up and there ought to be a ratable reduction in the decretal amount, operated as *res judicata*. In that connection it was held that every order passed by execution Court in the course of proceeding under Section 47 does not necessarily amount to a decree. It was held that the mere determination of a question would not be sufficient but that determination must amount to 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 the matters in controversy. It was pointed out that the earlier order was in the nature of an interlocutory order and the objection of the judgment debtor was not disposed of by the Court conclusively as it had still to determine the market value of the different parts of property and to fix the ratable liability. It would be seen that on the facts found in that case the earlier order *ex facie* was not a decree and the decision given in that case, therefore, is clearly distinguishable.

19. Learned counsel for opposite party No. 1 then referred to the decision of the Division Bench of this Court in *Shanker Lal's case* AIR 1934 Allahabad 730 (*supra*). In that case one Smt. Ram Devi was the judgment-debtor. The decree-holder in execution of his decree against Smt. Ram Devi had sought to execute the decree by sale of her assets and had impleaded certain persons as the legal representatives of Smt. Ram Devi. The decree-holder was not to question who was the real heir to estate of the deceased because all that he was interested in was the realization of the amount due to him out of the assets of the deceased judgment-debtor. Out of the persons impleaded as legal representatives of Smt. Ram Devi aforesaid, one Shyam Sunder on the one hand and certain other relations of Smt. Ram Devi on her father's side on the other claimed to be heirs of Smt. Ram Devi. The execution Court recorded a finding in favor of Shyam Sunder. Against that order an appeal was filed and the question arose as to whether the appeal was maintainable. It was held that under Order 22, Rule 12, Civil Procedure Code it was not absolutely necessary for the execution Court to apply the provisions of Rules 3, 4 and 8 of that order, to an execution proceeding but it was necessary in order to avoid all future trouble to have all

possible claimants before the Court in case they wanted to urge any objection. It was pointed out that the execution Court thinking that it was its duty to proceed under Order 29 Rule 5 and determine the question who was the heir of the deceased, recorded a finding in favor of Shyam Sunder. The learned Judges took the view that the dispute decided was one between two sets of persons who were claiming to be the heirs of the deceased judgment-debtor and was not at all a dispute between the decree-holder on the one side and the judgment-debtor on the other. An analogy was drawn from the decision made in proceedings under Order 22, Rule 5, Civil Procedure Code and on the view that since a decision under Order 22, Rule 5 was not appealable, an order in an execution proceeding deciding who should be treated for the purposes of the execution as a representative of the deceased, was also not appealable inasmuch as it was a summary order.

20. It appears that the attention of the Bench in Shanker Lal's case AIR 1934 Allahabad 730 was not invited to Sub-Section (3) of Section 47. In these circumstances, the Bench did not apply its mind about the effect of a decision given under Section 47(3) nor was the question considered whether such a decision would be decree, the definition of which includes the determination of any question within Section 47. The Division Bench appears to have been guided by the fact that the order passed by the execution Court stood on the same footing as if it was so order under Order 22, Rule 5, Civil Procedure Code and was of a summary nature. This question, on the other hand, was specifically considered in the case Ram Autar, supra, and it was held that a decision under Section 47 (3) is a decree. In case the observations made in Shanker Lal's case are interpreted to impliedly include within its sweep that a decision given under Section 47(3) is not a decree then, in my opinion, the said case does not lay down correct law.

21. In the instant case it was the decree-holder who had died. As already noticed both Ghansham Singh and Smt Harpiarey had made separate applications for execution. They had not made simple applications for being substituted as legal representatives of the deceased decree-holder. In fact a Full Bench of this Court in *Baij Nath v. Ram Bharos*,<sup>35</sup> held that there is no rule of law which enables the legal representative of a deceased decree-holder to apply for mere substitution of names. He must apply, whenever he does apply, for

fresh execution, even when his predecessors' application is pending. This is an additional reason on account of which the decision of the execution Court in the instant case could not be said to be of a summary nature analogous to an order passed under Order 22, Rule 5, Civil Procedure Code

22. In the result, I am of opinion that the suit giving rise to the present revision is barred by principle of constructive res judicata.

23. The revision is accordingly allowed and the suit dismissed with costs.

**Satish Chandra, J.** :- I concur.

**H.N. SETH, J.** :- I agree.

Revision allowed.

Cases Referred.

1. AIR 1934 All 710
2. AIR 1936 All 479
3. AIR 1931 PC 231
4. AIR 1932 PC 161
5. AIR 1935 PC 139
6. AIR 1943 All 197
7. AIR 1950 PC 17
8. AIR 1970 SC 809
9. AIR 1973 SC 283
10. AIR 1925 Mad 645
11. AIR 1948 Lah195
12. AIR 1951 Pat 537
13. AIR 1961 Ker 224
14. AIR 1925 All 578
15. 1961 All LJ 669
16. AIR 1942 Bom 309
17. AIR 1954 Bom 139
18. AIR 1973 Mad 64
19. 1970 All WR (HC) 721

20. AIR 1965 SC 1153
21. AIR 1953 SC 65
22. (1970) 3 SCC 440: (AIR 1970 SC 1525)
23. (1972) 2 SCC 192: (AIR 1972 SC 1427)
24. AIR 1953 SC 33
25. AIR 1971 SC 664
26. 1973 RD 464 (HC)
27. AIR 1941 Mad 161 (FB)
28. AIR 1943 Mad 407
29. AIR 1945 Mad 25
30. AIR 1933 Bom 396
31. AIR 1941 Lah 342
32. AIR 1957 Tran Coc 5
33. AIR 1957 Pun 64
34. AIR 1930 All 638
35. AIR 1927 All 165 (FB)