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was raised in cases relating to other districts but was answered in favour of the pre-deceased daughter's son.

In my opinion the plaintiff's suit has been rightly decreed and I would dismiss the appeal with costs.

TEK CHAND J.

MONROE J.—I agree.

MONROE J.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Bhide J.

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Dec. 5.

BIBI VAID KAUR (DECREE-HOLDER) Appellant

versus

BALKISHAN DAS MEHRA (JUDGMENT-DEBTOR) Respondent.

Civil Appeal No. 545 of 1932.

Execution of Decree—maintenance in favour of wife—Decree in declaratory form—executed previously without objection—whether objection that decree is not executable can be entertained in subsequent proceedings—res judicata.

The wife obtained a declaratory decree for maintenance of Rs. 45 *per mensem* against her husband in May 1915. The decree was executed by the wife several times through the Court without objection, but when in 1929 she again claimed arrears for about 2½ years, the husband for the first time raised the objection that the decree, being declaratory, was not executable.

Held, that the decree having been allowed to be executed in previous proceedings without any objection, the objection that the decree was incapable of execution could not be raised in subsequent proceedings.

Banu Mal v. *Pars Ram* (1), *Ram Kirpal Shukul* v. *Mst. Rup Kuari* (2), *Raja of Ramnad* v. *Velusami Tevar* (3), *Dip*

(1) (1926) 92 I. C. 254. (2) (1883) 11 I. A. 37 (P. C.).
(3) (1921) 33 Cal. L. J. 218 (P. C.).

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Prakash v. *Bohra Dwarka Prasad* (1), and *Gadigappa* v. *Shidappa* (2), relied upon.

Kalyan Singh v. *Jagan Prasad* (3), *Prithi Mahton* v. *Jamshad Khan* (4), and *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill* (5), distinguished.

Miscellaneous appeal from the order of Mr. M. A. Sooft, Additional District Judge, Amritsar, dated the 4th February, 1932, reversing that of Khan *Mohammad Sher Nawab Khan, Subordinate Judge, 2nd Class, Amritsar, dated the 13th July, 1931, and holding that the declaratory decree is incapable of execution.*

JAGAN NATH, AGGARWAL, for Appellant.

JAI GOPAL SETHI, and GOBIND RAM KHANNA, for Respondent.

BHIDE J.

BHIDE J.—The material facts of the case giving rise to this second appeal are briefly these. *Mussammat* Vaid Kaur, appellant, obtained a decree for maintenance against her husband Balkishen Das on the basis of a compromise on the 13th May 1915. The decree was as follows :—

I hereby pass a declaratory decree to the effect that the plaintiff is entitled to Rs. 45 per mensem by way of maintenance from the defendant and that this sum will be a charge on the moveable and immoveable property of the appellant.

This decree was executed several times through the Court by the appellant, but when in 1929 she claimed arrears for about $2\frac{1}{2}$ years, the respondent raised objections (*i*) that the decree had been satisfied out of Court, and (*ii*) further that the decree, being declaratory, was not executable. The latter objection was

(1) (1926) I. L. R. 48 All. 201.
(2) (1924) I. L. R. 48 Bom. 638.
(3) (1915) I. L. R. 37 All. 589.
(4) (1922) I. L. R. 1 Pat. 593.
(5) 1926 A. C. 94.

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raised in execution proceedings in 1929 for the first time. The trial Court dismissed the objections, but the learned District Judge having upheld the latter objection on appeal, *Mussammat* Vaid Kaur has come up to this Court in second appeal.

The learned counsel for the appellant has contended that the respondent not having raised the question of the executability of the decree till 1929 and having allowed the decree to be executed against him on previous occasions without any objection, the matter was impliedly decided against him in the previous proceedings and could not be raised again. The learned counsel has relied upon *Mungul Pershad Dichit* v. *Greja Kant Lahiri Chowdhry* (1), *Ram Kirpal Shukul* v. *Mussammat Rup Kuari* (2), and *Raja of Ramnad* v. *Velusami Tevar* (3), in this respect.

The learned counsel for the respondent conceded that the principle of *res judicata* applied to execution proceedings, but he urged that no decision on any matter could be held to operate as *res judicata* for the purposes of execution proceedings unless it was actually heard and decided. He contended that the principle of Explanation IV to section 11 of the Civil Procedure Code did not apply to execution proceedings. But the decision of their Lordships of the Privy Council in *Raja of Ramnad* v. *Velusami Tevar* (3), seems to go against this contention. In that case the question of limitation had only been decided impliedly and yet the decision was held to operate as *res judicata*. It has been held in *Dip Prakash* v. *Bohra Dwarka Prasad* (4), that even if a point is

(1) (1881) 8 I. A. 123 (P. C.).
(2) (1883) 11 I. A. 37 (P. C.).
(3) (1921) 33 C. L. J. 218 (P. C.).
(4) (1926) I. L. R. 48 All. 201.

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decided by necessary implication, it operates as *res judicata* in the subsequent proceedings. A similar view was taken in *Gadigappa* v. *Shidappa* (1). The learned counsel for the respondent relied on *Kalyan Singh* v. *Jagan Prasad* (2) and *Prithi Mahton* v. *Jamshad Khan* (3), but the facts of the former case are distinguishable. In the former case there was only an error in the decretal amount claimed in a previous application and there had been no occasion yet for giving a definite decision on that point in the previous proceedings. In the latter case it was held that the point raised before the learned Judges had not been taken up before the District Judge and could not be reagitated. The further remarks on the question of *res judicata* appear, therefore, to be in the nature of *obiter dicta*. Besides, the view taken therein seems to be opposed to the view expressed by their Lordships of the Privy Council in *Raja of Ramnad* v. *Velusami Tevar* (4). In the present instance the previous application for execution could not have been granted unless it was held that the decree was capable of execution. The respondent not having raised the latter objection, it must be held to have been decided against him by necessary implication, in view of the authorities cited for the appellant.

The learned counsel for the respondent urged that the present claim for maintenance was for a different period and hence the principle of *res judicata* is not applicable. But this argument has, I think, no force as the claim arises under the same decree. The learned counsel referred in this connection to *Broken Hill Proprietary Company, Ltd.* v. *Municipal Council of*

(1) (1924) I. L. R. 48 Bom. 638, 645. (3) (1922) I. L. R. 1 Pat. 593.
(2) (1915) I. L. R. 37 All. 589. (4) (1921) 33 C. L. J. 218 (P. C.).

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Broken Hill (1), but that case is clearly distinguishable. All that was held therein was that a decision with respect to an assessment for one year does not operate as *res judicata* for the purposes of an assessment for a subsequent year. But the assessment for each year was distinct, while here the maintenance is being claimed under the same decree. It was argued next that the point whether the decree is or is not capable of execution is a pure question of law and hence the principle of *res judicata* cannot apply. But I do not think the point can be treated as a pure question of law. The question is really one of construction of the decree. In *Ram Kirpal Shukul* v. *Mussammat Rup Kuari* (2), when it was once held that mesne profits were claimable under a certain decree, the decision was held to operate as *res judicata* in subsequent proceedings. The present case is analogous. It must also be remembered that the decree in this case was based upon a compromise and the question whether it was to be executed by recourse to the Court depended mainly on the intention of the parties. The fact that the respondent never raised any objection to execution through the Court till 1919 is very significant in this connection.

The facts of the present case seem to be very similar to those in *Banu Mal* v. *Pars Ram* (3), a Division Bench ruling of this Court. In that case a preliminary decree in a mortgage suit had been erroneously allowed to be executed without objection in previous proceedings, though such a decree is incapable of execution. It was held (following *Epoor Ramasamy Reddy* v. *Kandadai Rangamaunar Iyengar* (4)) that the objection that the decree was incapable

(1) 1926 A. C. 94.
(2) (1883) 11 I. A. 37 (P. C.).
(3) (1926) 92 I. C. 254.
(4) (1914) 23 I. C. 390.

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of execution could not be raised in subsequent proceedings.

In my opinion, the trial Court's decision was correct. I accept the appeal and setting aside the order of the learned District Judge direct the execution to proceed according to law. The appellant will get her costs throughout.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Addison and Agha Haidar JJ.

1932

Dec. 20.

MUHAMMAD HABIT KHAN (PLAINTIFF) Appellant

versus

BADI-UL-ZAMAN KHAN (DEFENDANT) Respondent.

Civil Appeal No. 590 of 1928.

Declaratory Suit—whether competent—where property attached by Magistrate and Receiver appointed—custodia legis.

In view of acute differences between plaintiff and defendant the police took action under Section 145 of the Criminal Procedure Code, and the Magistrate, 1st Class, passed orders under Section 146 by which the property in dispute was attached, and a Receiver appointed in respect thereof. The Receiver was ordered to realise rents and profits of the property attached until the parties had got their rights settled by a competent Civil Court. The plaintiff thereupon brought the present suit for a declaration that he was the absolute owner of the property, and the defendant had no concern or connection therewith. His suit was dismissed by the lower Court on the ground that as the property was in possession of the defendant, plaintiff ought to have sued for possession.