APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Imam.

1912

March 11.

BAIJ NATH GOENKA

v.

PADMANAND SINGH.*

Res judicata—Execution proceeding—Decision in such proceeding not appealed against—Finality of such decision—Erroneous decision on a question of law, whether res judicata.

A decision in a previous execution proceeding which merely lays down what the law is, and is found to be erroneous, cannot have the force of *res judicata* in a subsequent proceeding for a different relief.

APPEAL by the decree-holder, Baij Nath Goenka.

This appeal arose out of an application for execution of a decree. One Baij Nath Goenka obtained a decree for a certain sum of money aganst Raja Padmanand Singh on the 25th September 1905, who, in order to pay off his debts, sold his estate to his minor son, reserving to himself a monthly allowance of Rs. 4,000. The estate being under the management of the Court of Wards, this allowance was paid to the said Raja by the manager of the estate, Mr. Macgregor. The decree-holder thereupon in execution of his decree attached the monthly allowance. A number of applications were also made by several other decree-holders in the Court of the Subordinate Judge of Bhagalpur for execution of their decrees, and they prayed for rateable distribution of the said monthly allowance. An objection was taken by the judgment-debtor that his monthly allowance could not be attached on the ground that it was a right to future maintenance. The learned Subordinate Judge overruled

*Appeal from order, No. 606 of 1911, against the order of Kishori Mohan Sikdar, Subordinate Judge of Bhagalpur, dated Sept. 14, 1911.

this objection on the 24th April 1909, but permitted the attachment of three quarters of the allowance only, and left the rest for the judgment-debtor to enjoy. No appeal was preferred against the order of the Subordinate Judge. This amount was paid into Court by Mr. Macgregor, and rateable distribution was made amongst the several decree-holders. Baij Nath Goenka by successive applications for execution obtained rateable distribution out of the said sum till about September 1911. In the meantime another creditor of the Raja having applied for execution of his decree by attachment of the allowance, the judgment-debtor took objection to this attachment on the ground that it was not attachable, being a right to future maintenance. The learned Subordinate Judge overruled the objection. On appeal to the High Court, the judgment of the Subordinate Judge was reversed, and it was held that the maintenance allowance could not be attached till it fell due. Thereafter the judgment-debtor, with a copy of the judgment of the High Court, applied to the Subordinate Judge of Bhagalpur that all the execution cases which were pending before him might be dismissed. The decree-holder Baij Nath Goenka objected to his execution case being dismissed, *inter alia*, on the ground that the judgment-debtor was debarred from raising the objection by virtue of the order in the previous execution case, and by his conduct. The learned Subordinate Judge gave effect to this objection of the judgment-debtor and dismissed the execution case. Against that order the decree-holder appealed to the High Court.

Dr. Rashbehary Ghose (*Babu Khetter Mohan Sen* with him), for the appellant. The learned Subordinate Judge released the annuity from attachment on the ground that under the law the annuity was not

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liable to attachment. The question is, whether an order in a previous execution proceeding passed by the learned Judge between the same parties that an annuity is liable to attachment would operate as *res judicata* or not; and whether the judgment-debtor having acquiesced in the order which was made, partly in favour of the decree-holder (appellant), and partly in favour of the judgment-debtor, and he having accepted the benefit of it, could now say, that he is not bound by it. The previous decision, although erroneous would operate as *res judicata*. In section 11 of the Code of Civil Procedure (V of 1908), "issues" mean both issues of law and of fact. The Legislature did not make any distinction between a determination of an issue of law and of fact. In the case of *Alimunnissa Chowdhurani* v. *Shama Charan Roy* (1) it was no doubt held that a decision on a question of law cannot operate as *res judicata*. But the question is, if there had been no alteration of law since the previous decision, whether the previous decision would operate as *res judicata*; I submit it would. The learned Chief Justice in the aforesaid case carefully guarded himself against laying down any general principles of law. The cases of *Gowri Koer* v. *Audh Koer* (2), *Rai Churn Ghose* v. *Kumud Mohon Dutta* (3) and *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* (4) support my contention. The cases of *Parthasaradi Ayyangar* v. *Chinnakrishna Ayyangar* (5) and *Chamanlal* v. *Bapu Bhai* (6) seem to be against me; but the facts are distinguishable from the present case. If section 11 of the Code of Civil Procedure (Act V of 1908) is held not to be applicable, then the decision in the previous execution proceeding is, at any rate,

(1) (1905) I. L. R. 32 Calc. 749.
(2) (1884) I. L. R. 10 Calc. 1087.
(3) (1897) I. C. W. N. 687.
(4) (1901) I. L. R. 28 Calc. 318.
(5) (1882) I. L. R. 5 Mad. 304.
(6) (1897) I. L. R. 22 Bom. 669.

binding upon the parties upon general principles of law: see *Ram Kirpal* v. *Rup Kuari* (1) and *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2).

Mr. B. Chakravarti (*Babu Ram Charan Mitter*, *Babu Bepin Behary Ghose* and *Babu D. N. Bagchi* with him), for the respondents. The order that the learned Subordinate Judge passed in the previous execution proceeding was wholly without jurisdiction, and it was not a final order. The present proceeding is not in continuation of the previous proceeding; the previous application for execution was disposed of, and money was realised thereunder. The present proceeding did not refer to the previous proceeding at all. The attachment was in the nature of a prohibitory order; it is not in any sense a final order of the Court. The doctrine of *res judicata* cannot apply, because the subject-matter is not the same; there was no final decision, and the previous decision was not a decision which the Subordinate Judge had jurisdiction to pass. After disposal of the previous application for execution, the attachment came to an end, and the decree-holder made a fresh application for another sum of money and asked for a prohibitory order. The application was registered as a new case, and therefore no question of *res judicata* could arise; see *Namuna Bibi* v. *Rosha Miah*(3) and *Patringa Koer* v. *Madhava Nand Ram*(4). An erroneous decision on a question of law in a previous suit cannot operate as *res judicata*: see *Aghore Nath Mukerjee* v. *Srimati Kamini Debi* (5), *Purna Chandra Sarbajna* v. *Rasik Chandra Chakrabarti* (6) and *Alimunnissa Chowdhurani* v. *Shama Charan Roy* (7).

(1) (1883) I. L. R. 6 All. 269.
(2) (1881) I. L. R. 8 Calc. 51; L. R. 8 I. A. 123.
(3) (1911) I. L. R. 38 Calc. 482.
(4) (1911) 16 C. W. N. 332.
(5) (1909) 11 C. L. J. 461.
(6) (1910) 13 C. L. J. 119.
(7) (1905) I. L. R. 32 Calc. 749.

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Babu Kshetter Mohun Sen, in reply.

Cur. adv. vult.

COXE AND IMAM JJ. The appellant in this case in a former execution proceeding attached an allowance payable to the respondent. The attachment was contested, but the case was decided against the respondent and the decision was not appealed against. It is clear that what was sought to be attached in that case was not any particular instalments but the whole allowance as it fell due. Subsequently it has been held in a case between the respondent and another creditor, to which the appellant was not a party, that this allowance could not be attached in this general way, and that instalments could not be attached before they respectively fell due. The appellant again took out execution and the respondent again pleaded that this attachment could not be made. This plea was accepted by the Subordinate Judge and the decree-holder accordingly appeals.

The only point that really arises in the appeal is whether the liability of the allowance to attachment is or is not a *res judicata* between the parties. The former proceeding was an execution in the same suit and was not a former suit, so that section 11 of the Code has no application and the matter must be decided on the principles laid down in *Ram Kirpal* v. *Rup Kuari*(1). The question, however, whether an erroneous decision of law can have the force of a *res judicata* must necessarily be decided on the same principles, whether it arises under section 11 of the Code or in successive execution proceedings. There is considerable divergence of judicial opinion on the point, and we have been referred to numerous cases, of which all the most important are cited in *Aghore*

(1) (1883) I. L. R. 6 All. 269.

Nath Mukerjee v. *Srimati Kamini Debi* (1). The learned Judges there held that an erroneous decision on a point of pure law cannot have the force of a *res judicata* in a subsequent case in which the cause of action is not the same. This decision was followed in *Purna Chandra Sarbajna* v. *Rasik Chandra Chakrabarti* (2). It appears to us that so long as the former decision merely lays down what the law is, it cannot have the force of *res judicata* in a subsequent proceeding to recover different relief. But if it is a decision that is contrary to law, when that expression is used in the wide sense attributed to it, for example, in section 100 of the Civil Procedure Code, it may or may not have the force of a *res judicata*. For instance, in the case *Ram Kirpal* v. *Rup Kuari* (3) cited above, the two proceedings did not relate to the same mesne profits, and in the first the proper construction of the decree of which execution was sought was decided. This would be a question of law under section 100 of the Civil Procedure Code, but the decision did not profess to lay down what the law on the subject was. But when a decision does lay down what the law is and is found to be erroneous, it cannot, in our opinion, have the force of *res judicata* in a subsequent proceeding for different relief. A decision cannot alter the law of the land. *Rai Churn Ghose* v. *Kumud Mohon Dutta Chaudhuri* (4) and *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* (5).

We think, therefore, that although it was decided between the parties in a previous execution proceeding that the allowance could be attached, the Subordinate Judge has no more power now, than he really had then, to attach the allowance before it was due;

(1) (1909) 11 C. L. J. 461.
(2) (1910) 13 C. L. J. 119.
(3) (1883) I. L. R. 6 All. 269
(4) (1897) I. C. W. N 687.
(5) (1901) I. L. R. 28 Calc. 318.

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and that the former decision cannot alter the law in this respect or give the Subordinate Judge a jurisdiction that he would not otherwise possess.

It has been argued that the judgment-debtor is precluded from attacking the attachment, because in the former proceeding he accepted benefits under it. But we think that there is nothing in this contention. The decree-holder sought to attach the whole allowance, but the executing Court, moved apparently by compassion, permitted the attachment of three-quarters only and left the rest for the judgment-debtor to enjoy. The judgment-debtor may have received this indulgence, which in the view taken by the executing Court was quite unjustifiable; but it certainly cannot preclude him from contesting the whole attachment.

The appeal is accordingly dismissed with costs.

S. C. G. *Appeal dismissed.*