

*Nath*, (Weekly Notes for 1893, p. 204) and the decision of Mr. Justice Trevelyan and Mr. Justice G. Banerji, in the case of *Jogodindro Nath, v. Sarut Sunduri Debi* (1). In support of the appeal there is merely the decision of Mr. Justice Straight. In the case in which he expressed that opinion Mr. Justice Tyrrell, who was sitting with him, expressed no opinion on the point. There are thus in support of the contrary view the decisions of Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Trevelyan, Mr. Justice G. Banerji, Mr. Justice Burkitt, Mr. Justice Aikman and the decision at present under appeal of Mr. Justice Blair. The balance of authority is certainly in favor of the respondent. When permission is given under s. 373 there is no formal or other expression of an adjudication upon any right claimed or defence set up, and such a permission does not decide the suit, or, if the permission be given in the course of an appeal, the appeal or the suit. Consequently, the order giving permission is not a decree as defined in s. 2 of Act No. XIV of 1882. It is, however, an order granting permission, but it is not one of the orders which is appealable under s. 588 of the same Act. When an order is made under s. 373 in the course of an appeal permitting the plaintiff to withdraw the suit with liberty to bring a fresh suit, it decides nothing as to the merits of the decree of the first Court, but it merely wipes out that decree by reason of the suit being withdrawn. We dismiss this appeal with costs.

*Appeal dismissed.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*

*January 18.*

JANKI KUAR (JUDGMENT-DEBTOR) v. SARUP RANI AND ANOTHER (DECREE-HOLDERS.)\*

*Execution of decrees—Civil Procedure Code, ss. 253, 582, 583—Security for performance of decrees of appellate Court—Method of enforcing such security.*

Where in an appeal security has been given to the appellate Court for the due performance of such decree as it may pass, the decree-holder may enforce such

\* Letters Patent Appeal No. 9 of 1894.

(1) I. L. R., 18 Calc 322.

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security in the manner provided for by s. 253 of the Code of Civil Procedure. *Bans Bahadur Singh v. Mughla Begam* (1) followed. *Thirumalai v. Ramayyar* (2) and *Venkapa Naik v. Baslingapa* (3) approved. *Kali Charun Singh v. Balgobind Singh* (4) and *Tokhan Singh v. Udwant Singh* (5) dissented from.

IN this case the decree-holders had obtained a decree from the Court of the Subordinate Judge of Cawnpore. That decree was affirmed on appeal by the High Court. The decree-holders applied more than once for execution, but specifying in their applications the decree of the lower appellate Court and not that of the High Court. Their applications were, however, granted and execution proceeded; but on a subsequent similar application being made the judgment-debtor raised an objection that the wrong decree had been named. The Subordinate Judge overruled that objection, applying the principle of s. 13 of Act No. XIV of 1882. The decree-holders sought to execute their decree by sale of certain property included in a security bond given for the performance of the decree which the High Court might pass in appeal.

The judgment-debtor on her objection being disallowed appealed to the High Court, and pleaded *inter alia* that, the decree having been incorrectly stated in the application for execution, that application could not be granted; that the principle of *res judicata* did not apply, and that the decree-holders could not enforce the decree in respect of the property covered by the security bond without first obtaining a decree for sale under section 99 of the Transfer of Property Act, 1882.

This appeal was dismissed by Burkitt, J., on the 6th of February 1894, and from that decision the judgment-debtor appealed under s. 10 of the Letters Patent.

Babu *Becha Ram Bhattacharji*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

EDGE, C. J., and BANERJI, J.—This is an appeal in execution proceedings. The decree-holder obtained a decree from the Court

(1) I. L. R., 2 All. 604.

(3) I. L. R., 12 Bom. 411.

(2) I. L. R., 13 Mad. 1.

(4) I. L. R., 15 Cal. 497.

of the Subordinate Judge of Cawnpore. His opponents appealed to the High Court. The decree of the Subordinate Judge was confirmed by the High Court with costs. The decree-holder subsequently applied for execution of the decree of the Court of first instance. An order for execution was made and execution proceeded. This is a subsequent application to further execute the same decree, by the assignees of the decree-holder. The judgment-debtor objects that the decree which could be executed was not the decree of the Subordinate Judge, but the decree of the High Court. It is perfectly true that the decree of the Subordinate Judge did merge in the decree of the High Court, but this point is not open to the judgment-debtor now. It was a point which the judgment-debtor could have taken in the previous application. It was not taken by her, and the principle of *res judicata* applies, and she is not now entitled to say that the decree of the Subordinate Judge is not the decree which can be executed. Mr. *Becha Ram* contended that the principle of *res judicata* did not apply because his client did not think it convenient to raise that objection on the previous application. The principle of *res judicata* does not depend upon the convenience, interest or motive of the litigant. It depends upon whether it was open to the litigant to raise the point on the previous occasion, and this point not having been raised by her then she cannot open it now.

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In execution of the decree the judgment-creditors, the present decree-holders, asked the Court to put its process in execution by sale of property included in a security bond given for the performance of the decree which the High Court might pass in appeal. It is contended by Mr. *Becha Ram* that s. 99 of the Transfer of Property Act, 1882, limits the rights of these decree-holders, so far as the security bond is concerned, to a suit, and that s. 253 of the Code of Civil Procedure does not apply to the case. Section 99 of the Transfer of Property Act has, in our opinion, no application to the enforcement, by a process of the Court, of a security bond given to the Court for the performance of its decree. We are also of opinion that a security bond given to an appellate Court can be

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enforced in the same way as a security bond can be enforced under s. 253 of the Code of Civil Procedure. We are supported in that opinion by the judgment of the High Court of Madras in *Thirumalai v. Ramayyar* (1), by a judgment of the High Court of Bombay in *Venkapa Naik v. Baslingapa* (2), and by the judgment of the majority of the Full Bench in this Court in *Bans Bahadur Singh v. Mughla Begam* (3). It appears to us that when an appellate Court is given by law power to require a security bond to be given for the performance of its decree, as for instance under s. 545 of the Code of Civil Procedure, 1882, it was not the intention of the Legislature that the bond should be given by one party to the other, or that the bond given to the Court should not be enforced by ordinary process, similar to that under s. 253 in the case of a security bond given in the suit; and it could not have been the intention that the Court should sue upon the bond, or that it should be necessary for the Court to assign the bond for some other person to sue upon it. In our opinion ss. 582 and 583 of the Code of Civil Procedure made applicable in the case of a security bond given to an appellate Court s. 253 of the same Code. The provision in s. 363 of the Code that "in the case of a surety such security may be realised in manner provided by s. 253" was necessary, as s. 363 applies to circumstances arising subsequent to the decree of the first Court and is not in the chapters relating to the powers of appellate Courts. Our attention has been drawn to the case of *Kali Charan Singh v. Balgobind Singh* (4), subsequently followed in the case of *Tokhan Singh v. Udwant Singh* (5). In our opinion the view of law as stated in the cases in Madras and Bombay and by the majority of the Full Bench of this Court is right. The other objections were purely technical, and even from a technical point of view there was no substance in them. We dismiss this appeal with costs.

*Appeal dismissed.*

(1) I. L. R., 13 Mad. 1.

(3) I. L. R., 2 All. 604.

(2) I. L. R., 12 Bom. 411.

(4) I. L. R., 15 Calc. 497.

(5) I. L. R., 22 Calc. 25.