1891

WALI AHMAD KHAN v. AJUDHIA KANDU.

them. I therefore hold that this Court is precluded by law from going beyond those findings of fact, and the position to which I revert in coming to a decision in this second appeal is the position at which the case stood prior to the 1st July 1889. Reverting to that position I find no question of law involved in the pleas as recorded in the memorandum of appeal, nor indeed did I find any in the argument addressed to me whilst sitting in this Full Bench which properly flowed from those pleas or which bore upon the sole question arising in this case, namely, whether in law the plaintiff had made out his title for possession and demolition of the buildings which have been found wrongfully erected by the appellant. I would therefore, without any reference to or consideration of what has been found by the Judge of Ghâzipur since the 1st July 1889, dismiss this appeal with costs.

*Appeal dismissed.*

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1891
*April* 30.

*Before Mr. Justice Straight and Mr. Justice Mahmood.*

SHER SINGH AND OTHERS (JUDGMENT-DEBTORS) *v.* DAYA RAM AND OTHERS (DECREE-HOLDERS).*

*Execution of decree—Principle of* res judicata *as applied to execution proceedings—Rule in Sarju Prasad* v. *Sita Ram—Civil Procedure Code, s.* 373.

Where a judgment-debtor, being entitled and having an opportunity to plead s. 373 of the Code of Civil Procedure as a bar to execution of the decree against him neglects to do so, and the application in respect of which such objection might have been taken is entertained by the Court and orders passed thereon, the principle of *res judicata* will apply to such proceedings, and the judgment-debtor cannot at a subsequent stage of the same execution proceedings object that such previous application for execution ought in fact to have been held to be barred by the operation of s. 373 abovementioned.

The facts of this case sufficiently appear from the judgment of Straight, J.

Mr. T. *Conlan* and Mr. A. H. S. *Reid*, for the appellants.

Munshi *Madho Prasad*, for the respondents.

STRAIGHT, J.—This is a first appeal in execution, and the decree to which it relates was dated the 16th December 1879. That is a

* First Appeal No. 89 of 1888, from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 28th May 1888.

decree passed upon a mortgage, and was, so I am informed, drawn up in the form then prevailing, providing for the sale of the mortgage property in the event of the amount of the decree not being paid by the mortgagor, judgment-debtor.

The first application for execution was made on the 22nd April 1880, and no further reference need be made to that proceeding. The second application for execution was put in on the 29th January, 1883, and upon it certain proceedings were taken. Among others a report was called for from the office as regards the property sought to be sold, and the pleader for the decree-holder was required to file an affidavit as to whether the property to be sold was or was not ancestral property of the judgment-debtor. A considerable period of time passed without any thing being done, and on the 18th March 1884, the following order was made on this second application of the 29th January 1883:—

"The pleader for the decree-holder stated that his client does not wish to prosecute the case further, it is therefore ordered that it be dismissed for default."

On the 20th March 1884, the third application was put in, and by his petition the decree-holder sought for sale of the property mortgaged. On the 13th May 1884, notification of sale was issued, fixing the 21st July 1884, but the judgment-debtors got time for the payment of the amount of the decree and the sale was postponed. Subsequently fresh notices of sale were issued for the 20th September 1884, when one Kalyan Das put in an objection and asked that one of the properties notified for sale should be sold first, to which the decree-holder, on the 20th November 1884, agreed. On the 5th February 1885, the sale of that property was transferred to the Collector, as it was considered that such property was the ancestral property of the judgment-debtor.

With regard to this application and what was done upon it I may say that it was a real application, according to law, accepted by the Court below, and, as the judgment-debtors were cited, they had an opportunity of being heard and of offering and setting up any

1891

SHER SINGH v. DAYA RAM.

objections that they might be in a position to prefer to the execution of the decree, amongst them, of contending that the order, dated the 18th March 1884, was a bar to the Court's entertaining the application of the 20th March 1884. No such objection was ever taken, and the very same remarks apply to the application of the 28th May 1886, by which the decree-holder applied for the sale of the mortgaged property. On the 5th June 1886, notice was issued to the judgment-debtors to show cause why the sale should not take place. They did not appear, but two persons, one of them Karan Singh, did appear, and upon his application the proceedings were struck off, as will be seen by an order of the Subordinate Judge of Aligarh dated the 28th July 1886, which is in the following terms :—

"This date was fixed for the hearing of this case. A regular suit has, however, been instituted by Karan Singh. The number of that suit is 141 of 1886. An order has been passed in the said suit for postponement of the sale. No further proceedings can therefore be taken."

The case was then struck off. That order got rid of the application of the 28th May 1886, and on the 9th January 1888, the application with which we are concerned in the present appeal was put in by the decree-holder for the sale of the mortgaged property, and the learned Subordinate Judge has allowed the decree-holder to execute the decree. Two objections are urged by the judgment-debtors before us as to the propriety of that order. The first of these is that looking to the terms of the former order, dated the 18th March 1884, the principle of the case of *Surju Prasad* and the subsequent rulings of this Court, which adopted and followed it, as set out in the Full Bench ruling, should be applied, and we should hold that that order was a bar to all the subsequent applications that were made, and was a fatal impediment to the decree-holder's subsequent application.

The second point urged by the learned counsel for the appellant is that the execution should have been transferred to the Revenue Court, the property attached being the ancestral property of the

judgment-debtors, and this may be disposed of at once. No such question appears to have been raised before the Court below, nor are there any materials upon this record to guide us in forming an opinion upon it. All I can say is that the Court which has the conduct of the proceedings in execution, that is, the Court below, may, at the instance of the judgment-debtors, if proper materials are placed before it, hereafter decide this question according to law and make such order as appears proper and right.

The first point referred to above is one of great importance, and in order to guard against any possible confusion or misunderstanding as to the means upon which it is in this particular case decided, I think it necessary to explain the grounds upon which I come to the conclusion I have. In my opinion the principle laid down in *Ram Kirpal* v. *Rup Kuari* (1) prohibits me from going behind a formal application for execution of a decree admitted by a Court executing a decree, in which notice has been issued to the judgment-debtors and proceedings from time to time have been taken thereunder in execution of that decree. I concede that the decree-holder in the case might be in a difficulty if the judgment-debtor could go behind the proceedings which were instituted by the application of the 20th March 1884. But in my opinion the judgment-debtor cannot do so. I have already stated and I need not repeat all that was done upon that application. What I wish to emphasize now is that it was a real and substantial proceeding taken by the Court at the instance of the decree-holder, to which the judgment-debtors were made parties, in which orders were made which could only have been made by the Court upon the assumption that what had hitherto been done had been properly done and according to law. It seems to me that the objection on the score of s. 373 of the Code of Civil Procedure cannot be gone into in the present case, and that the argument for the judgment-debtors cannot prevail. I hold therefore that the learned Subordinate Judge was right in the conclusion at which he arrived, though I wish to add this much in regard to the application of the 28th May 1886, that considering the nature of the final order passed in that proceeding it would not, having regard

(1) I. L. R., 6, All., 269.

1891

SHER SINGH v. DAYA RAM.

to what was laid down in the case of *Fakirullah* v. *Thakur Prasad* (1), have acted as a bar within the meaning of s. 373 of the Code of Civil Procedure. The order then made was an order by the Court of its own motion in reference to a suit then pending on its own file in which it had already issued an injunction restraining the execution proceedings.

I dismiss the appeal with costs.

MAHMOOD, J.—I am entirely of the same opinion. My brother Straight has already stated that the rule laid down in the Full Bench case of *Radha Charan* v. *Man Singh* (2) approving an earlier ruling of this very Bench is not to be shaken in its authority or in its application. My brother has also said that, so far as the order of the 28th July 1886, striking off the application for execution dated the 28th May 1886, made by the Subordinate Judge of Aligarh, is concerned, the ruling of *Fakirullah* v. *Thakur Prasad* (1) does not govern this case. That proceeding is therefore of no value to either party for the purposes of barring any application for execution of the decree.

And moreover the important point upon which I entirely concur with my brother Straight is the principle of not going behind a proceeding in execution which has already been taken to be valid. This rule is contemplated not only by the case of *Ram Kirpal* v. *Rup Kuari* (3) and *Mungul Parshad Dichit* v. *Girja Kant Lahiri* (4), but also by the general principles laid down by their Lordships in the Privy Council in the case of *T. R. Aruna Chellam Chetti* v. *V. R. R. M. A. R. Aruna Chellam Chetti* (5). I have considered it necessary to say this because there are some cases now pending in this Court which have been referred by me to a Bench of two Judges for the decision of this very question, and I may add that the view of the law now taken by my brother Straight and myself is in accord with the suggestion which I made in delivering my judgment in *Badri Nath Misr* v. *Ram Rup Singh* (6).

*Appeal dismissed.*

(1) I. L. R., 12, All., 179.
(2) I. L. R., 12, All, 392.
(3) I. L. R. 6 All. 269.
(4) I. L. R., 8, Calc., 51.
(5) L. R., 15 I. A., 171.
(6) Weekly Notes, 1890, p. 9.