

case should be placed before the Rules Committee with a view to the amendment of the rule.

By THE COURT.—The questions formulated by the District Judge in this reference were :—

(1) Can a judgement-debtor make an application under order XXI, rule 89?

Our answer to this question is—Yes.

(2) Can a purchaser from a judgement-debtor subsequent to the date of the sale apply under this rule?

Our answer to this is—No.

Let these answers be returned to the District Judge together with copies of our orders.

Reference answered.

REVISIONAL CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

AHMAD HUSAIN KHAN (DEFENDANT) v. HARDAYAL
(PLAINTIFF).*

1925
July, 16.

Civil Procedure Code, order IX, rule 13—Suit dismissed for default—Conditional order restoring suit on payment of costs.

An order restoring a case dismissed for default on condition of the payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order, but, on the contrary, is an order contemplated by order IX, rule 13, of the Code of Civil Procedure.—*Jagarnath Sahi v. Kamta Prasad Upadhyaya* (1) and *Nand Lal v. Kishori* (2), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu A. P. Bagchi, for the applicant.

Pandit Uma Shankar Bajpai, for the opposite party.

* Civil Revision No. 50 of 1925.

(1) (1914) I.L.R., 36 All., 77.

(2) (1914) 12 A.L.J., 1270.

1925

ARMAD
HUSAIN
KEAN
v.
HAR. AYAL.

SULAIMAN and DANIELS, JJ.:—This is an application in revision under the following circumstances. A suit was decreed *ex parte* against the applicant on the 29th of April, 1924. On the 26th of July, the Subordinate Judge set aside the *ex parte* decree on condition of the defendant paying the plaintiff Rs. 40 as costs by the 28th of July. The defendant did not at the time make any objection that the time allowed was too short. On the 28th of July the defendant, having failed to deposit the money, applied for ten days' further time, which was refused. An appeal from this order was dismissed by the learned District Judge. It appears to us that because the learned Subordinate Judge in the exercise of his discretion considered that the defendant was not entitled to an extension of time for payment of the money, this does not amount either to a failure to exercise jurisdiction or to a material irregularity in the exercise of jurisdiction against which a revision can lie. The applicant has drawn our attention to a decision in *Jagarnath Sahi v. Kamta Prasad Upadhya* (1) in which the opinion was expressed that a conditional order was not a proper form in which to pass the order, and that an order should first be made directing payment of the money by a certain time and then a separate order passed restoring or declining to restore the suit according as the money had been paid or not. The real question in that case was as to the order from which an appeal lay, and it was held that the final order dismissing the suit or refusing to restore the suit was the one from which an appeal could be filed. In a later case, *Nand Lal v. Kishori* (2) to which one of the same learned Judges was a party, some doubt appears to have been felt

(1) (1914) I.L.R., 36 All., 77.

(2) (1914) 12 A.L.J., 1270.

as to the correctness of the earlier ruling. However that may be, to prevent any misapprehension we wish to lay down definitely that an order restoring a case dismissed for default on condition of the payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order, but, on the contrary, is an order contemplated by order IX, rule 13, of the Code of Civil Procedure. This application has no force, and we dismiss it with costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

DIP PRAKASH AND OTHERS (OBJECTORS) v. BOHRA
DWARKA PRASAD AND ANOTHER (DECREE-HOLDERS.)*

1925
July, 15.

Civil Procedure Code, section 11—Res judicata—Execution of decree—Principle of res judicata how far applicable to proceedings in execution.

Although neither section 11 of the Code of Civil Procedure nor any of its explanations can in terms apply to proceedings in execution, because the question arises in the same suit and not in a second suit, yet where a point has been either expressly or by necessary implication decided in the execution department that decision binds the parties in all subsequent proceedings. *Ram Kirpal v. Rup Kuari* (1), *Mangul Pershad Dichit v. Grija Kant Lahiri* (2), *Raja of Ramnad v. Velusami Tevar* (3), *Dwarka Das v. Muhammad Ashfaq-ullah* (4), *Kalian Singh v. Jagan Prasad* (5) and *Theo Mangal v. Musammatt Hulsa* (6), referred to.

THE facts of this case were as follows :

The plaintiffs obtained a decree from the appellate court on the 15th of December, 1920, ordering

* Second Appeal No. 1844 of 1924, from a decree of Raj Rajeshwar Sahai, Third Additional Subordinate Judge of Aligarh, dated the 25th of September, 1924, reversing a decree of Jagdishwar Nath Kaul, Munsif of Hathras, dated the 31st of March, 1924.

(1) (1888) I.L.R., 6 All., 269.

(2) (1861) I.L.R., 8 Calc., 51.

(3) (1920) L.R., 48 I.A., 45.

(4) (1924) I.L.R., 47 All., 86.

(5) (1914) I.L.R., 37 All., 589.

(6) (1921) I.L.R., 44 All., 159.