

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

1895.
September 17.

VENKATANARASIMHA NAIDU (PLAINTIFF AND PETITIONER),
APPELLANT,

v.

PAPAMMAH (DEFENDANT AND COUNTER-PETITIONER).
RESPONDENT. *

Decree, construction of—Application for execution by defendant—Previous orders as applied for by defendant—Present objection by plaintiff to continual execution on behalf of defendant—‘Res judicata.’

Although a decree does not in terms give a certain relief yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on subsequent applications to treat those orders as erroneous and put another construction on the decree.

APPEAL under Letters Patent, section 15, against the judgment of DAVIES, J., dismissing an appeal against the order of G. T. Mackenzie, District Judge of Kistna, in miscellaneous appeal No. 661 of 1891, by which an order of C. Rangayya Pantulu on miscellaneous petitions Nos. 1239 and 1550 of 1891 was affirmed.

The last mentioned petitions were preferred respectively by the plaintiff and defendant in original suit No. 333 of 1877. In that suit the plaintiff sued to establish his right to open and keep open the mouth of a channel leading to a village in his estate and a decree was passed by which it was declared “that the plaintiff is entitled to take through the channel in question the flood water of the Tammileru, but to take none of the clear water; that for this purpose he is entitled to extend the channel 343 yards from the spot locally known as ‘ene’ parallel to the bank of the river on which the channel is, and to take such measures as may be necessary for diverting the flood water, but none of the clear water; that the channel shall not be more than 5 yards 2 feet and 2 inches wide at the mouth with a ‘floor’ sufficiently to prevent clear water passing and that the taking of clear water to the injury of the interests of the village of Vengur shall be at his risk.”

* Letters Patent Appeal No. 31 of 1894.

In 1883 and 1886 the plaintiff presented applications for execution of the decree by the erection of the 'floor' therein referred to, but they were not proceeded with. In 1885 the defendant made an application with the same object; the plaintiff thereupon objected that it was not competent to the defendant to make the application, but the Court made an order that the 'floor' should be constructed and the plaintiff did not appeal. In 1887 on the application of the defendant, which was opposed by the plaintiff, the Court applied a commissioner for the execution of the decree, and under similar circumstances the Court in 1890 appointed another commissioner to construct the 'floor' in accordance with the decree. The plaintiff now applied to stop the work which had been begun alleging that the decree was declaratory only and did not determine the height of the 'floor' to be erected.

The District Munsif was of opinion that, although the decree was declaratory and not capable of execution, the orders above referred to were binding on him and that the work should proceed. With regard to the height of the erection, he pointed out that the suit went on second appeal before the High Court by which an order was made for the trial of an issue relating to that matter, and that the second appeal was abandoned by the plaintiff before this issue was determined; and he put off making an order about that matter pending the receipt of a report from the commissioner.

The District Judge on appeal concurred in the opinion that though the decree was declaratory merely the plaintiff was not now entitled to raise the objection which had been overruled by the orders of 1885, 1887 and 1889 against which he had not appealed.

The plaintiff preferred an appeal against the appellate order of the District Judge which came on for hearing before DAVIES, J., who dismissed it.

The present appeal was preferred as above against the judgment of DAVIES, J.

Pattabhirama Ayyar for appellant.

Krishnasami Ayyar for respondent.

JUDGMENT.—It appears that, since the passing of the decree in 1879, no less than four applications have been made for execution, and orders have been passed accordingly for the construction of a dam or 'floor' as it is termed in the decree. These orders were passed notwithstanding the opposition of the plaintiff and he never appealed.

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There can be no doubt that, although some of the terms of the decree are inserted for the protection of the defendant, it was never intended that the defendant should execute it against the plaintiff. It is argued that the District Munsif had no jurisdiction to order execution of the decree and that the previous orders in execution should be disregarded, and we are referred to *Kalka Singh v. Parasram* (1).^{*} That was not a case in which the execution of a decree was immediately in question and is therefore distinguishable from the other decisions of the judicial committee which were cited.

Those decisions go to show that although a decree does not in terms give a certain relief, yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on a subsequent application to treat those orders as erroneous and put another construction on the decree *Mungul Pershad Dicit v. Griya Kant Lahiri Chowdhry* (2) *Ram Kirpal Shukul v. Mussu-mat Rup Kuari* (3) and *Bani Ram v. Nanhu Mal* (4).

We think those decisions are applicable to this case. We must dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

CHAKRAPANI ASARI (PLAINTIFF), APPELLANT,

1895.
July 26.

v.

NARASINGA RAU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Courts Act (Madras)—Act III of 1873, s. 12—Suits Valuation Act—Act VII of 1887, s. 8—Suit for share of undivided property.

Persons entitled to a share in certain lands of a village only part of which was held in severalty, executed a mortgage of part of the lands due to their share. The mortgage contained a description of the land comprised therein by paimash numbers and admeasurement. The mortgaged property was brought to sale in execution of a mortgage decree and was purchased by the present plaintiff.

(1) L.R., 22 I.A., 68.

(2) L.R., 8 I.A., 123.

(3) L.R., 11 I.A., 37.

(4) L.R., 11 I.A., 181

* Referred Case No. 12 of 1894.