

# PATNA HIGH COURT

Ram Narain Singh

Vs

Basudeo Singh

(Beavor, J.)

02.08.1946

## JUDGMENT

### **Beavor, J.**

1. This is an appeal by the decree-holder against a decision of the Additional Subordinate Judge of Chapra, reversing a decision of the Munsif passed under Section 47, Civil Procedure Code, on a petition objecting to execution of the decree.

2. The decree-holder brought a suit on the basis of a mortgage bond, and he impleaded as defendants the executant of the bond and his sons. The trial Court dismissed the suit as against the sons, holding that the claim was barred by limitation as against them. On appeal by the decree-holder, the first appellate Court dismissed the entire suit, but on second appeal to this Court it was pointed out that the lower appellate Court had failed to consider or notice an admission in the written statement of the executant, and the original Court was directed to pass a personal money decree against the executant for an amount which was to be ascertained by that Court, and the original Court having ascertained the amount passed a decree accordingly. That is the decree which it is now sought to execute.

3. The judgment-debtor has died, and the decree, holder has brought his sons on the record as his legal representatives and is seeking to execute his decree as against a share of the joint family property which would represent the share obtainable by the father, the original judgment-debtor, on a partition prior to his death.

4. The sons, who are now impleaded as the legal representatives of the original judgment-debtor, have objected that as the suit was dismissed against them the decree cannot now be executed against them, or against any property in their hands. The decree-holder has urged that this view of the law is incorrect, and further that this contention of the sons is barred by the principles of res judicata. The executing Court held that the decree was not capable of execution against the sons, but that this claim of the sons was in its turn barred by res judicata. On appeal the Subordinate Judge reversed the decision on the question of res judicata, but upheld the decision that the decree was not capable of execution against the sons. He, therefore, allowed the appeal and the objection petition of the sons, with the result that the decree-holder's application for execution would fail. Hence the present appeal to this Court by the decree-holder.

5. Before us the decree holder has challenged the finding of the lower appellate Court on the question of res judicata, and he has also challenged the finding that the decree is not capable of execution against the sons.

6. Now, if the objection be not held to be barred by the principles of res judicata, I think this case would need a very careful examination in order to determine whether the decision of the Privy Council in *Raja Ram v. Raja Bakhsh Singh*<sup>1</sup>, would apply to the facts of this case so as to prevent the decree-holder from executing his decree in the manner sought; but as I have come to the conclusion that this contention on the part of the sons of the original judgment-debtor is barred by the principles of res judicata I do not think it is necessary to examine this matter further.

7. In order to explain how the plea of res judicata arises I must refer to certain proceedings in the execution case. The decree-holder filed his execution petition on 28-5-1943, against the sons, the father the original judgment-debtor being dead by that time, though we are informed that there was a previous execution case against the father during his life-time. On 20-1-1944, the sons filed an objection under Section 47, Civil Procedure Code, claiming that the decree was incapable of execution as against them. That application was dismissed for default in presence of the decree-holder on 6-5-1944, and on 11-5-1944, the decree-holder was directed to file requisites for valuation by 18-5-1944, which he did. The sons applied under Order 47, Rule 1, and Section 151, Civil Procedure Code, to set aside the order, dated 6-5-1944, dismissing their application for default, but that petition was rejected on 17-7-1944. Then the sons filed another Misc. case No. 371 of 1944 on 22-7-1944. That also was dismissed, and an application for restoring that petition was filed on 11-12-1944 and was in turn itself dismissed for default on 10-3-1945. Meanwhile, on 21-12-1944, the application objecting to execution out of which the present appeal arises was filed. It is to be noted at once that two previous applications or objection petitions against execution had been filed by these same sons and had both been dismissed for default. Both dismissals took place in the presence of the decree-holder.

8. The learned Munsif in holding that the plea was barred by the principles of res judicata relied on a decision of this Court in *Mahadeo Prasad Bhagat v. Bhagat Narain Singh*<sup>2</sup> That was a case in which a money-decree was obtained on the footing of a mortgage in which respect the facts are similar to those now before us. Property was sold in execution of that decree, and certain objections were put in by the judgment-debtor as to the validity of the execution proceedings. On two occasions the question whether the sale was a valid sale, that is to say, whether the executing Court had jurisdiction to sell the property in execution of a money-decree was mooted but not decided, yet objection petitions were all dismissed; and the property having come into the possession of the purchaser a suit was brought claiming a declaration that, there having been no sanction of the Commissioner under the Chota Nagpur Encumbered Estates Act, the sale to the defendant was void. It was held that the objection having been raised under Section 47, though not decided, operated as res judicata. In the judgment reference is made to Expl. IV of Section 11, Civil Procedure Code It seems probable, however, that this is a clerical error for Expl. V. That decision seems to be in point in the present case. Still more certainly the decision of this Court in *Jago Mahton v. Khirodhar Ram*<sup>3</sup> will apply to the facts of the present case. In that case a judgment-debtor objected to the execution of a decree on the ground that the application was barred by limitation. His objection was dismissed for default. It was held that he was not entitled, when a subsequent application for execution was made, to object that the previous application was time barred. This decision was based on a decision of the Privy Council in *Mungul Pershad*

*Dichit v. Grija Kant Lahiri*<sup>4</sup>

9. In a later decision of this Court in *Nageshwar Prasad v. Jai Bahadur Singh*<sup>5</sup> the previous decision in *Jago Mahton v. Khirodhar Ram*<sup>6</sup> was distinguished and the ground of distinction was that in the case in *Nageshwar Prasad v. Jai Bahadur Singh A.I.R. 1932 Pat. 357 (SUPRA)* the order of dismissal was passed in the absence of both parties. It seems to me that the very ground of distinction adds weight to the decision in *Jago Mahton v. Khirodhar Ram A.I.R. 1924 Pat. 122(SUPRA)* in a case in which the order of dismissal for default on the part of the judgment-debtor was passed in the presence of the decree-holder.

10. It seems to me also that this ground of distinction is easily explainable on the principle enunciated by the Privy Council in *Kalipada De v. Dwijapada Das*<sup>7</sup>, It was there laid down that the terms of Section 11, Civil Procedure Code, are not exhaustive of circumstances in which the rule of res judicata applies. In the course of their judgment their Lordships quoted from the judgment of Sir Lawrence Jenkins in *Sheo Parsan Singh v. Ramnandan Prasad Narayan Singh*<sup>8</sup> as follows:

In view of the arguments addressed to them their Lordships desire to emphasise that the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time. It hath been well said' declared Lord Coke, 'interest reipublice ut sit finis litium,--otherwise great 'oppression might be done under colour and pretence of law'. Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by the Jaw, each citing for this purpose the text of Katyayana, who describes the plea thus: 'If a person though defeated at law sue again he should be answered, 'you were defeated formerly.' This is called the plea of former judgment: (see the Mitakshara Vyavahara), Book II, Chap. I, edited by J.R. Gharpure, p. 14, and the Mayuka, Chap. I, Section 1, p. 11 of Mandlik's edition). And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

11. It has always been recognized in warfare that if one side flees and leaves his opponent in command of the battle field he stands defeated, but if both sides retire there has been no decision and neither can claim to be the victor. Exactly the same principle should be applied to the mimic warfare of the Courts.

12. The next case I will consider is *Prannatha Nath Malia v. I.S. Mackeys*<sup>9</sup> in which it was held that a previous application for amendment of a decree having been rejected without adjudication on merits, the dismissal of that application did not operate as a bar, on the principles of res judicata, to the hearing of the subsequent application. That decision, however, appears to be based on the principle of the decision in *Nageshwar Prasad v. Jai Bahadur Singh*<sup>10</sup> because the order of dismissal for default was passed in the absence of both parties.

13. The question of constructive res judicata in execution proceedings was also considered by this Court in *Mrs. Lall v. Raj Kishore Narain Singh*<sup>11</sup> where the decision in *Jago Mahton v.*

*Khirodhar Ram A.I.R. 1924 Pat. 122(SUPRA)* was again followed.

14. On behalf of the judgment-debtors we were referred to the decision in *Prithi Mahton v. Jamshed Khan*<sup>12</sup> wherein Dawson-Miller C.J. stated:

I further think, however, that although the doctrine laid down in Section 11, Civil Procedure Code relating to res judicata may be applied and rightly applied in certain proceedings in execution arising out of the same judgment so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought raising points which have already been decided in execution cases fought between the same parties, still I do not think that the special rules laid down in the explanation to that section which go beyond the ordinary doctrine of res judicata ought to be applied generally in execution cases.

That decision was, however, explained by Wort J. in the case in *Mahadeo Prasad Bhagat v. Bhagat Narain Singh*<sup>13</sup> already cited, and that decision cannot be taken as weakening the authority of the decision in *Jago Mahton v. Khirodhar Ram A.I.R. 1924 Pat. 122(SUPRA)*, which I find clearly covers the facts of the present-case.

15. For these reasons I would allow this appeal with costs throughout, and allow the decree-holder's application for execution to proceed.

**Meredith, J.**

16. I agree, and have nothing to add.

Cases Referred.

1AIR 1938 PC 7 : 1938-47-LW 1  
2A.I.R. 1938 Pat. 427: 177 I.C. 810  
3A.I.R. 1924 Pat. 122  
4(82) 8 Cal. 51: 8 I.A. 123  
5A.I.R. 1932 Pat. 357  
6A.I.R. 1924 Pat. 122  
7AIR 1929 PC 22 : AIR 1930 PC 22  
8A.I.R. 1916 P.C. 78  
9A.I.R. 1933 Pat. 208  
10A.I.R. 1932 Pat. 357  
11A.I.R. 1933 Pat. 658  
12 A.I.R. 1922 Pat. 289  
13A.I.R. 1938 Pat. 427: 177 I.C. 810