RAJASTHAN HIGH COURT

Barkat Ali

Vs.

Badrinarain

Civil Spl. Appeal No. 15 of 1981
(Rajesh Balia and S.K. Garg, JJ.)

26.07.2000

JUDGMENT

Rajesh Balia, J

1. This special appeal has arisen in the following circumstances. The respondents are legal representative of the decree-holder Badrinarain and the appellants are the legal representatives of the decree- holder Abdul Ghani. The said Badrinarain obtained a decree against Abdul Ghani in a mortgage suit on 11.5.52 in which an amount of Rs. 11, 194.25 was determined as payable by the said Abdul Ghani from the date of final decree. The successive execution applications were filed for recovering the same sum. First application for execution was filed on 7.10.52 in which proceedings the decree was partially satisfied. The proceedings ended on 21.12.56. The second execution resulted in further partial satisfaction. The said execution terminated on 25.9.1957. The third execution application which was filed on 20th May, 1958 resulted in further partial satisfaction of the decree and the said proceedings ended on 6.8.1960. The present execution application for the recovery of remainder sum was filed on 30th January, 1971. The notice of the application was issued to all the appellants and another son who was reported to be dead by the process-server. The appellant No. 1 accepted service on behalf of appellants Nos. 2 and 3, who were then minors. The notice was served on 20.4.72 for hearing on 3.6.73. An appearance was filed by counsel on 3.6.73 who sought time to file objections which was granted and the proceedings was adjourned to 5.8.72. On 5.8.72 again adjournment was sought which ws granted and the case was adjourned to 12.8.72. On 12.8.72 also, the proceedings could not proceed further because the learned Presiding Judge was on leave and the case was adjourned to 16.9.72. On 16.9.72, the Court finding that no objections have been filed till then by the judgment-debtor, the decree holder was directed to file

expenses for carrying out attachment within five days on the submission of which the warrants of attachment could be issued and the proceedings were adjourned to 21.9.72. The attachment warrant was not issued prior to 21.9.72. On finding that expenses for attachment have been filed, the executing Court ordered for the issuance of warrant of attachment on 21.9.72. After issuance of warrant of attachment, the objections were filed by the appellant on 21.9.72 pleading *inter alia* that the execution proceedings were barred by time and that amount for which the execution was sought was also not correctly stated. The executing Court found that since after completing preliminaries of issuing notice and finding that no objections have been filed in spite of the service under Order 21, Rule 22 and the Court has proceeded to next stage of execution for attaching the property under Order 21, Rules 23 and 24 of Civil Procedure Code any objections raised subsequent thereto cannot be entertained as the same are barred by principles of constructive *res judicata*. Against the dismissal of the objections dated 16.11.72 by order dated 13.7.74 an appeal was preferred before this Court which has been dismissed by the learned Single Judge. By judgment under appeal, the learned Single Judge found that the objections filed on 16.11.72, after the warrant of attachment was issued, could not be entertained by the executing Court as the same was barred by principles of constructive *res judicata*. Ancillary issues raised by the learned counsel for the appellant were also found to be not sustainable and the appeal was dismissed on 16.1.1981.

2. The same contentions have been raised before us. In our opinion, in substance, the only question that arises for consideration is whether on failure of the judgment-debtor to raise objection to the execution of the decree in pursuance of notice under Order 21, Rule 22 within the time allowed and the Court has proceeded under Order 21, Rule 23 for attachment of property, is the judgment-debtor precluded from raising any objection to the continuance of the execution proceedings ?

3. It has been vehemently contended by the learned counsel for the appellants that the plea of limitation being plea of inherent lack of jurisdiction cannot operate as *res judicata*. The Court is entrusted with a duty even if no objection has been raised to examine the question of limitation and it is only after finding that the institution of the proceedings before it is within limitation that it acquires the jurisdiction to entertain the same. Limitation is a condition precedent for exercise of jurisdiction. If the proceedings are not instituted within jurisdiction (limitation ?), the Court has no jurisdiction to proceed in the matter and all proceedings are void at the inception. He

placed reliance on the decision of the Supreme Court in *Andhra Industrial Works v. Chief Controller, Imports,* [1] wherein the Court was considering the cases can be considered giving rise to breach of fundamental rights entitling a petitioner to invoke the jurisdiction of the Supreme Court under Article 32 of the Constitution. The Court said :

> "Such violation, actual or potential, may arise in variety of ways, and it is not possible to give exhaustive classification. But on the analogy of Ujjam Bai's case (1963) 1 SCR 788 instances, most usual in relation to laws regulating the citizen's right to carry on trade or business may be catalogued as under:
> (a) xxx
> (b) where the statute concerned in *ultra vires* (*intra vires* ?) but the impugned action is without jurisdiction on account of a basic defect in the constitution of the authority or tribunal or owing to the absence of a preliminary jurisdiction fact i.e. a condition precedent to the exercise of jurisdiction.
> (c) xxx"

4. We are of the opinion that the reliance on the aforesaid decision of the Supreme Court decision is misplaced. It is not a case where we are concerned with breach of any fundamental right affecting his right to carry out trade or business under Article 19(1)(g) of the Constitution. We are concerned here to consider whether a plea of limitation affects the proceedings so fundamentally that it renders the exercise of jurisdiction a nullity from the inception not resulting in any fruitful order. The argument emanates from the prohibition imposed on the Courts to entertain any suit, appeal or application which is not presented within the period of limitation under Section 3 of the Limitation Act.

5. The question is no more *res integra* and open to doubt and settled by the Highest Court of Land, the Supreme Court, in *Ittyavira Mathai v. Varkey Varkey,* [2]

6. This was a case in which the appellant before the Supreme Court was defendant in a suit filed by the plaintiffs for recovery of the property in his possession. The plaintiffs had claimed their right to the property as acquired in execution of a decree passed against the father of the appellant before the Supreme Court in earlier Suit OS No. 59/1093. The appellant was claiming the right to property as transferee under a sale from his father which was challenged as Benami and Sham. The suit of the

plaintiff was decreed against the defendant in respect of some of the items. In the appeal before the Supreme Court, the appellant urged that the decree passed in favor of one Ramalinga in OS No. 59/1093 was a nullity because the suit was barred by time and therefore it did not confer any right on the purchaser of the property in execution thereof. The Court repelled the contention by holding that where a Court has jurisdiction over the subject matter and the party and passes a decree in such suit, it cannot be treated as a nullity and ignored in subsequent litigation even if the suit is barred by time. The failure on the part of the Court to discharge its obligation under Section 3 was held to be an error of law which could be corrected only in the manner laid down in the Civil Procedure Code. Madholkar, J. speaking for the Court, said :

> "....Even assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the Court decreed it, the Court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against. But it well settled that a Court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, Courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities.....If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity."

7. Therefore, though the question of limitation may be touching the jurisdiction of the Court and is liable to be corrected if the Court by making wrong application of law of limitation entertains such proceedings, only in the manner provided under the law either by taking recourse to appeal or revision but does not render the order passed, whether a decree or in appeal or application inoperative. An order passed by a Court

having jurisdiction over subject matter and over the parties cannot be ignored as nullity unless such erroneous orders are corrected in accordance with law, and such orders bind the parties in a subsequent litigation or before the same Court in the subsequent stage of the proceedings. The principle that a decision on question of limitation, therefore, even if erroneous, operates as *res judicata* in subsequent proceedings, cannot be doubted.

8. We need not repeat the discussion with reference to other cases referred to by the learned counsel in support of their respective contentions which had already been referred to before the learned Single Judge with whose conclusion we entirely agree.

9. The bar of principles of *res judicata* as well as constructive *res judicata* can be raised a plea of limitation also, subsequent to earlier decision, is well established since the decision on of the Privy Council in *Raja of Ramnand v. Velusami Tevar,* [2] In this case, on an earlier occasion on 13th December, 1915, the executing Court had recognized the transfer of decree and allowed the applicant assignee of a decree to proceed with the execution of the decree. The material portion of the order passed by the executing Court as reproduced by the Board in its opinion reads as under:

> "The transfer of the decree in favor of the petitioner is recognized and petitioner allowed to execute the decree....petitioner may file a fresh application for attachment."

10. One of the defendants applied for review of the said decision on 24.8.1916 on the ground that the application was barred by time. The review application itself was dismissed as not filed within limitation. However, in the order dated 13th December, 1915 or in the order rejecting review application no reference was made to the question of limitation nor the Court reserved any question of limitation for future determination. In pursuance of the said order, the transferee, of the decree proceeded to obtain the attachment of such properties of the respondents as were available to him in execution. In the proceedings to obtain attachment in furtherance of the application, in which order was made on 13th December, 1915, allowing the transferees to proceed with the execution of the decree, the executing Court entertained the petition as to plea of limitation and accepted the same and dismissed the execution application as barred by time. The order of the executing Court was upheld by the High Court in appeal. The Board found that though no reference has been made to the plea of limitation in

the order dated 13th Dec., 1915 yet it operated as *res judicata*, the Board opined :-

> "Their Lordships are of the opinion that it was not open to the learned Judge to admit this plea, the order of the 13th December, 1915 is a positive order that the present appellant should be allowed to execute the decree. To that order the plea of limitation if pleaded, would according to the respondent's case have been complete answer, and therefore it must be taken that a decision was given against the respondents on the plea. No appeal was brought against the order and, therefore, it stands as binding between the parties. Their Lordships are of opinion that it is not necessary for them to decide whether or not the plea would have succeeded. It was not only competent to the present respondents to bring the plea forward on that occasion, but it was proposed to rely on it, and moreover it was incumbent on them to do so if they proposed to rely on it, and moreover, it was in fact brought forward and decided upon. No appeal was brought from the order then made, and therefore, it was not competent for the subordinate Judge to admit the plea on subsequent proceedings, or to consider it in his order of the 31st March, 1917, and the same remark applies to the judgment of the High Court on the 17th March, 1918, from which this appeal is brought."

11. In *Mohanlal Goenka v. Benoy Kishna Mukherjee,* [3] Supreme Court said that principle of constructive *res judicata* is applicable to execution proceedings is no longer open to doubt. It was a case in which the execution application was made and a notice of that application was served upon the judgment-debtor. No objection was raised to proceed with the execution proceedings resulting in sale of his property. He filed an application for setting aside the sale, the Court said :

> "...failure to raise such an objection which goes to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constructive *res judicata*....'

Other decisions completely answer the contention of the appellant. We hold that a decision on question of limitation, like any other decision operates as *res judicata* in subsequent proceedings, as well as in subsequent stage of the same proceedings and that in execution proceedings also principle of constructive *res judicata* applies.

12. Learned counsel for the appellant urged that in order to raise the plea of *res*

judicata there must be an earlier order of the Court deciding the issue and the principle of *res judicata* does not apply to an interlocutory order.

13. We are of the opinion that this contention of the learned counsel too has no merit. Firstly, as we have already seen that principle of constructive *res judicata* applies to execution proceedings also, the constructive *res judicata* pre-supposes that infact there is no determination of the issue but it is impliedly deemed to have been decided between the parties which arose in the circumstances where a plea which ought to have been raised in the earlier proceedings by the parties and if the party now seeking to raise has an opportunity to raise it but has failed to raise if at the earlier occasion, he is precluded from raising the same in the subsequent proceedings on the principle of constructive *res judicata*. Therefore, the question that there has to be an order deciding the issue only then the principle of *res judicata* can apply, does not take into consideration the basic premise on which the constructive *res judicata* operates.

14. Reliance in this connection was placed by the learned counsel for the appellants on *Sheodan Singh v. Daryao Kunwar,* [4]

15. We find no support for this contention in the aforesaid decision. A close reading of the decision reveals that there were four civil suits raised between the parties. Namely 37 of 1950, 42 of 1950, 77 of 91 and 91 of 1950 for different reliefs. However, the common question between the parties in the aforesaid suit were about the title of the plaintiff. The title of the property was decided in favor of one Smt. Daryao Kunwar in Suit No. 37 of 1950 and on the basis of this finding suit No. 91 was decreed in favor of Daryao Kunwar. Appeals was filed against the decree passed in Suit No. 37 by the aggrieved party in which the finding as to title of Smt. Daryao Kunwar was recorded. Appeals against other decisions were also filed. The two appeals were filed in the High Court viz. against the decree in Civil Suit No. 37 of 1950 and decree in suit No. 42 of 1950 and other two appeals were filed against respective decrees in the Court of the District Judges which were also transferred to the High Court. The appeal filed in the High Court in Suit No. 91 was dismissed as barred by time and appeal arising out of Suit No. 77 was also dismissed on the ground of failure of the appellants' father to apply for translation and printing of the record as required by the rules of the High Court. On the basis of these two dismissals of the appeals, the respondents in other two appeals which were pending in the High Court in Suit No. 37 of 1950 and Suit No. 42 of 1950 on the ground that since finding about title of Smt. Daryao Kunwar has become final on dismissal of other two appeals, the same operates as *res judicata*. The

Full Bench to whom the question about operation of *res judicata* was referred accepted the plea and dismissed the other two appeals also. In appeal before the Supreme Court, it was contended that decision of appeals viz. one dismissing the appeal on the ground of limitation and another for non-compliance were not decisions on merit, hence will not operate as *res judicata*. The Supreme Court negatived the contention and said :

> "We are of the opinion that where a decision is given on the merits by the trial Court and the matter is taken in appeal and the appeal is dismissed on some preliminary grounds, like limitation of default in printing, it must be held that such dismissal when it confirms the decision of the trial Court on the merits itself amounts to the appeal being heard and finally decided on the merits, whatever may be the ground of dismissal of the appeal."

16. We do not see any general principle forming the ratio of the decision that interlocutory order as of rule does not operate as *res judicata*.

17. The question had arisen earlier in *Satyadhyan v. Smt. Deorajin Debi,* [5] The Court made the following observations which bring out the cases in which the principles of *res judicata* applies in two stages of the same litigation and an interlocutory order falling in that category where principle of *res judicata* applies. The Court said :

> "The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

18. When the Court has decided a matter, it is certainly final as regard that Court. However, in future litigation by way of appeal, the Court opined that an interlocutory order, which has not been appealed either because no appeal lay or even though an appeal lay an appeal was not taken, can be challenged in an appeal from a final decree or order, and such decision at earlier stage of the proceedings shall not bind the appellate Court in appeal from the final order in a proceeding, during the course of which such order was made.

19. This makes abundantly clear that so far as the Court deciding the matter in

furtherance of proceeding further in the case it is not permissible to allow the parties to agitate and re-agitate the same issue again so as to stall a smooth progress of the case before it. It also makes abundantly clear that an interlocutory order against which no appeal has been proved or even if appeal has been proved under Order XXXXIII but if that has not been appealed but if there be an appeal against the final order, then in such event the order of the lower Court at earlier stage of proceedings does not bind the appellate Court, it is not prevented from going into the question of decision made earlier.

20. In *Arjun Singh v. Mohindra Kumar,* [6] the Court said :

> "Interlocutory orders are of various kinds : some like orders of stay, injunction or receiver are designed to preserve the *status quo* pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the Court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequent emerge. As they do not impinge upon the legal rights of parties to the litigation the principles of *res judicata* does not apply to the findings on which these orders are based....There are other orders which are also interlocutory, but would fall into a different category, the difference from the ones just now referred to lies in the fact that they are not directed to maintaining the *status quo*, or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, to put an end to the ligation. The case of an application under Order 9, Rule 7, Civil Procedure Code, would be an illustration of that type."

21. However, the Court further considering the question as *res judicata* held :

> "Scope of principle of *res judicata* is not confined to what is contained in Section 11 but is of more general application. Again, *res judicata* could be as much applicable to different stages of the same suit as to finding on issues in different suits....Where the principle of *res judicata* is invoked in the case of the

different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides the decision being reached, as well as the specific provisions made on the material and relevant factors to be considered before the principle is held applicable."

22. As the matter related to an order passed under Order 9 Rule 7, the Court found that it was an order to which principle of *res judicata* does not apply.

23. These two decisions fairly establish that the principle of *res judicata* applies not only between two separate proceedings but general principle of *res judicata* applies at the subsequent stage of the same proceedings also and the same Court is precluded from going into that question again which has been decided or deemed to have been decided by it at earlier stage. If an appeal lay against that order and against the final order that may be passed in the pending proceedings for which the question can be raised then the question cannot be prevented from being agitated in appeal against final order. But so far as the Court which decided the issue or question at an earlier stage is bound by general principles of *res judicata*, which also include the principle of constructive *res judicata*.

24. Order 21 Rule 22 culminates in end of one stage before attachment of the property can take place in furtherance of execution of decree. The proceedings under Order 21 Rule 23 can only be taken if the executing Court either finds that after issuing notice under Section XXI Rule 21 the judgment-debtor has not raised any objection or if such objection has been raised, the same has been decided by the executing Court. The sub-Rule (1) as well as sub-Rule (2) under Order 21 Rule 22 operates simultaneously on the same field. Sub-Rule (1) operates when no objection is filed then the court proceeds and clears the way for going to the next state of the proceedings namely attachment of the property and if the Court finds objections on record then it decides the objections in the first instance and thereafter clears the way for taking up the matter for attachment of the property if the objections have been over- ruled. Whether the order is made under sub-Rule (1) and sub-Rule (2) it has the effect of determining the preliminary state before the attachment process is set in motion. In this background, the order of the Court to proceed with attachment on finding that no objection has been raised also operates as an order deciding the preliminary stage of the execution proceedings and operates as if the judgment-debtor has no objection to file. If thereafter, the judgment-debtor wants to raise an objection in the same

proceedings in the absence of any modification of order passed under Order 21 Rule 22 sub-Rule (1) or (2) he has to take recourse to get ride of the order by way of appeal. There is no dispute and it has not been agitated that the order for proceeding by the judgment under Order 21 Rule 22 amounts to a decree under Section 47 of the Civil Procedure Code and is appealable as a decree i.e. to say it is not an appeal against the interim order but an appeal against the decree which is provided against the final order only that means that at the different stages of the execution orders passed by the executing Court have been attached finality unless they are set aside by way of appeal before the higher forum else they bind the parties at the subsequent stage of the execution proceedings so that the smooth progress of execution is not jeopardized and the stage which reached the finality by dint of various orders of the Order 21 operates as *res judicata* for the subsequent stage of the proceedings. Since the order passed at different stage itself operates as decree and appealable as such, the same cannot be challenged in appeal against subsequent orders also, because appeal against an order passed under Order 21 Rule 22 does not fall as appeal against order at initial stage but amounts to a decree finally determining the question. That is why no appeal against orders made under Order 21 have been provided under Order 43. In this background where a judgment-debtor has an opportunity to raise objection which he could have raised but failed to take and allowed the preliminary stage to come to an end for taking up the matter to the next stage for attachment of property and sale of the property under Order 21 Rule 23 which fell within the above principle, the judgment-debtor thereafter cannot raise such objections subsequently and revert back to earlier stage of proceedings unless the order resulting in termination of preliminary stage which amounts to a decree is appealed against and order is set aside or modified.

25. It will be profitable here to refer to the decision of the High Court in *Th. Amar Singh v. Gulab Chand,* [7] wherein the Court disagreed with the view taken by the Allahabad High Court in *Gendalal v. Hazarilal,* [8] that where an objection to execution is taken but it is not dismissed on merits or is dismissed for default and the application for execution does not become fructuous, the judgment debtor is not debarred from subsequent raising the question that application was not within limitation and that where no objection is taken but the application for execution does not fructify. The judgment-debtor is not debarred by the principle of *res judicata* from raising the question of limitation (sic), and has followed the view expressed by the Madras High Court in *Desayi Venkatranga Reddy v. Paraku Chinna Sithamma,* [9] holding that the judgment-debtor who ignores a notice of the Court requiring him to show cause why

execution should not be issued against him and omits to raise any objection, should not be permitted to ignore an adjudication directing execution at a later stage, said :

> "The effect of the order is that all pleas is bar, if any, go by the board, there is absolutely no justice or equity in his favor and it will be wholly undesirable to set a premium on default and contumacy. The consideration that a notice under Order 21 Rule 22 is not accompanied by a copy of the application for execution as also those relevant for in connection with suits should to have much weight in execution cases which are concerned merely with the enforcement of decisions bindings on parties. There is no reason why default on the judgment-debtor in this connection should not be seriously viewed."

26. This is in consonance with the object of speedy disposal of the execution proceedings and to vouch against protraction of execution of decrees by unscrupulous judgment-debtors when rights between the parties have finally been decided and the decree-holder is entitled to reap its fruits as expeditiously as possible. We are in agreement with the same.

27. It was then contended by learned counsel for the appellants that the debt in question being mortgage debt and the suit decree was for enforcement of a mortgage in execution of such decree, there is no requirement of attaching the property because the property is already subject to charge and attachment is wholly unnecessary. No notice can be taken to entail its consequences on subsequent proceedings. Reliance was placed on the case of *A. Choudhary & Co. v. A.I. Syndicate*, [10]

28. Having given our careful consideration. We find no substance in it. Order 21 Rule 54 which provides for attachment of immovable property, requires making of an order prohibiting the judgment-debtor from transferring or charging the property in any way and prohibits all persons from taking any benefit from such transfer or charge. Thus, the attachment of property acts as an injunction against the owner of such property from exercising his right to alienate the property at all, whereas the effect of creation of mortgage is to create the charge which is in favor of mortgagee as a security for repayment of loan for which the property stands as security. The effect of the mortgage by the owner of the property nowhere affects his right to alienate the property. The effect of subjecting the mortgage is only that any transferee or the owner of the property takes the remaining interest of the owner namely and equity of

redemption. He gets the proprietary right in the property subject to the rights of the mortgagee to enforce his claim against the property as security. Thus, two obligations viz. one under attachment and another under mortgage operate in different fields. We do not see any analogy between the fact of creating a charge in the property by holding, it as a security for repayment of the debt and the effect of attachment of a property in execution of a decree by a Court which has the effect of suspending the right of holder of the property to deal with the property in any manner for alienating the same. No provision of Civil Procedure Code has been brought to our notice which excludes the application of procedure for attaching the property before sale by the Court for satisfying the decree sought to be executed.

29. We further find that in the aforesaid decision of the Tripura Court, no such general proposition has been laid that in execution of a mortgage decree the property is not liable to be attached. The case related to attachment of property, *inter alia*, over which charge was crated by a decree of the Court and not by volition of parties. The question before the court was whether any fresh suit was required to be filed to obtain a decree for enforcement of the charge of the decree itself acted as enforcement. The Court made a distinction in a charge created by the act of the parties as a matter of contract and a charge created through a decree, though in accordance with the terms of compromise, which decree itself is executable. It is on this premise, it was held that because charge has been created by an executable decree, therefore, it is not required to be subjected to a fresh suit and also not subjected to the requirement of attachment proceedings. The correctness of the proposition that on creation of charge the property only becomes a security for the repayment of the debt but does not become subject matter of prohibitory injunction restraining the owner of the property from alienating the property in any manner whether by way of sale, mortgage or in any other manner cannot be doubted. Whether for enforcement of a charge created by a decree of Court founded on compromise, needs a separate suit for securing a decree or very same decree can be put to execution, is not the question that arises in this case. We make no comment on it. However, assuming that such a charge itself becomes part of an executable decree, there is no escape from the conclusion that such a decree of enforcement of charge has to be executed though the same process as any other decree for enforcement of such charge can be executed. No separate mode of execution of such decree has been provided. If a decree passed in mortgage suit has to be executed by having response to Order 21 Rule 23 by attaching the mortgage property, a decree creating charge will also have to be executed in same manner. There is no provision

that once a declaration by a decree is made that property is subject to charge or mortgage, it stands automatically attached. On this premise, we are clearly of the opinion that whenever immovable property of the judgment-debtor is to be subjected to sale by the Court is an execution of a decree, attachment of the same is required to be made under Order 21 Rule 24 to put the interest of the judgment-debtor on the ale for satisfaction of the decree whether such interest of the judgment-debtor is of absolute unencumbered ownership or is remainder or with an encumbered interest in the property which has to be put in the interest of the judgment-debtor in the property and not merely the property in absolute. In the case of mortgaged property, the same can also be put to attachment and sale, but the purchaser, who merely steps in the shoes of owner, gets the property subject to such existing circumstances. If the mortgaged property is sold in execution of a mortgage decree, the buyer will get the property free from encumbrance, because in that case it is encashment of security. But in either case the Court does not have authority to attach the property before sale so that the owner of such interest in the property does not meddle with such property thereafter in any manner. We are therefore unable to subscribe to view that merely because such charge is created by Court different procedure could apply for putting the property on sale.

30. In view of aforesaid, we regret our respectful inability to the proposition laid in Tripura case that charge created by Court automatically results in attachment of such property.

31. In view of the aforesaid conclusions that the principle of *res judicata* including constructive *res judicata* operates in execution proceedings and that the order made under Rule 22 Clauses (1) and (2) of Order 21 CPC, which result in closure of preliminary stage and commencement of next stage operates as *res judicata* and precludes the judgment-debtor from raising objections to continuance of proceeding thereafter unless such order is appealed against as a decree. We do not deem it necessary to discuss the subsidiary issues on which we entirely agree with the reasons and conclusions recorded by the learned Single Judge.

32. Appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1974 SC 1539
2. AIR 1921 PC 23
3. AIR 1953 SC 65
4. AIR 1966 SC 1332
5. AIR 1960 SC 941
6. AIR 1964 SC 993
7. 1960 Raj LW 149
8. AIR 1936 All21 (FB)
9. AIR 1941 Mad 440
10. AIR 1963 Tri 46