

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

SHEIK BURAN v. RAMCHANDRA BHUNJGAYA, DECEASED,
BY HIS HEIR, BHAVANISHANKAR.*

1887.
March 21.

Decree—Execution—Mode of execution—Construction of decree—Decree against mortgaged property—Liability of judgment-debtor to arrest under such decree—Decree not to be extended in execution beyond its terms—Res judicata—Principles of res judicata applicable to execution proceedings.

A decree cannot be extended in execution beyond the real meaning of its terms.

A decree obtained on a mortgage directed that the judgment-debtor should pay the sum adjudged out of the property mortgaged. After executing the decree against the mortgaged property, the decree-holder made an application for execution against the person of the judgment-debtor. A notice was issued calling upon him to show cause why execution should not be further proceeded with. But the notice did not give him any intimation of the application for the arrest of his person. He did not appear, and, in his absence, an order was made for his personal arrest, but the order was not executed, as the decree-holder did not pay the process fee. Subsequently a fresh application was made for execution against the person of the judgment-debtor.

Held, that as the decree merely provided for the satisfaction of the judgment-debt out of the property mortgaged, the decree could not be executed against the person of the judgment-debtor.

Held, also, that the question as to the personal liability of the judgment-debtor to satisfy the decree was not concluded by the order made in the previous execution proceedings for execution to issue against his person. The order would have operated as a *res judicata* if the judgment-debtor had been called upon to contest the right claimed by the decree-holder to hold him personally liable under the decree, and had then failed in his contention to the contrary, or allowed the judgment to go by default. The order was *res judicata* as to the legal possibility of further execution in terms of the decree, but not as to the special construction which the judgment-creditor sought to impose on it.

THIS was a second appeal from the decree of A. H. Unwin, Acting District Judge of Kánara, in Appeal No. 192 of 1884.

One Purshotam Parpayashet obtained a decree in Suit No. 46 of 1872 upon a mortgage against Sheik Budam valad Sheik Ismáil. The decree merely directed that Purshotam should recover the amount claimed from the property mortgaged. The decree was, in the first instance, enforced against the mortgaged

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property. Subsequently, the decree-holder applied in execution for the arrest of the judgment-debtor. A notice was issued to the judgment-debtor under section 248 of the Civil Procedure Code (Act XIV of 1882), calling upon him to show cause why execution should not be further proceeded with. But the notice did not give him any intimation of the mode in which the decree was sought to be executed. The judgment-debtor did not appear to show cause, and, in his absence, an order was made for execution against his person. But this order was not carried out, as the decree-holder failed to pay the process fee.

On the 1st September, 1884, the decree-holder presented a *darkhást* for the attachment of a shop and moveable property of the judgment-debtor, as well as for his personal arrest. The Subordinate Judge declined to issue a warrant of arrest, on the ground that the terms of the decree, sought to be executed, did not authorize the decree-holder to recover the amount of the judgment-debt from the judgment-debtor personally.

On appeal, the Acting District Judge was of opinion that as the amount of the decree had not been fully satisfied out of the property mortgaged, the decree-holder was at liberty to proceed against the person of the judgment-debtor. He, therefore, granted the *darkhást*.

Against this decision the judgment-debtor appealed to the High Court.

Shamráv Vithal for the appellant:—The decree in this case merely directs the mortgage-debt to be recovered out of the property mortgaged. The judgment-debtor cannot be held personally liable under this decree. To execute the decree against his person would be to vary the decree. This cannot be done in execution—*Baron Forester v. Secretary of State for India in Council*⁽¹⁾ and *Bhánushankar Gopálrám v. Raghunáthráv Mangalráv*⁽²⁾.

N. G. Chandávarkar for the respondent:—The question as to the personal liability of the judgment-debtor to satisfy this decree is *res judicata*. In the previous execution proceedings the

(1) L. R., 4 Ind. Ap., 137.

(2) 2 Bom. H. C. Rep., 101, A. C. J.

decree-holder had applied for the arrest of the judgment-debtor ; and that application was granted after notice to the judgment-debtor. He cannot now re-open the same question. The doctrine of *res judicata* applies to execution proceedings—*Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry*⁽¹⁾.

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Shámrao Vithal in reply :—The judgment-debtor had no notice, in the previous execution proceedings, that the decree was sought to be executed against his person. He, therefore, did not contest the point on the previous occasion. The question about his personal liability is, therefore, not *res judicata*.

WEST, J. :—The decree in this case, which might properly have commanded the judgment-debtor to pay the sum adjudged, and directed that, in default, the property mortgaged should be sold or otherwise made available in satisfaction of the claim, was not, in fact, so framed. What it says is distinctly that the judgment-debtor is to satisfy the adjudication “on the answerability or liability of the property mortgaged.” There is no mention of any further responsibility, nor any order for payment independently of the property mortgaged. Such a decree is anomalous, but it cannot be extended, in execution, beyond the real meaning of its terms—*Bhánushankar Gopákrám v. Raghunáthráo Mangalráo*⁽²⁾; *Baron Forester v. Secretary of State for India in Council*⁽³⁾. But then, it has been urged, the question of the true construction of the deed was already *res judicata* in this case between the parties when the application now in dispute was made to the Court. If the question of the judgment-debtor’s personal liability, or of the liability of his property generally to execution of the decree had really been determined by an adjudication in the course of the execution proceedings, that determination, so long as it stood unreversed, would, no doubt, be binding on the parties, whether the term *res judicata* properly applied to it or not—see *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry*⁽⁴⁾; *Bani Rám v. Nánhu Mal*⁽⁵⁾—which show that a point adjudged in execution is concluded unless the judgment is

⁽¹⁾ L. R., 8 Ind. Ap., 123.

⁽³⁾ L. R., 4 Ind. Ap., 137.

⁽²⁾ 2 Bom. H. C. Rep., 101, A. C. J.

⁽⁴⁾ L. R., 8 Ind. Ap., 123.

⁽⁵⁾ L. R., 11 Ind. Ap., 181.

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reversed. But a judgment implies the judicial determination of a point contested either directly or by implication. See *per* Lord Romilly in *Jenkins v. Robertson*⁽¹⁾. In *Langmead v. Maple*⁽²⁾ the late Mr. Justice Willes said: "It is not sufficient, to constitute *res judicata*, that the matter has been determined on; it must appear that it was controverted as well as determined upon." See *In re May*⁽³⁾, where the language of Willes, J., is cited, and approved.

Now, in the present case, after execution had been had against the mortgaged property, the judgment-debtor was called on to show cause why, though more than one year had elapsed since the last preceding step in execution, the execution should not be further proceeded with. The application had, in fact, been made for execution against the person of the judgment-debtor, but the notice gave him no intimation of this. He had no reason to suppose that the application went beyond the terms of the decree. He did not appear, and, in his absence, an order was made for execution against his person, but it was not executed, because the judgment-creditor failed to pay the requisite fee. Such an order, *primá facie* only of an executive character, could not possibly have the effect of *res judicata*, unless the judgment-debtor, being called on to dispute, if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-creditor, had then either failed in his contention to the contrary, or, at any rate, allowed the judgment to go by default. The order made by the Subordinate Judge was *res judicata* as to the legal possibility of further execution in terms of the decree, but not as to the special construction which the judgment-creditor sought to impose on it.

Hence, the decision of the District Judge, that the decree is now capable of enforcement against the person of the judgment-debtor, is wrong, and must be reversed, with costs on the respondent. The order of the Subordinate Judge is restored.

Order reversed.

⁽¹⁾ L. R., 1 H. L. Sc., 117.

⁽²⁾ 18 C. B. (N. S.), 255.

⁽³⁾ L. R., 25 Ch. Div., 231.