

1923.

RAGHU
SINGH
v.
MAHANT
KRISHNA
DEYAL
GIR.

1922, will be set aside and the decree which is reversed will be restored.

The appellant is entitled to his costs from the respondent, Mahant Krishna Deyal Gir, who has appeared.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

1923.

May, 31.

JAGANNATH SAO

v.

DEBI PRASAD DHANDHANIA.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 30—decree for money—certain properties pledged as security for payment—execution of decree whether attachment is necessary.

The procedure provided in Order XXI, rule 30, Civil Procedure Code, applies only to cases in which there is a decree for the payment of money and the decree does not affect specific immovable property.

Where, therefore, a compromise decree provided for the payment of a certain sum of money and also provided that certain property should be regarded as security for the fulfilment of the terms of the decree, and that in case of default in payment the plaintiff should be entitled to sell the charged property in execution of the decree, *held*, that it was not necessary for the plaintiff to have the property attached before bringing it to sale in execution of the decree

Appeal by the judgment-debtors.

The decree-holders obtained against the judgment-debtors a decree for the sum of Rs. 29,925. That decree, which was passed on the 14th June, 1919, was the result of a compromise between the parties to the suit. The suit was decreed in terms of the compromise. It provided that a decree should be passed in favour

* Appeal from Original Order No. 127 of 1922, from an order of Babu Abinash Chandra Nag, Subordinate Judge of Bhagalpur, dated the 7th April, 1922.

of the plaintiff for the sum of Rs. 25,925 and that the defendants should pay that sum, together with interest and costs, by certain instalments which were set out at the end of the decree. If the defendants should fail to pay the whole or a portion of any of the instalments then the plaintiff should have the right to realize the entire decretal amount of principal and costs together with interest at 8 annas *per cent* per month until realization. Certain properties were also given as security for the due fulfilment of the terms of the decree, and by clause (e) of the decree it was provided that should these defendants fail to pay the decretal amount payable by instalments, the plaintiffs shall have the right to take out execution of the decree to get the charged property sold by auction and realize the decretal amount principal with interest and costs to which these defendants shall have no objection. Those were the principal terms of the compromise as embodied in the decree. Default was made in the payment of the instalments and thereupon the decree-holders applied for execution of the decree on the 21st September, 1921, claiming the balance still due, one instalment only having been paid, and a sale of the property charged by the terms of the decree as security for the fulfilment of those terms. The judgment-debtors filed an objection to execution and contended that the properties charged under the decree could not be sold in execution unless they were first attached as provided in Order XXI, rule 30. That rule provides that :

“ Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property, or by both.”

The Subordinate Judge who heard the objection came to the conclusion that there was no necessity in the present case, having regard to the terms of the decree which provided specifically for the sale of these properties in the event of default in payment of the instalments, to attach the properties before sale but

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that the decree could be executed by a sale of the properties as provided therein. From that decision this appeal was preferred.

Norendra Nath Sen, for the appellants.

Guru Saran Prasad and Jadubans Sahai, for the respondents.

DAWSON
MILLER,
C. J.

DAWSON MILLER, C. J. (after stating the facts of the case, as set out above, proceeded as follows):—

It seems to me that in a case of this sort, where the decree gives effect to a charge on the property and orders the property to be sold in the event of the instalments not being paid, it is altogether unnecessary that the procedure mentioned in Order XXI, rule 30, should be carried out. That procedure is only applicable in the cases of a decree for the payment of money, that is to say cases in which there is no decree which affects any specific immovable property. In such cases before any specific immovable property belonging to the judgment-debtor can be the subject of sale in satisfaction of the decree, it is necessary that the property should first be attached. In the present case, however, the decree itself provides for the sale of this very property in the event of the instalments not being paid and the decree is in fact something more than a decree for the payment of money. It is not only a decree directing the payment of money but it is a decree directing that in the event of non-payment certain property belonging to the judgment-debtor shall be sold. The form of the decree is very similar to that in a mortgage decree. It is clear that in mortgage decrees it is not necessary to attach the property and the reason for that is that the form of the decree in a mortgage suit itself directs that the property shall be sold. So here the form of this decree which created a charge upon the property directed that the property in question should be sold in a certain event which has happened. In my opinion Order XXI, rule 30, has no application to a suit like the present,

and the decision of the learned Subordinate Judge was right.

The appeal is dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

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JAGAN-
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v.
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DHANIA.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

RAMLAL MALIKAND

v.

DEODHARI RAI.*

1923.

June, 4.

Civil Procedure Code, 1908 (Act V of 1908), section 11—Res judicata—question of law, decision on, in previous execution case, effect of, in subsequent execution case.

A decision on a question of law in an execution case operates as *res judicata* in a subsequent application for execution of the same decree even though the view of the law on which the decision of the prior execution case was based has been subsequently disapproved of by a higher judicial authority.

Gowri Koer v. Audh Koer(1) followed.

Alimunnissa Chowdhurani v. Shama Charan Roy(2), explained.

In considering a question as to the applicability of the rule of *res judicata* what has to be looked at is not whether the cause of action in the subsequent suit is the same as in a previous suit but whether the matter directly and substantially in issue in the subsequent suit has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim,

Aghore Nath Mukharji v. Srimati Kamini Debi(3), followed.

* Appeal from Appellate Order No. 215 of 1922, from an order of Babu Lala Damodar Prasad, Officiating District Judge of Saran, dated the 8th August, 1922, reversing an order of Babu Jotindra Chandra Baa, Subordinate Judge of Saran, dated the 29th April, 1922.

(1) (1884) I. L. R. 10 Cal. 1087.

(2) (1905) I. L. R. 32 Cal. 749.

(3) (1910) 11 Cal. L. J. 461.