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apply the section to a case of this kind the words should have been wider, and should have included not merely property or any part of property, but also "rent and profits" of the property. For these reasons we are of opinion that the Court below is wrong in its decision and that the appeal should be granted.

It must be understood that our judgment is not to be taken as entitling the appellant to obtain payment from the Collector without a suit if the Collector contests the matter.

Appeal decreed.

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January 13.

Before Sir John Edge, Knight, Chief Justice, and Mr. Justice Blair.
BEHARI LAL AND ANOTHER (DECREE-HOLDER) v. MAJID ALI (JUDGMENT-DEBTOR).*

Execution of decree—Principle of res judicata as applied to execution proceedings—Succession certificate—Act No. VII of 1889 (Succession certificate Act), section 4.

The principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue which, in that suit or in the execution proceedings in that suit, had been previously determined.

The principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. A defendant-respondent cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit, and a plaintiff who has got an *ex parte* decree on proof of his title or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. *Ram Kirpal v. Rup Suari* (1) referred to.

ONE Gauri Shankar obtained a decree for money against Majid Ali. Gauri Shankar having died, one Behari Lal, alleging himself to be a brother of Gauri Shankar, and one Muszammatt Sonkali, alleging herself to be the widow of a deceased brother of Gauri Shankar, applied for execution. No decision was come to on that application, but it was struck off under circumstances which did not make the striking off a dismissal. After this Behari Lal and Sonkali again applied for execution by arrest of the judgment-debtor. Notice of that application was apparently

* Second Appeal No. 1049 of 1894, from an order of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 7th June 1894.

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served, but Majid Ali made no appearance, and a warrant of arrest was issued against him in his absence. This warrant was, however, never executed, and the application for execution proved infructuous. A third application for execution was presented by Behari Lal and Musammat Sonkali making the same allegations of their relationship or connection with Gauri Shankar, and again praying for the arrest of Majid Ali. On this occasion Majid Ali did appear and objected to the right of Behari Lal and Sonkali to have execution of the decree. The objections were that neither of them was a member with Gauri Shankar of a joint Hindu family; that Behari Lal had been born deaf and dumb, and, even if he was a brother of Gauri Shankar, no rights had devolved upon him, and that under section 4 of Act No. VII of 1889 the Court could not proceed upon the application for execution except upon the production by the applicants of probate or letters of administration or of one of the certificates referred to in that section. The first Court disallowed the objections and made an order for execution. The judgment-debtor appealed, and the lower appellate Court (District Judge of Gorakhpur) reversed the order of the Court of first instance and dismissed the application for execution. That Court held that Behari Lal was not a member of a joint family with Gauri Shankar, and that neither he nor Musammat Sonkali was entitled to have execution of the decree, and further that the objection under section 4 of Act No. VII of 1889 was a good one. Against this order the decree-holders appealed to the High Court.

Mr. *Abdul Majid*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

EDGE, C. J., and BLAIR, J.—Gauri Shankar obtained a decree for money against Majid Ali. Gauri Shankar died, and one Behari Lal, alleging himself to be a brother of Gauri Shankar, and one Musammat Sonkali, alleging herself to be the widow of a deceased brother of Gauri Shankar, applied for execution. No decision was come to on that application, but it was struck off under circumstances which did not make the striking off of the application a dismissal. Afterwards Behari Lal and Musammat Sonkali, making the same allegations of relationship or

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connection with Gauri Shankar, applied for execution of the decree by arrest of Majid Ali. Notice was issued to Majid Ali under section 248 of the Code of Civil Procedure. It has been proved that that notice was served, and indeed, as the Court proceeded to adjudicate on the application, it must be presumed, until the contrary is shown, that the Court was satisfied by proper evidence that the notice had been served. Majid Ali did not appear. On that second application the Court made an order for the issue of a writ for the arrest of Majid Ali. Majid Ali could not then be found, and the warrant was never executed, and the application was infructuous. Subsequently, on the 2nd of August, 1893, Behari Lal and Musammât Sonkali, making the same allegations of their relationship or connection with Gauri Shankar, presented another application for execution of the decree by the arrest of Majid Ali. On this occasion Majid Ali did appear and objected to the right of Behari Lal and Sonkali to have execution of the decree. The objections were that neither of them was a member with Gauri Shankar of a joint Hindu family; that Behari Lal had been born deaf and dumb, and, even if he was a brother of Gauri Shankar, no rights had devolved on him, and that under section 4 of Act No. VII of 1889, the Court could not proceed upon the application for execution except upon the production by the applicants of probate or letters of administration or of one of the certificates referred to in that section. The first Court disallowed the objection and made an order for execution. The second Court held that Behari Lal was not a member of a joint family with Gauri Shankar, and that neither he nor Musammât Sonkali was entitled to have execution of the decree, and further that the objection under section 4 of Act No. VII of 1889 was a good one, and allowing the objections dismissed the application.

Of course it is obvious that, whether Musammât Sonkali's husband died before or after Gauri Shankar died, she was in no sense a co-parcener of Gauri Shankar, and in that sense not a member of a joint Hindu family conjointly with him; and that if she was a representative entitled to have the decree executed, section 4 of Act No. VII of 1889 would apply in her case.

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As to Behari Lal, the question appears to turn upon what would be the effect of the second application and the order for execution issued thereon. Section 13 of the Code of Civil Procedure of course in terms does not apply to a case of this kind, but, as has been pointed out by their Lordships of the Privy Council in the case of *Ram Kirpal v. Rup Kuar* (1) the principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings an issue which, in that suit or in the execution proceedings in the suit, had been previously determined. Now Majid Ali had an opportunity to come before the Court on the second application and to raise these very objections. We must presume, as the Court made an order for the issue of a warrant on that second application, that the Court rightly or wrongly did decide and determine the question as to the right of Behari Lal and Musammat Sonkali to have execution of the decree obtained by Gauri Shankar. We must presume that the Court followed the procedure indicated by the Code of Civil Procedure in cases in which a defendant does not appear, and, as it made an order in favour of the applicants, it is to be presumed that the Court was satisfied by evidence that these applicants were representatives of Gauri Shankar entitled to execute his decree. It is immaterial for present purposes whether or not the Court came to a wrong decision on that point. We think the decision probably was wrong, but we cannot decide the question. It is obvious that the principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. The defendant-respondent cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit. The plaintiff who has got an *ex parte* decree on proof of his title, or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. In such cases the plaintiff could not sue again on the same cause of action, and it would be a curious

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principle of law which would preclude the plaintiff from suing again on his cause of action, but would leave it open to the defendant to raise in any subsequent litigation between himself and the plaintiff the issues which must necessarily have been decided explicitly or implicitly to have entitled the plaintiff to the decree which he had obtained *ex parte*. Under these circumstances we hold that the effect of the adjudication and order passed upon the second application for execution was that Majid Ali cannot now dispute the right and competence of Behari Lal and Musammam Sonkali to have execution of the decree as representatives of Gauri Shankar. That, in our opinion, is the necessary result of the principle of *res judicata* as applied to this case.

But the principle of *res judicata* has no effect upon the provisions of section 4 of Act No. VII of 1889. That section prohibits a Court from passing a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled, to the effects of the deceased person or any part thereof, or from proceeding upon the application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except upon production of one or other of the documents specified in the section. It imposes a duty on the Court which the Court is bound to perform, no matter what the proceedings between the parties, or any agreement between the parties, may be. All that is clear in this case is that it cannot now be questioned that Behari Lal and Musammam Sonkali, as between them and Majid Ali, are entitled to have execution of the decree, of course subject to the provisions of section 4 of Act No. VII of 1889. Whatever title the Court may have assumed that they had, it is obvious that Musammam Sonkali, at any rate, was not a member of the same joint family as Gauri Shankar. The Court below ought, instead of dismissing the application for execution, to have given reasonable time to the applicants to perfect their title by the production of one or other of the documents specified in section 4 of Act No. VII of 1889. We set aside the decree of the Court below and remand this case to that Court under section 562 of the Code of Civil Procedure to be disposed of according to law. We allow the appeal, but without costs.

Appeal decreed and cause remanded.