

LETTERS PATENT APPEAL.

Before Tek Chand and Coldstream JJ.

PRABHU DAYAL (JUDGMENT-DEBTOR) Appellant

versus

DEWAT RAM (DECREE-HOLDER)
 MST. KANIZ ABBAS AND OTHERS } Respondents.
 (DEFENDANTS)

1934

Feb. 27.

Letters Patent Appeal No. 58 of 1932.

Execution-proceedings — Res judicata — principles of — whether applicable—and whether includes constructive res judicata—Civil Procedure Code, Act V of 1908, section 11, Explanation IV.

Held, that although section 11 of the Code of Civil Procedure does not in terms apply to execution-proceedings, the general principles underlying the rule of *res judicata* are applicable to these proceedings.

Ram Kirpal v. Rup Kuari (1), and *Mussammat Lachhmi v. Mst. Bhulli* (2), followed.

Held also, that the applicability of the rule is not limited to matters, which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but the principle of “constructive *res judicata*” as embodied in Explanation IV to section 11 is also applicable to such proceedings.

Mungul Pershad Dichit v. Grija Kant Lahiri (3), and *Raja of Ramnad v. Velusami Tevar* (4), followed.

Other Cases referred to.

Appeal under clause 10 of the Letters Patent from the order passed by Harrison J. in C. A. No. 1434 of 1932 on 15th October 1932, affirming that of Seth Iqbal Rai, Subordinate Judge, 1st Class, Delhi, dated 29th August 1932, rejecting the application for setting aside the sale.

(1) (1884) I.L.R. 6 All. 269 (P.C.). (3) (1882) I.L.R. 8 Cal. 51 (P.C.).

(2) (1927) I.L.R. 8 Lah. 384, 395 (F.B.). (4) (1921) 48 I. A. 45 (P.C.).

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PRABHU DAYAL

v.

DEWAT RAM.

TEK CHAND J.

NAWAL KISHORE, for Appellant.

SHAMAIR CHAND, for (Decree-holder) Respondent.

TEK CHAND J.—A learned Judge of this Court has dismissed the judgment-debtor's appeal on the ground that the objection now raised by him against the execution of the decree might and ought to have been raised when the decree-holder had previously applied for execution, and that his failure to do so debarred him from raising it at this stage. I have no doubt that the decision of the learned Judge is correct.

It is true that section 11 of the Code of Civil Procedure does not in terms apply to execution proceedings, but it has long been settled that the general principles underlying the rule of *res judicata* are applicable to these proceedings. See *Ram Kirpal v. Rup Kuari* (1) and *Mussammat Lachhmi v. Mussammat Bhulli* (2). It has also been held that the applicability of the rule is not limited to matters which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but the principle of "constructive *res judicata*," as embodied in Explanation IV to section 11, also applies to such proceedings. Therefore, it is not open to a judgment-debtor to object to execution, on a plea which could have been raised in former execution proceedings, but was not so raised. See *Bibi Vaid Kaur v. Balkishan Das Mehra* (3), *Dip Prakash v. Bohra Dwarka Prasad* (4), *Rajitagiripathy v. Bhavani Sankaram* (5), *Gadigappa v. Shidappa* (6) and *Daw Ohn Bwin v. U Ba* (7). The

(1) (1884) I.L.R. 6 All. 269 (P.C.).

(4) (1926) I.L.R. 48 All. 201.

(2) (1927) I.L.R. 8 Lah. 384, 395 (F.B.).

(5) (1924) I.L.R. 47 Mad. 641.

(3) (1933) I.L.R. 14 Lah. 409.

(6) (1924) I.L.R. 48 Bom. 638.

(7) (1930) I.L.R. 8 Rang. 302.

matter is really concluded by the decisions of their Lordships of the Privy Council in *Mungul Pershad Dichit v. Grija Kant Lahiri* (1) and *Raja of Ramnad v. Velusami Tevar* (2). In the latter case their Lordships clearly laid down that "it was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so, if they proposed to rely on it, and as this had not been done" it was not competent for the "Subordinate Judge to admit the plea on subsequent proceedings."

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It is conceded by the learned counsel for the appellant that the appellant could have taken this objection at an earlier stage but he did not do so.

The appeal is without force and is dismissed with costs.

COLDSTREAM J.—I agree.

COLDSTREAM J.

A. N. C.

Appeal dismissed.

(1) (1882) I.L.R. 8 Cal. 51 (P.C). (2) (1921) 48 I.A. 45: 33 Cal. L.J. 218 (P.C.).