

Sita Ram Vs. Devi Dayal

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Court : Delhi

Decided On : Feb-05-1968

Reported in : 4(1968)DLT266

Judge : I.D. Dua, C.J. and; T.V.R. Tatachari, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 11

Appeal No. : Election First Appeal No. 75D of 1962

Appellant : Sita Ram

Respondent : Devi Dayal

Advocate for Pet/Ap. : Vijay Kishan and; S.L. Sethi, Advs

Judgement :

I.D. Dua, C.J. and T.V.R. Tatachari, J.

(1) This appeal has been placed before us pursuant to the order of reference dated 24th, April 1967 by Ismail J., because, according to the learned Judge, this appeal raises an important question of law.

(2) The decree in execution of which the order appealed from was made had been passed on 28th, January, 1959 in terms of an award. In March 1961 the decree-holder started proceedings for execution of the decree and the judgment debtor was given notice for settling the proclamation of sale. 22nd. April. 1961 was the

date fixed for this purpose, but the judgment debtor did not appear on the date. The executing court after recording the absence of the judgment-debtor directed that warrant for auction be issued and fixed 29th May, 1961 as the date for the auction. Srd. June. 1961 was fixed for the report to be put up before the court. On 2nd. May. 1961, the judgment debtor filed an application under order 21, Rules 2 and 23 read with section on 151 of the Code of Civil Procedure urging that the decree was not executable and also setting forth some of her objections. Prayer for setting aside the ex-parte order with respect to the sale of the house was also made and by way of interim relief stay of sale was claimed. It may be noted that on 22nd. April 1961, the judgment debtor had sent a medical certificate praying for adjournment, but the same was declined on the ground that the counsel of judgment-debtor could have appeared. On 19th. May. 1961, the decree-holder filed his reply to the objections of the judgment-debtor dated 2nd May, 1961. The matter came up for hearing on 19th. August 1961 on which date again the judgment-debtor was absent though the decree-holder and his counsel were present. On that date, the court- dismissed the objections preferred by the judgment-debtor explaining his non-appearance, with the observations that those objections were frivolous. Warrants of auction were again directed to issue; the auction was fixed for 26th. September. 1961 and the report to the court to be made on 30th. September, 1961. the auction Same how did not take place as directed and on 18th. December. 1961 the judgment-debtor filed fresh objection petition praying for dismissal of the execution application. In this application, no reference was made to the order made by the executing court on 22nd. April. 1961. nor to the objections presented by the judgment-debtor on 2nd. May. 1961, not to the order of the executing court dismissing those objections in default on 13th, August. 1961. Admittedly, no application was made by the judgment-debtor for restoration of his objection-petition dated 2nd. May, 1961, which was as just observed, dismissed in default on 19th. August. 1961. The decree-holder contested the judgment-debtor's objections on various grounds, including the plea that the order of dismissal dated 19th, August 1961 operated as res judicata and the judgment-debtor was not entitled to raise the objections contained in his petition dated 18th, December, 1961. This plea was taken up as a preliminary objection, and the executing court by an order dated 3rd, January, 1962, repelled

the preliminary objection holding that the doctrine of *res judicata* did not bind the judgment-debtor from raising the objections in his petition dated 8th, December, 1961. It is this decision which falls for examination by us.

(3) The executing court in support of its view relied on *Hanmantrao v. Dhruvaraj*, *Jagdish Ram v. Jagat Ram* and *Hazura Singh v. Jewon Singh*. The executing court observed in its order dated 3rd January, 1962 that as against the decisions of the Punjab High Court, mentioned above, the counsel for the decree holder had not been able to cite any other authority of that court holding to the contrary, and apparently feeling bound by those decisions the objections of the decree-holder were repelled.

(4) The short question which thus requires determination by us is whether a decision of the executing court- dismissing the objections of the judgment debtor in default would be covered by the doctrine of constructive *res judicata*.

(5) It may be pointed out that the learned counsel for the judgment debtor (respondent before us) has not seriously contested the applicability of the doctrine of constructive *res judicata* to execution proceedings. All that he says is that this doctrine can be invoked only if there is a decision on merits and not if an order is merely made in default of presence of the parties. In any event, adds the learned counsel, there must be some order which is to operate as *res judicata* taking within its fold constructively the points in regard to which the bar of *res judicata* is pleaded. He has, it may be pointed out, also placed his reliance on the decision of the Punjab High Court in *Hazura Singh's case*. We have to see if the respondent's submissions are well-founded. We may first examine the two Punjab decisions on which reliance was placed by the executing court. The learned single Judge (Gover J.) in *Hazura Singh's case* observed as follows:

'So far as the Lahore High Court and this court are concerned it seems to be well settled that the rule of constructive *res judicata* cannot be made applicable when an objection petition under S. 47, C.P.C. has been dismissed for default. In *Kishna v. Sundar Bhai J.* held that when the first objection petition had been dismissed in default, and not on the merits, a second objection petition was maintainable. Actually the view is that when an application is dismissed for default a second

application is barred not under S. 11, Civil Procedure Code but if any bar can operate that can be only under the provisions of O. 9, R. 9, of the code. Now O 9, R. 9, does not apply to execution proceedings therefore the second objection petition cannot be held to be barred.'

We are required to consider the correctness of this approach and if any order dismissing in default the objections of a judgment-debtor preferred in execution proceedings does not operate as constructive res judicata. in regard to future objections by the same judgment-debtor in those proceedings, which objections he might and ought to have taken on the earlier occasion. In Jagdish Ram's case. Harnam Singh J., observed as follows:-

'IN case a suit is dismissed in default under R. 8 of O. 9 of the Code, it cannot be said to have been heard and finally decided on the merits and, therefore, the judgment in that suit cannot operate as res judicata. but the plaintiff is under the specific provisions of R. 9 precluded from bringing a fresh suit on the same cause of action. That being so, whatever the effect of the dismissal of the previous suit under R. 8 of O. 9 of the Code may be on the suit of Jagdish Ram the dismissal of that suit does not affect the suit of Amru with respect to one half of the property in suit.'

No comment is needed to show that this case, concerned as it is with Order 9 which applies to suits and not to execution proceedings, has very little to do with the problem which concerns us and it clearly does not exclude execution proceedings from the doctrine of constructive res judicata when there is no statutory provision covering the point. In *Kishna v. Sunder*, Bhide, J. in a very brief judgment observed as follows:-

'IN *Situ Ram v. Pir Bux*, it was held that a second objection is not tenable in such circumstances. That ruling purports to follow the principle of *Nank Chand Daulat Ram v. Buta Singh*' In the later case, the first objection was however by a third party and not by the judgment-debtor. In the case of an objection under O.21, R. 58'. Civil P.C., there is a clear statutory provision that an order passed on the objection is conclusive as to the result of a suit (see O.21, R 63. Civil P.C.) There is no such provision so far as objections under S. 47, Civil P.C. are

concerned and, when the first objection was only dismissed in default and not on merits, there seems to be no good reason why a second petition should not be entertainable. This view receives support from that taken by the Calcutta High Court in several cases : see *Abhoy Kumar Kar v. Krishna Chandra*.

This judgment obviously cannot be considered to be the last word on the point, for it does not notice various relevant aspects requiring consideration. In *Haribux v. Sharmaswider*, *Bhide J.*, while dealing with S. 292 of the Succession Act (1925) distinguished the Privy Council decision in *Thakur Prashad v. Fakrullah*, and observed as follows :-

'THE application under S 292 was really made in proceedings in the nature of execution. I do not see that there was any bar to a fresh application being entertained in the exercise of inherent jurisdiction when the first application had been dismissed in default and not on merits.'

This case is equally unhelpful. In *Mt. Ascharyl Bibi v. Swami Shesh, Sahai, Tek Chand J.*, while dealing with an application of a judgment-debtor for setting aside a dismissal in default to her objection petition under Order 21, Rule 90, Civil Procedure Code, said:-

'IT is no doubt true that S.141, Civil P.C., does not apply to proceedings in execution of decrees, and therefore O. 9, Rules 4 and 9, Civil P. C. are inapplicable, but as held in 2 Lah. 66, the court has inherent power under S. 151, Civil P. C. to restore an application in execution proceedings which has been dismissed in default, not withstanding the fact that the applicant had an alternative remedy open.'

This decision quite clearly deals with a different problem.

(6) We may now turn to the cases which seem to us to be a comparatively closer resemblance. In *Bhagwan Singh v. Barkat Ram*, (*Tek Chand and Beckett JJ.*) *Tek Chand J.*, expressing the opinion of the court, spoke thus:-

'THE present application was made in 1933 and numerous objections to the proceedings taken on it were filed on other grounds and it was in April 1939 that it

was urged for the first time that the first application having been made on 27th April, 1933 more than three years after 28th November, 1927 when the High Court had passed the decree, it was time-barred, and therefore the decree could no longer be executed. In the first place, the objection is not purely one of law. It is a mixed question of fact and law and cannot be allowed to be raised at this late stage. It appears from the record that after the passing of the decree, but before the presentation of the first execution application, the judgment debtor had made several payments to the decree holder. They had paid Rupees 15,030 on 19th March, 1923, Rs. 22,940 on 7th July, 1923, and Rs. 4,498 between 5th August, 1926 to 26th November, 1926. It is asserted by the appellant's learned counsel that these payments were accompanied by writings signed by the judgment-debtors which saved limitation under sections 19 and 20, Limitation Act, and it was for this reason that none of the judgment-debtors urged that at the time that the first application was time-barred. If the plea had been raised, the writings would have been produced. It is however not necessary to go into this matter, for the objection is clearly barred by the rule of constructive *judicata*. As laid down by their Lordships in 8 Cal. 51 although the execution of a decree may have been actually barred by time at the date of the application made for its execution yet, if an order for such execution had been regularly made by a competent court having jurisdiction to try, whether it was barred by time or not, such order although erroneous, must, if unreversed, be treated as valid. See also *Prabhu Dayal v. Dewat Ram*, and the cases cited therein. It is conceded that if the validity of the first application cannot be allowed to be challenged, the other applications were within time. We hold that this objection, also, is without substance and has rightly been disallowed.'

Gauri v. Ude (Tek Chand. Bhide and Beckett JJ) is an authority for the view that even though section 11, Civil Procedure Code, is inapplicable to execution proceedings, the general principles of *res judicata* including those of constructive *res judicata* embodied in Explanation 4 to section 11 applied to them. Bhide J., said at page 168 of the report:-

'IF the judgment-debtor is duly served but fails to raise any objection to the proposed sale, I do not see why he should not be held to be debarred from raising

the objection later on the principle contained in the observations of their Lordships of the Privy Council quoted above. It has been repeatedly held that although section 11 Civil Procedure Code, does not apply to execution proceedings the general principle of *res judicata* applies to such proceedings including the principle of constructive *res judicata* embodied in Explanatory 4 to S. 11, Civil Procedure Code. In *Mungal Pershad Divhit v. Grija Kant Lahiri*, a judgment debtor who had notice of a petition for execution failed to raise the objection that it was barred by limitation, with the result that execution was allowed to be taken out. In a subsequent petition for execution, objection was raised that the previous petition was barred by time, but it was held that the objection was barred by the principle of *res judicata*. It will be observed that in this case there had been no express decision on the question of limitation in the previous execution petition and yet it was held that the objection was barred on the principle of *res judicata*. There are several decisions of this court in which this principle of constructive *res judicata* has been applied to execution proceedings and I see no good reasons why it should not be applied in the present case, *Prabhu Dayal v. Dewat Ram*, *Madan Lal v. Jaswant Rai* and *Umrao Singh v. Muhammad Abdullah*.

In fact, Bhide J., had on an earlier occasion in *Bibi Ved Kaur v. Bal kishan Dass Mehra*, also expressed similar view in these words :-

'THE learned counsel for the respondent conceded that the principle of *res judicata* applied to execution proceedings but he urged that no decision on any matter could be held to operate as *res judicata* for the purposes of execution proceedings unless it was actually heard and decided. He contended that the principle of Explanatory 4 to S. 11, Civil P. C. did not apply to execution proceedings. But the decision of their Lordships of the Privy Council in *Raja of Ramanand v. Velusawi Tevar*, seems to go against the contention. In that case the question of limitation had only been decided impliedly and yet the decision was held to operate as *res judicata*. It has been held in *Dip Prakash v. Dwarka Prashad*, that even if a point is decided by necessary implication, it operates as *res judicata* in the subsequent proceedings. A similar view was taken in *Gadigappa Chandbasappa v. Shidappa Gurshidappa*. The learned counsel for the respondent relied on *Kalyan Singh v. Jagan Prasad*, and *Prithi Mahton v. Jamshed Khan*, but

the facts of the former case are distinguishable. In the former case there was only an error in the decretal amount claimed in a previous application and there had been no occasion yet for giving a definite decision on that point in the previous proceedings. In the latter case it was held that the point raised before the learned Judge had not been taken up before the District Judge and could not be registered. The further remarks on the question of res judicata appear therefore to be in the nature of obiter dicta. Besides the view taken there in seems to be opposed to the view expressed by their Lordships of the Privy Council in *Raja of Ramanand, v. Velusami Tevar*. In the present instance the previous application for execution could not have been granted unless it was held that the decree was capable of execution. The respondent not having raised the latter objection, it must be held to have been decided against him by necessary implication in view of the authorities cited for the appellant.'

(7) In *Kidar Nath v. Taj Mohammad Khan, Dalip Singh J* though with certain hesitation, expressed similar view by holding objections not raised earlier in execution proceedings to be barred by the doctrine of constructive res judicata. In *Pirji Safdar Ali v. The Ideal Bank Ltd.* a Full Bench of the East Punjab High Court, speaking through M. C. Mahajan J. (as he then was) affirmed the view taken by the Full Bench of the Punjab High Court in Gauri's case with the following observations :-

'AS regards the third aspect from which the applicability of the Punjab Debtors' Protection Act has to be viewed in this case the matter seems to me not open to much controversy. It is true that the provisions of S. 11, Civil P.C., have no application to execution proceedings; but the rule of res judicata on general principle governs the proceedings in execution and on the same principle the rule of constructive res judicata has application to cases where a certain decision could not have been given by the executing court if the matter sought to be raised earlier (later?) would have been raised at an earlier stage of the proceedings. In this case, as pointed out above, the order of sale could not have been made by the executing court if in the first two sets of objections the objection raised on the third occasion had been agitated before the executing court and a decision invited on that question. The question of the saleability of this property in execution of the

mortgage decree after hearing the objections of the judgment debtor was decided on 21st December 1944 by the executing court and a date was fixed for the sale of the property. That decision presupposes that there was no bar to the sale of this property in execution of the decree. In these circumstances, the judgment debtor was bound to raise all questions that affected the saleability of the property before that order was made and if he failed to raise these questions he is barred by the rule of constructive res judicata from re-agitating them after that Order has been made. If no order for sale had been made in these proceedings, then the matter would have been quite different as the rule of constructive res judicata cannot apply to cases where either partially or wholly the decree has not been satisfied after the rejection of the objections or there has been no actual decision on the point or no order directing the sale has been passed. Reference in this connection may be made to the Full Bench decision in *Gauri v Ude*. In that case, however, the property had been sold after the order of sale had been made but that distinction does not affect the application of the rule of constructive res judicata to the facts of this case.'

(8) Without multiplying authorities and there is certainly a long catena of them-it can safely be said that the view of the Lahore and Punjab High Courts is not settled against the applicability of the principle of constructive res judicata to execution proceedings and if on an earlier occasion an objection might and ought to have been raised by a judgment-debtor and it has not been so raised, he would be debarred from raising the same later under the principle of constructive res judicata. In *Shah Shivraj Gopalji v. Edappakath Ayissa Bi and others*, the Privy Council has also had an occasion to deal with Explanation IV to section 10, Civil Procedure Code. The following head-note embodies the decision of the Board :-

'WHERE in an earlier execution proceedings a decree holder could have raised a plea that the judgment-debtor had an interest in certain property which could be attached under his decree but the plea was not raised through his own default and the execution was dismissed, the dismissal operates as res judicata in the subsequent execution proceedings and even apart from the provisions of S. 11, Civil P.C., it is contrary to the principle to allow the decree-holder in fresh proceedings to renew the same claim merely because he neglected at a proper

stage in previous proceedings to support his claim by the argument of which he sub-sequently wishes to avail himself.'

(9) The Privy Council referred to an earlier decision of its own in *Ram Kirpal Shukul v. Rup Kuari*, and observed that apart from the provisions of section 11, Civil P. C., it would be contrary to principle to allow the decree holder in fresh proceedings to renew the same claim, viz., that the properties in question were properties of the respondents liable to attachment or, as he would now put it, that the respondents had severable interests in the properties which are liable to attachment, merely because he neglected at the proper stage in previous proceedings to support that claim by an argument of which he now wishes to avail himself. This principle, in our opinion, seems to go against the judgment-debtor, respondent in the case in hand.

(10) Apart from the Privy Council decisions, noticed and followed in the decided cases cited above, we find that the Supreme Court has also dealt with this point and has applied the principle of constructive res-judicata to execution proceedings. In *Mohanlal Goenka v. Benoy Krishana Mukherjee* the Supreme Court noticed the various decisions of the Privy Council as also the decisions of Indian High Courts and upheld the applicability of the principle of constructive res-judicata to execution proceedings. Some of the decisions of the other High Courts taking the view enunciated above are *Bajnath Prasad Sah. v. Ramphal Shani* and another, *Tejwari Kaur* and another v. *The Central Bank of India* and others', *Ganchi Laxmi chand Ambaram v. Tulsidas Madhavda, (Bhagwati J.)* and *Gundicha Padhano* and another v. *Paravati Podhanuni*.

(11) Dealing with the matter independently of the decisions noticed above, it may be remembered that the doctrine of res judicata is a rule of reasonable conclusiveness of orders and, therefore, of convenience and rest. In fact, 'this doctrine is inspired by the practical and judicious consideration that no man should be vexed twice by the same cause, and indeed this principle is dictated by a sense of wisdom, in the normal human activities, which is founded on sound public policy and is of universal application. Once a matter becomes res judicata; it is not to be adjudged again. This is not a technical doctrine confined within some

artificial limits but is a fundamental principle of substantial Justice designed to end litigation and to save litigants from being vexed repeatedly. Broadly stated, it is directed to and btoh new decisions and new investigations to avoid continuous harassment in regard to the same controversy. In the background of this general principle, we may now advert to the facts of this case.

(12) It may be remembered that pursuant to the application of the decree-holder for execution of his decree, a ntoice was given to the judgment-debtor for 22nd April 1961 directing him to file particulars under Order 21, Rule 66 Civil Procedure Code, with respect to the house which was sought to be sold and had been charged with the decretal amount. The Judgment debtor did nto attend the court, but submitted a medical certificate. The court did nto grant the prayer for adjournment and directed the house to he sold, 29th May 1961 was fixed for the sale of the house by public auction. An application dated 2nd May 1961 was presented by the judgment-debtor in the executing court raising objections to the executability of the decree and also praying that the ex parie order of sale be set aside or at least stayed ti4 the decision of the said application. The decree holder filed his reply to this application pleading that the said application was fraivolus. It was also averred that the judgment-debtor was estopped from raising those objections. On 3rd June 1961, in the presence of the counsel for the parties, the case was adjourned to 19th August 1961 for arguments after taking on record the reply of the decree-holder aid also directing that the copies of the order and the decree in question be filed. On the next date, the decree holder and his counsel were present, but there was no representation on behalf of the judgment-debtor, the Court described the objections of the judgment debtor to be baseless (Fazul) and dismissed the same in default, at the same time directing the warrants for sale to issue. The aforsaid resume of the proceedings quite clearly shows that the order of the Court directing the sale to be held after describing the objections to be baseless and dismissing the same, though in default, fall within the recognised purview of the doctrine of constructiue rest judicata. Even if no objections had been raised by the judgment-debtor after an opportunity was granted to him to do so, it could have been argued that the judgment-debtor might and ought to have raised his objections against the sale and having nto done so, he was nto entitled later to urge them without showing legal justification turn his failure to do so on the

earlier occasion. But in the present case, the judgment-debtor failed to do so on the first occasion, and later applied to justify his absence on the earlier occasion and also to urge his grounds against sale of the property in execution of the decree. The decree-holder filed his reply to the judgment-debtor's objections and the Courts fixed a date for arguments. Merely because the judgment-debtor absented himself on the date of arguments and his counsel also did not appear to argue the matter, cannot on any logical ground take the case out of the operation of the doctrine of constructive res-judicata. But fundamental principles of ending litigation and saving a litigant from repeated harassment would be fully attracted to this case, and merely because Judgment-debtor by his own voluntary action stood in the way of an order on the merits, would not avail him against this doctrine. We are, therefore, clearly of the opinion that the present case is fully covered by the principle of constructive res-judicata, and merely because on 19th August, 1961 the executing court did not discuss the merits in detail and dismissed the objections as the Judgment-debtor did not come to the court to present them, the applicability of this rule cannot be excluded.

(13) Before concluding we cannot help observing that the cases like present impel us to point out once again that the real difficulties of a decree-holder, here, start when he embarks on what is described as the thorny path of execution. The decree in the case in hand was passed in January 1959 on the basis of an award and it is now nine years since it was made, and it has not been executed because of the dilatory tactics on the part of the judgment-debtors.

(14) For the reasons foregoing, we allow this appeal and reversing the order of the executing Court hold that the objections of the Judgment-debtor are barred by the rule of constructive res-judicata and the property in question should be sold by the executing court on dates to be fixed by it again. The appellant is entitled to his costs both here and in the court below, The parties are directed to appear in the executing court on 27th February, 1968, when a short date would be given for further proceedings in accordance with law and in the light of the observations made above. The executing court, we hope, would see that proceedings are not unnecessarily delayed.

