APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

RAM HARAKH AND ANOTHER (JUDGMENT-DEBTORS-APPELLANTS) *v.* LALA BANWARI LAL (DECREE-HOLDER-RESPONDENT)* 1937 *March*, 31

Civil Procedure Code (Act V of 1908), section 47 and Order IX, rule 9—Application under section 47 dismissed for default of appearance—Second application containing same objection, if barred by order IX, rule 9.

The combined effect of sections 2(2) and 47 is that an application under section 47 stands on the footing of a suit, and the determination of such an application is tantamount to a decree and the provisions of order IX, rule 9 are applicable to the objections made under section 47, Civil Procedure Code. Where, therefore, certain objections under section 47 are dismissed for default of appearance another application by the judgment-debtor under section 47 containing the same objections, as were previously dismissed, is barred by order IX, rule 9, Civil Procedure Code. *Thakur Prasad* v. *Fakir-Ullah* (1), and *Gauri* v. *Hinga* (2), referred to.

Mr. *P. N. Chaudhri*, for the appellants.

Mr. *Suraj Prasad Khandelwal*, for the respondent.

SRIVASTAVA, C.J. and SMITH, J.:—This is a second appeal under section 47 of the Code of Civil Procedure against an appellate decree of the learned Civil Judge of Sitapur upholding the decree of the learned Munsif of that place.

It is common ground between the parties that on the 17th of August, 1933, the decree-holder-respondent made an application for execution of the decree. The judgment-debtors, who are the appellants before us, filed certain objections under section 47 of the Code of Civil Procedure on the 25th of January, 1934, which were dismissed for default of appearance on the 16th of March, 1934. Five days later, on the 21st of March, 1934,

*Execution of Decree Appeal No. 45 of 1935, against the order of Pandit Kishun Lal Kaul, Civil Judge of Sultanpur, dated the 21st of January, 1935, confirming the order of Mr. G. M. Frank Agarwal, Munsif Sultanpur, dated the 26th of May, 1934.

(1) (1894) I.L.R., 17. All., 106. (2) (1920) 23 O.C., 349.

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the judgment-debtors filed another application under section 47 of the Code of Civil Procedure containing the same objections which had been previously dismissed. This application was opposed on the ground that it was barred by the provisions of order IX, rule 9 by reason of the dismissal of the previous objections for default. Both the lower courts have held that the provisions of order IX, rule 9 are applicable to the objections made under section 47 of the Code of Civil Procedure, and have accordingly dismissed the objections made by the judgment-debtors. It is conceded by the learned counsel for the appellants that if the provisions of order IX, rule 9 are applicable to the case, then the objections raised by the judgment-debtors in their application, dated the 21st of March, 1934, could not be maintainable. He has, however, contended that order IX does not apply to execution proceedings and cannot therefore, apply to an objection under section 47 of the Code of Civil Procedure. The learned counsel for the decree-holder does not question the correctness of the proposition that order IX of the Code of Civil Procedure does not apply to execution proceedings. It was so held by their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir Ullah* (1), and there is a consensus of judicial opinion in the country on this point. The question is whether it necessarily follows from this that the provisions of order IX are inapplicable also to an application made under section 47 of the Code of Civil Procedure. The learned counsel for the parties have not been able to cite any ruling bearing directly on the question. In *Gauri* v. *Hinga and others* (2), Mr. Lindsay observed that although the provisions of order IX, rule 9 are inapplicable to applications for execution of a decree, yet it does not follow that the same principle would apply to all applications made in the execution department. He accordingly held that the provisions of order IX, rule 9 were applicable to an order dismissing for default an application made under order XXI,

(1) (1894) I.L.R., 17 All., 106. (2) (1920) 23 O.C., 349

rule 90 of the Code of Civil Procedure. This case has been referred to by the learned Civil Judge in support of his view. The case is not directly in point, but the principle underlying it does lend support to the respondent's case. The definition of the term "decree" given in section 2, sub-section (2) of the Code of Civil Procedure includes the determination of any question within section 47, but does not include any order of dismissal for default. Thus there can be no doubt that if the judgment-debtors' objections had been decided the order passed on them under section 47 would have amounted to a decree, and any subsequent application raising the same objections would have been barred by the principle of *res judicata*. It seems to us that when orders of dismissal for default were generally excluded from the definition of "decree" the underlying intention was that such orders of dismissal were to be set aside under order IX, rule 9 just as much in a case under section 47 as in the case of a regular suit. The language of section 141 of the Code of Civil Procedure is also sufficiently wide to cover the case of an application under section 47. The main reasons which have led to the exclusion of execution proceedings from the purview of section 141 are that the law as laid down in the Code of Civil Procedure as well as in the Limitation Act contemplates successive applications for execution of a decree, and that such applications are proceedings in suits. Neither of these reasons is applicable to an application under section 47 of the Code of Civil Procedure. In fact, on the contrary, the combined effect of sections 2(2) and 47 is that an application under section 47 stands on the footing of a suit, and the determination of such an application is tantamount to a decree. We must therefore hold that the appellants have failed to satisfy us that the view taken by the lower courts is incorrect.

The result therefore is that the appeal fails, and is dismissed, with costs.

Appeal dismissed.