MANU/BH/0037/1970

Equivalent Citation: AIR1970Pat237, 1969(17)BLJR774, 1969(2)PLJR458

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.O.O. No. 175 of 1962 and No. 6 of 1964 and A.F.A.O. No. 248 of 1964

Decided On: 10.01.1968

Appellants: **Sarjug Singh and Ors.**
Vs.
Respondent: **Basisth Singh and Ors.**

Hon'ble Judges/Coram:
N.L. Untwalia , Tarkeshwar Nath and K.B.N. Singh , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: B.P. Samaiyar, S.C. Sinha, Ambika Kant Sinha, Kamlapati Singh and Ashwini Kumar Sinha, Advs.

For Respondents/Defendant: Kedar Nath Verma, Adv. for Respondent (in M.A. No. 175/62), S.K. Sarkar and K.N. Rao, Advs. for Respondents (in No. 6/64), Lalnarayan Sinha and Ram Nandan Sahai Sinha, Advs. for Respondent (in No. 248/64)

JUDGMENT

N.L. Untwalia, J.

1 . All these three miscellaneous appeals referred to Full Bench have been heard together as the common question of law involved in them is whether dismissal of a judgment-debtor's application under Section 47 of the Code of Civil Procedure hereinafter called the Code in his default is a bar to the maintainability of an identical or a similar application by the judgment-debtor on the principles of res judicata.

2. By order dated 13th of April, 1967 R.K. Choudhary and G.N. Prasad, JJ., referred miscellaneous appeal 175 of 1962 to a larger Bench as in respect of the point aforesaid there was a conflict of views expressed in two Bench decisions of this Court, namely, Ramnarain Singh v. Basudeo Singh, MANU/BH/0120/1946 : AIR 1947 Pat 298 and Bhagwati Prasad Sah v. Radha Kisun Sah, MANU/BH/0091/1950 : AIR 1950 Pat 354. Since this was an appeal from an original order, obviously the reference was under Rule 3, Chapter V of the Patna High Court Rules, and only the questions of law could be referred. No question for answer by the Full Bench was, however, framed by the Division Bench. Miscellaneous Appeal 248 of 1964 which is an appeal from an appellate order, in view of the earlier reference to the Full Bench in miscellaneous appeal 175 of 1962 as also because of the conflict between the two Bench decisions of this Court, was also referred to a larger Bench by Ramratna Singh and Shambhu Prasad Singh, JJ., on the 10th of July, 1967. Since this is a miscellaneous second appeal, manifestly the reference was under Rule 2. Chapter V of the Patna High Court Rules, and, therefore, not only the point of law but the whole case was for decision before the Full Bench. Miscellaneous appeal 6 of 1964 which again is an appeal from original order came up before the same Bench consisting of Ramratna Singh and Shambhu Prasad Singh, JJ., for hearing, and this was also referred to the Full Bench by their Lordships order made on the 14th September,

1967, without formulating any question of law. In this appeal as also in miscellaneous appeal 175 of 1962, we have framed and answered the question of law only as will be stated hereinafter. These two appeals eventually will have to be placed before the appropriate Division Benches for final disposal.

M. A. 175 of 1962

3. Sarjug Singh, one of the judgment-debtors, is the sole appellant in this case. Basistha Narain Singh is decree-holder respondent No. 1. The latter proceeded to execute his decree in execution case No. 9 of 1953 in the Court of the 2nd Additional Subordinate Judge, Muzaffarpur. It appears that the talika of the properties sought to be proceeded against in the execution case was altered at a subsequent stage by amendment of the execution petition. The judgment-debtor appellant filed an application on the 8th of August, 1961 under Section 47 of the Code, which was registered and numbered as miscellaneous case 20 of 1961, objecting to the execution chiefly on the ground that it was barred by limitation. The application was dismissed on the 20th of January, 1962 ('1961' is a mistake) in his default and in presence of the decree-holder respondent, by an order in the following terms--

> "139: 20-1-1961 Parties files (sic) hazari. Case called out. O.P.'s lawyer turns up A.P. does not turn up after repeated calls.
>
> The Hazari on behalf of the A.P. discloses the name of one Ramsobhit Singh as witness for the A.P. but none responded on repeated calls. The lawyer is sent for but he is not available. The miscellaneous Case is, therefore, dismissed for default."

Shortly after the dismissal, on the same date another application under Section 47 of the Code on identical lines was filed by the appellant, which was registered as miscellaneous case No. 4 of 1962. This miscellaneous case has been dismissed by the learned Additional Subordinate Judge by his order dated the 9th of June, 1962 merely on the ground that in view of the decision of a Full Bench of this Court in Baijnath Prasad Sah v. Ramphal Sahni MANU/BH/0024/1962 : 1962 BLJR 110 :AIR 1962 Pat 72 (FB) the second application was barred on the principle of constructive res judicata because of the dismissal of the first application in default of the judgment-debtor. The point as to whether the execution case was barred by the law of limitation has not been decided by the Court below. The judgment-debtor applicant has come up in appeal.

4. It is beyond debate and dispute now that though in terms the provisions of Section 11 of the Code are not applicable to execution proceedings, principles of res judicata as also of constructive res judicata are applicable to execution proceedings under appropriate circumstances in subsequent executions of the same decree or at different stages of the same execution, case. The decision of the Full Bench consisting of five Judges of this Court in the case of Baijnath Prasad Sah, MANU/BH/0024/1962 : AIR 1962 Pat 72 (FB) is a settlor on the point. The question, however, is whether the dismissal of an application under Section 47 of the Code filed by the judgment-debtor in his default -- either in presence of the decree-holder or in his absence--is an order which can be said to have decided, either, expressly or impliedly, i.e., by necessary implication, any of the points of objection to the execution, which were raised by him in his objection or which might and ought to have been raised. The order dismissing the application in default, it is manifest, did not decide anything expressly. Did it decide any matter impliedly or by necessary

implication? The answer, to my mind, to this question also is in the negative.

5. The analogy of dismissal of a suit for default of the plaintiff, which bars the filing of a second suit, if the dismissal has been in presence of the defendant, is not quite apposite, as has been taken in some cases. On the same analogy, it has been opined in some of them that if the dismissal of the application under Section 47 of the Code is in default not only of the judgment-debtor but also of the decree-holder then a second application by the former is not barred. It ought to be remembered, however, that dismissal of a suit for default of the plaintiff, either in absence or in presence of the defendant, does not involve any question of res judicata so as to bar the filing of a second suit by him in case the dismissal is in presence of the defendant. As early as in 1890 in the case of Radha Prasad Singh v. Lal Sahab Rai ILR(1891) All 53 (PC) Lord Watson delivering the judgment of the Privy Council had said at p. 62--

> "None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or determined by the Judge of the Shahabad Court in 1881; 2 (when the first suit was dismissed for default) "and his decree dismissing the suit does not constitute res judicata within the meaning of the Civil Procedure Code."

If the dismissal of the suit has been under Rule 3 of Order 9 of the Code, where neither party appeared when the suit was called on for hearing, the plaintiff under Rule 4 may (subject to the law of limitation) bring a fresh suit. But if the dismissal is under Rule 8, where the defendant appears and the plaintiff does not appear, when the suit is called on for hearing, the plaintiff under Rule 9 is precluded from bringing a fresh suit in respect of the same cause of action. The dismissal of a suit for default in either event does not bring into operation the bar of res judicata or constructive res judicata within the meaning of Section 11 of the Code in the institution of a second suit on the same cause of action. It is difficult to appreciate, then, as to how in an execution proceeding dismissal of an objection under Section 47 of the Code in default either of the judgment-debtor alone or of his and the decree-holder's, the second application can be held to be not maintainable on the ground of the principles of constructive res judicata.

What seems to have been done by the Bench of this Court in Ramnarain Singh's Case, MANU/BH/0120/1946 : AIR 1947 Pat 298 is to import the principles of law engrafted in Rules 4 and 9 of Order 9 of the Code in the garb of principles of res judicata to the proceedings in execution although it is well settled that the provisions of Order 9 are not applicable to such proceedings.

6. What is meant by res judicata? In Article 357 on pages 184-85 of the Halsbury's Laws of England, 3rd Edition, it has been stated--

> "Where res judicata is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact. ..... The doctrine of res judicata is not a technical doctrine applicable only to records: it is a fundamental doctrine of all Courts that there must be an end of litigation."

7 . The Supreme Court has reiterated this doctrine in Daryao v. State of U.P., MANU/SC/0012/1961 : AIR 1961 SC 1457 with reference to the question as to whether an application to the Supreme Court under Article 32 of the Constitution

could be barred on the principles of res judicata if a similar application made to the appropriate High Court under Article 226 has failed. The doctrine is not, it has been said, applicable with full force if the application under Article 226 has been dismissed in limine without passing a speaking order as in that event it would not be easy to decide what factors weighed in the mind of the High Court and

> "that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32" (Vide Page 1466 Column 1).

It should be pointed out here that there Is no specific provision in the Code to bring about dismissal of an application under Section 47 of the Code in default of the judgment-debtor. Obviously, it is done in exercise of the inherent power of the Court as the Court must necessarily have the power to dismiss a proceeding in default of the party. By such dismissal alone, however, it makes no order which decides any point of objection either expressly or by necessary implication. The matter becomes different if some other order in the execution case is made either at the time of dismissing the miscellaneous case under Section 47 of the Code in default of the judgment-debtor or at any time thereafter and before the filing of the second application.

8. In Ramnarain Singh's case AIR 1947 Patna 298 the facts were that the decree-holder filed his execution petition on 28-5-1943, against the sons of the original judgment-debtor, he being dead by that time. On 20-1-1944, the sons filed an objection under Section 47 of the Code claiming that the decree was incapable of execution against them. The application was dismissed for default in presence of the decree-holder on 6-5-1944, and on 11-5-1944, the decree-holder was directed to file requisites for valuation by 18-5-1944, which he did. The sons' application to set aside the order dated 6-5-1944, and for restoration of their earlier application under Section 47 was rejected on 17-7-1944. The sons filed another miscellaneous case on 22-7-1944. That was also dismissed, it appears, again for default and an application filed on 11-12-1944, for restoring that petition was also dismissed for default on 10-3-1945. Meanwhile on 21-12-1944, the application objecting to the execution, out of which the appeal before the High Court arose, was filed. The earlier two dismissals had taken place in presence of the decree-holder. Under those circumstances. Beevor, J., with whom Meredith, J., as he then was, agreed chiefly on the basis of the decision of this Court in Jago Mahton v. Khirodhar Ram ILR 2 Pat 759 : AIR 1924 Pat 122, held that the third miscellaneous case filed by the sons was barred on the principles of res judicata, as the earlier two miscellaneous cases had been dismissed in presence of the decree-holder. If they had been dismissed in absence of the decree-holder, Beevor, J., seems to be of the view, the dismissal would not have operated as res judicata. For the reasons given above, with very great respect, I say that the view thus expressed in Ramnarain Singh's case, MANU/BH/0120/1946 : AIR 1947 Pat 298 is not sound and must be overruled. If I may say so, again with respect, the decision of the High Court is right and can be well supported by the fact that after the dismissal of the first application on 6-5-1944, when on 11-5-1944, the decree-holder was directed to file requisites for valuation by 18-5-1944, that order by necessary implication negatived the objection that the decree was in executable against the sons.

In view of the principle of law in Baijnath Prasad Sah's case, MANU/BH/0024/1962 : AIR 1962 Pat 72 (FB) this order clearly operated as a bar to the second miscellaneous case or the third one on the principles of constructive res judicata. But I am definitely

of the view that the order dated 6-5-1944 did not operate as res judicata. I am happy to note that none of the learned Advocates for the decree-holders Messrs. Kedar Nath Verma, Lalnarayan Sinha (Advocate General) and S.K. Sarkar in any of the appeals could support the view expressed in Ramnarain Singh's case, MANU/BH/0120/1946 : AIR 1947 Pat 298; rather they all conceded fairly that it was erroneous.

9. The case of Jago Mahto AIR 1924 Pat 122 decided by Dawson Miller, C.J., and Kulwant Sahay, J., following the decision of the Judicial Committee of the Privy Council in Mungul Pershad Dichit v. Girja Kant Lahari ILR (1882) Cal 51 was quite different. In the execution case filed by the decree-holder in the year 1921, the judgment-debtor filed an objection contending that the execution was barred by limitation. On the date fixed for hearing the objection the judgment-debtor did not appear. The Court dismissed the objection for default and on the same date passed an order that the decree-holder should take further steps. On his failure to take steps on the date fixed, the execution case was dismissed in default of prosecution. The next execution case was filed some time later. The judgment-debtor filed an objection that it was barred by limitation as the previous execution case was so barred. It is to be noticed that the facts were almost identical to those of Mungul Pershad Dichit's case, ILR 8 Cal 51 (PC). In such a situation, it was held that after dismissal of the objection by the judgment-debtor, the order of the execution Court directing the decree-holder to take further steps indirectly decided that the previous execution case was a fit one to try and, therefore, not barred by limitation. The case, if I may say so with respect, fully supports the view I have expressed above, and was wrongly understood by Beevor, J., to say that the dismissal of the earlier objection for default operated as res judicata.

10. The facts of the case of Bhagwati Prasad Sah, MANU/BH/0091/1950 : AIR 1950 Pat 354 were that an earlier objection by the tenant judgment-debtors that they were not liable to be evicted in view of the provisions of law contained in Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act 3 of 1947) was dismissed for default on the 5th February, 1949, as the facts stated clearly show in presence of the decree-holder when he had produced a certified copy of the judgment of the High Court passed in the second appeal arising out of the title suit. The tenants filed another application on the 9th February, 1949. Rejecting the argument put forward on behalf of the decree-holder that the dismissal of the first application for default operated as a bar to the maintainability of the second application, Rai, J., said--

> "The second application might be considered as one in continuation of the previous application. It was in respect of the same relief about which the executing Court had not adjudicated. Under the circumstances of the present case, there would not arise any bar of res judicata while giving relief to the tenants on the application dated 9th February, 1949."

The case of Ramnarain Singh, MANU/BH/0120/1946 : AIR 1947 Pat 298 does not seem to have been cited. Although respectfully agreeing with the view that dismissal of the first application in default did not bring about the bar of res judicata in the way of the second application. I find myself unable to agree with the reason thereof given by Rai, J. The second application could not be considered as one in continuation of the previous application. Had some effective order intervened between the two, that order must have operated as res judicata. Sinha, J., as he then was, rested his judgment on somewhat different grounds and said that the dismissal for default of the previous application could not bar the hearing on merits of a second objection. I

respectfully agree with this view.

11. Ramnarain Singh's case, MANU/BH/0120/1946 : AIR 1947 Pat 298 has been consistently followed by the Orissa High Court in Simhadri Sahu v. Balaji Padhi MANU/OR/0024/1955, Sori Dibya v. Kanhucharan Rath MANU/OR/0036/1961, Gundicha Padhano v. Parvati Podhanuni MANU/OR/0044/1964 and Ramchandra Nahaka v. Bharat Rana MANU/OR/0018/1967; the case of Bhagwati Prasad Sah MANU/BH/0091/1950 : AIR 1950 Pat 354 has not been followed. In Simhadri Sahu's Case, AIR 1955 Orissa 81, as rightly pointed out by A.N. Grover, J., in the case of Hazura Singh v. Jewon Singh MANU/PH/0097/1958, with reference to the facts of the case of Bhagwati Prasad Sah, MANU/BH/0091/1950 : AIR 1950 Pat 354, it was wrongly stated that it did not appear clearly whether the previous objection petition had been dismissed for default of both parties or in presence of the decree-holder. The Punjab High Court, if I may say so with respect has rightly followed the decision of Bhagwati Prasad Sah, MANU/BH/0091/1950 : AIR 1950 Pat 354 and not that of Ramnarain Singh, MANU/BH/0120/1946 : AIR 1947 Pat 298.

In the last mentioned Orissa case, namely, Ramchandra Nahaka's case, AIR 1967 Orissa 38, the objection of the judgment-debtor that he was an agriculturist and, consequently, his property proceeded against in the execution case was exempt from attachment and sale under Clauses (b) and (c) of Section 60 of the Code was dismissed for default on 3-11-1962. Narasimham, C.J., stated--

> "When the Miscellaneous case was fixed for hearing on 3-11-1962 and the appellant (petitioner) failed to appear on that date, the obvious inference is that he had no evidence to prove that he was an agriculturist, and the order dated 3-11-1962 must be held to be an implied decision against the appellant. The principle of constructive res judicata applies to execution proceedings also."

It is no doubt true that the principle of constructive res judicata applies to execution proceedings. But I say with very great respect that the order dismissing the miscellaneous case for default cannot be held to have impliedly held that the objection had no merit. I do not agree with this view, and the similar ones expressed in other cases of the Orissa High Court.

12. Grover, J., in the case of AIR 1958 Punj 339, while following the decision of Bhagwati Prasad Sah's case, MANU/BH/0091/1950 : AIR 1950 Pat 354, has referred to several earlier decisions of Lahore and Punjab High Courts including the decision of Bhide, J., in Jot Ram Sher Singh v. Jiwan Ram Sheoli Mal (Sic) AIR 1932 Lah 643 taking the identical views.

13. In Bishwanath Kundu v. Sm. Subala Dassi, MANU/WB/0066/1962 : AIR 1962 Ca 272 a Bench of Calcutta High Court has said at p. 274 col. 2--

> "A dismissal for default of a particular objection which involves no decision on the merits, either expressly or impliedly, that is, by necessary implication, cannot, therefore, be held to bar a subsequent objection, either similar or different."

I respectfully agree with this view.

14. The following question of law is framed and will be deemed to have been framed and referred to the Full Bench by the Division Bench:--

'Whether, on the facts and in the circumstances of this case, the objection of the judgment-debtor appellant filed on 20-1-1962, in miscellaneous case 4 of 1962 was barred on the principles of res judicata?'

15. For the reasons stated above, 1 would answer the question in the negative, and hold that the dismissal of miscellaneous case 20 of 1961 on 20-1-1962, in default of the appellant, although in presence of the decree-holder, did not bring about any bar on the principles of res judicata or constructive res judicata. The case will now be placed for final adjudication by the Division Bench which referred it.

M.A. 248 of 1964.

16. This is a miscellaneous second appeal by the judgment-debtor. One Gujjar Sahu instituted title suit 149 of 1951 in the Court of the Subordinate Judge of Darbhanga against Tarni Prasad Singh, defendant 1st Party, and Ramcharan Shaw, defendant 2nd party. No relief had been claimed against Ramcharan Shaw. Tarni only contested the suit. It was dismissed by the trial Court on 2-3-1954 and costs were awarded to him against the plaintiff. Plaintiff Gujjar Sahu filed a title appeal in the lower appellate Court. It was dismissed on 15-2-1956, awarding cost to Tarni. The memorandum of appeal filed in second appeal 663 of 1956 by the plaintiff stood rejected for non-compliance with certain peremptory order. On 22-12-1961. Tarni filed execution case No. 31/1 of 1961/62 for realisation of his decree for costs against the heirs of Gujjar Sahu as also against Ramcharan Shaw. Asharfi shaw, one of the sons of Ramcharan Shaw, deceased, filed miscellaneous case No. 10 of 1962 under Section 47 of the Code objecting to the execution for realisation of the decree for costs against him. Obviously, there was no decree for cost against Ramcharan Shaw. Two other sons of his filed miscellaneous case 11 of 1962. Lachman Sahu, the other son of Ramcharan Shaw, who is the sole appellant in this second appeal, filed on the 30th of June, 1962, miscellaneous case 12/3 of 1962. His miscellaneous case was dismissed for default on 14-7-1962 in presence of the decree-holder and the other two miscellaneous cases 10 and 11 were allowed in part on 16-7-1962 on merits.

Substantially the objections were disallowed. What happened thereafter on 16-7-1962 has to be noted carefully. Lachman Sahu filed another objection on identical lines under Section 47 of the Code and this was numbered as miscellaneous case 7 of 1962. In the order sheet of that date, however, after recording order No. 49 in regard to the allowing in part of the other two miscellaneous cases on contest. Order No 50 on which great reliance was placed by the learned Advocate General appearing for the decree-holder respondent was recorded thus:--

"Misc. Cases have been disposed of. In view of the orders passed in misc. cases the D. Hr. is directed to file fresh requisites for issue of S.P. by 20-7-1962."

And, then Order No. 51 was recorded on that date registering miscellaneous case 7 of 1962 on the application filed by Lachman Sahu, it is conceded on all hands, wrongly labelled under Order 21, Rule 58 of the Code, although, in law, it was one under Section 47. The decree-holder respondent contested this case, and eventual-ly it was dismissed by the execution Court on 19-2-1963 treating this application as a second application under Section 47 of the Code, as being not maintainable in view of the dismissal of the previous application on 14-7-1962 in default, although on merits the learned additional subordinate Judge seems to have taken a view in favour of the judgment-debtor.

All the three sets of the judgment-debtors filed three miscellaneous appeals. Miscellaneous appeals 78 and 79 of 1962 arising out of miscellaneous cases 10 and 11 of 1962 were allowed by the learned Additional District Judge on the finding that the properties attached in the execution case were not liable to be attached because they belonged to Ramcharan Shaw and consequently to his sons who were not liable under the decree for costs, Miscellaneous appeal 24 of 1963 filed by the appellant against the dismissal of his miscellaneous case 7 of 1962, however, failed on the technical ground on the basis of the Division Bench decision of this Court in ILR 25 Pat 395= (MANU/BH/0120/1946 : AIR 1947 Pat 298); this appeal was not decided on merits.

17. For the reasons already given, it is obvious that the dismissal of the miscellaneous appeal of the appellant by the Court of appeal below on the basis of Ramnarain Singh's case, MANU/BH/0120/1946 : AIR 1947 Pat 298 cannot be upheld. As already stated by me, the learned Advocate General conceded to this position. He, however, submitted that although order dated 14-7-1962 dismissing the previous miscellaneous case in default would not operate as res judicata, what would bar the maintainability of miscellaneous case 7 of 1962 on the principles of constructive res judicata is order No. 50 dated 16-7-1962. Learned counsel submitted that when the decree-holder was asked to file fresh requisites for issue of sale proclamation, that order by necessary implication should be deemed to have negatived the objection of the appellant that his properties were not liable to be attached and sold. His contention was, in the first instance, that order No. 50 was recorded in point of fact before recording order No. 51 registering miscellaneous case 7 of 1962; or, even if on the special facts of this case, it could be held that order No. 50 was recorded during the pendency of the miscellaneous case 7 of 1962, it impliedly overruled the objection taken in that miscellaneous case.

18. I am unable to accept either of the points canvassed by the learned Advocate-General on behalf of the decree-holder respondent. Firstly, on the special facts of this case, when another application was filed by the appellant on 16-7-1962 and when both the orders Nos. 50 and 51 were recorded on the same date in juxtaposition, it cannot be assumed that miscellaneous case 7 of 1962 came to be registered in point of fact after passing of the order No. 50 merely because in the order sheet it was recorded before the recording of order No. 51. Both the things must have happened, more or less, simultaneously, and that is the reason that the main argument which was advanced on behalf of the decree-holder was on the footing that order No. 50 was made during the pendency of miscellaneous case 7 of 1962. Secondly, on the language of that order, it is difficult to hold that merely because the decree-holder was directed to file fresh requisites for issue of sale proclamation, by necessary implication the objection of the judgment-debtor was overruled. It is further to be noted that such a direction related to the filing of fresh requisites for issue of sale proclamation not only of the property of the present appellant but also of the applicants of the other two cases--a direction which did not hold good when the two appeals arising out of those cases were allowed by the lower appellate Court.

19. Even assuming, as was largely the argument addressed to us on behalf of the parties that order No. 50 dated 16-7-1962 by implication decided that the property of the appellant was liable to be proceeded against in execution of the decree for costs, such decision by implication must be held to be subject to the final decision in miscellaneous case 7 of 1962. During the pendency of that case, the objection taken therein cannot be held to have been overruled by an order of the kind which is engrafted in order No. 50. If, of course, the objection to the attachment or sale of the

property proceeded against was filed definitely later, the order may operate as res judicata. But during the pendency of the objection, it would be a travesty of justice to hold that on the passing of such an order, the miscellaneous case must fail on the ground of principles of res judicata. Learned Advocate-General pressed this point with vehemence, but I have no hesitation in rejecting it as being untenable. No case was cited by him in support of his contention that if an order of the kind as recorded in order No. 50 is made during the pendency of a miscellaneous case under Section 47 of the Code objecting to the attachment, it must fail on the principle of constructive res judicata without the objection being decided. If the judgment-debtor comes later, he can be confronted with the position that he might and ought to have come earlier before the recording of the order, but I find it difficult to accept that if during the pendency of his objection case such an order is made, he would be confronted with such a position even though his objection case was neither heard nor decided by adjudicating on any question raised by him. It has been pointed out by Sahai, J., in the majority decision of the case of Baijnath Prasad Sah, MANU/BH/0024/1962 : AIR 1962 Pat 72 (FB) at pp. 76-77:--

> "In a proceeding for execution of a money decree by attachment and sale of the judgment-debtor's immovable pro perty, there are five important stages. Under the Patna Amendment of Rule 22 of Order XXI, the Court has to issue notice in every case to the person against whom execution is levied, requiring him to show cause why the decree should not be executed against him. Rule 23 reads:
>
> > "(1) where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should be executed, the Court shall order the decree to be executed.
> >
> > (2) Where such person offers an objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.' This is the first stage. If the notice under Order XXI, Rule 22 is not served upon the judgment-debtor, that is a different matter, but, if the notice is served upon him, he must raise all his objections to the executability of the decree at that stage. If he does, the Court's decision on those objections will operate as res judicata in all further proceedings. If, in spite of service of notice, he fails to raise an objection which he might and ought to have raised at that stage, for instance, an objection on the ground of limitation, the Court, in passing the order for execution of the decree, must be deemed to have decided the objection against him. Ordinarily, however, the Court does not pass an express order to the effect that the decree be executed. That order is implied in the order for issue of attachment, which is the next stage. In the present case also the order under Rule 23(1) is implied in order for issue of attachment. All objections to the executability of the decree have to be raised in such cases before the order for issue of attachment. The third stage is one when the Court orders sale of the judgment-debtor's property. Rule 64 of Order XXI provides that an executing Court may order the sale of any property attached by it, provided that the property is liable to sale. As the Court has come to a decision at this stage that the property in question is liable to sale, any objection on the ground of non-saleability of the property must be raised before that

> stage. If an objection relating to saleability is raised, the Court's decision will be binding upon the parties. In case the judgment-debtor fails to raise any such question, the Court must be deemed to have decided it against him by passing an order for sale of the property because, unless it is liable to sale it cannot pass that order."

20. I fail to follow, however, as to how the Court can, be said to have come to a decision by passing an order of the kind recorded in order No. 50 that the property in question is liable to be sold without adjudication of the objection raised by the judgment-debtor in the miscellaneous case while keeping it pending. In such a situation, it must be held that the order made by the executing Court will always be subject to the ultimate decision in the miscellaneous case.

The learned Advocate-General referred to the decision of the Privy Council in Raja of Ramnad v. Velusami Tevar MANU/PR/0008/1920 : AIR 1921 PC 23 in support of his point discussed above. The relevant facts of that case are that during the pendency of the execution case filed by the original decree-holders on the 9th of March, 1914, the appellant before the Privy Council had purchased the decree from the then plaintiffs and on the 20th November, 1914 made his application to be brought on the record as an assignee of the decree and to have the decree executed. This was resisted by the respondent before the Privy Council or their predecessor in title on several grounds. They put the appellant to the proof of his assignment, they alleged that the right to execute the decree was barred by limitation, and they raised questions as to the liability of certain of the properties to attachment. The matter came on for hearing before the Subordinate Judge, who delivered judgment thereon on the 13th December, 1915. The objections were overruled, but the question of limitation was not specifically decided. One of the defendants applied for a review of this decision on the ground that the execution case was barred by limitation. On the 24th August, 1916 judgment was given dismissing this petition. This review application was dismissed on the ground of limitation but the order made by the Court was of importance in that the learned Judge pointed out that the order of the 13th December, 1915 did not reserve any question of limitation for future determination.

It was in such a situation that Lord Moulton delivering the judgment of the Board said at p. 24, Col. 1--

> "It is clear, therefore, not only that the issue of the execution of the decree being barred by limitation was in fact before the Court (as is shown also by the pleadings) on the occasion, but that the Judge at the time was aware of it, and that his decision included (as legally must have been the case) the rejection of this plea."

His Lordship further stated--

> "To that order the pica of limitation, if pleaded, would according to the respondents' case have been a complete answer and therefore, it must be taken that a decision was given against the respondents on the plea."

What this case, therefore, decides is that if the miscellaneous case in which several objections have been raised by the judgment-debtor to the execution is decided against him, all the objections must be deemed to have been overruled although any of them might not have been specifically and expressly considered and decided. It is difficult to follow how any of such objections taken in the miscellaneous case can be

deemed to have been decided by an order of the kind made in order No. 50 when the miscellaneous case remained pending and none of the objections was considered while making that order.

21. Mr. Aswini Kumar Sinha, learned Advocate for the appellant, strongly relied upon the decision of the Full Bench of Allahabad High Court in Genda Lal v. Hazari Lal, MANU/UP/0148/1935 : AIR 1936 All 21 (FB). I do not think that this decision is of any help to answer the point as presented on behalf of the respondent. The decision of the Privy Council in Mungul Pershad Dichit's case, ILR 8 Cal 51 was distinguished and Chief Justice Sulaiman stated one of the principles thus--

> "Where no objection is taken, but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of res judicata from raising the question of limitation later."

Patanjali Sastri, as he then was, delivering the judgment of Madras High Court in Desayi Venkatranga Reddi v. Paraku Chinna Sithamma, MANU/TN/0305/1940 : AIR 1941 Mad 440 differred from this view of the learned Chief Justice. He referred to the provisions of Order 21, Rule 23 of the Code and then said at p. 442--

> "It will be noticed that Sub-rule (1) covers not only cases where the judgment-debtor does not appear in response to the notice or does not offer any objection to execution, but also those where he appears and objects but fails to satisfy the Court that the decree should not be executed. In all such cases the Court is required to 'order' the decree to be executed. That is to say, even in cases where the judgment-debtor appears and 'offers any objection to the execution of the decree' and the Court 'considers such objection', it has to act under Sub-rule (1) if it is not satisfied that the objection is valid. Where such objection is found to be tenable, the Court has to make, under Sub-rule (2) 'such order as it thinks fit', that is to say, according to the nature and scope of the objection upheld. There is thus no justification for the view that an order under Sub-rule (1) 'has to be automatic' and that an order under Sub-rule (2) alone amounts to an 'adjudication' such as would fall within the definition of a decree, and we are unable to see any such distinction as the learned Judge supposed to exist between these sub-rules. If therefore, the Court's 'order' under Sub-rule (1) that the decree should be executed is, as it must be held to be, in cases where the judgment-debtor appears and objects but the objections are overruled, an appealable adjudication binding on the parties so long as it is un-reversed, it is difficult to see why a similar order under the same provision in cases where the judgment-debtor does not choose to appear in response to the notice duly served on him, should be regarded as not having that effect. It seems to us that there can be no logical difference for this purpose between an application which results in partial satisfaction of the decree and is then allowed to be dismissed, and one which is eventually dismissed without any 'fructification'."

If I may add with respect, the view of the Full Bench of this Court in Baijnath Prasad Sah's case, MANU/BH/0024/1962 : AIR 1962 Pat 72 (FB) is in consonance with the view of Patanjali Sastri, J., as stated above.

22. In my considered judgment, therefore, the lower appellate Court committed an error in this case in dismissing the appellant's appeal and maintaining dismissal of

his miscellaneous case 7 of 1962 as being barred by res judicata. Since this Court has not decided the case on merits, the case has to go back to the Court of appeal below.

23. In the result, the appeal as allowed, the judgment and order of the lower appellate Court in miscellaneous appeal 24 of 1963 are set aside and the case is remitted back to it for a fresh hearing and disposal of the appeal in the light of the observations made and points decided above; I shall make no order as to cost, M.A. 6 of 1964

24. The relevant facts of this case are that in execution case 18 of 19G1 Bhagwat Ram, the judgment-debtor appellant in this miscellaneous first appeal, filed miscellaneous case 4 of 1962 under Section 47 of the Code challenging the validity of the final decree passed in title suit 36 of 1932 on various grounds. This miscellaneous case was dismissed for default on 29-3-1963 in presence of the decree-holder. Thereafter Bhagwat Ram filed miscellaneous case 9 of 1963 under Section 151 of the Code on 16-4-1963 for restoration of miscellaneous case 4 of 1962. Subsequently on 6-8-1963 he filed miscellaneous case 15 of 1963 giving rise to this appeal challenging the validity of the final decree on almost the same grounds on which he had challenged it in miscellaneous case 4 of 1902. Later on he withdrew miscellaneous case 9 of 1963 and proceeded with miscellaneous case 15 of 1903.

25. Srimati Savitri Devi, respondent No. 1 who was executing the decree, contended in the Court below that the second miscellaneous case was not maintainable in view of the fact that the previous application to the same effect had been dismissed for default and the order dated 29-3-1963 dismissing it for default operated as a bar on the principles of res judicata. Following Ramnarain Singh's case, MANU/BH/0120/1946 : AIR 1947 Pat 298, the Court below has held that miscellaneous case 15 of 1963 is barred by res judicata. Bhagwat Ram has preferred this miscellaneous first appeal.

26. For the reasons stated above, it is manifest that the view of the Court below based upon Ramnarain Singh's case, MANU/BH/0120/1946 : AIR 1947 Pat 298 cannot be supported. Order No. 63 recorded on 29-3-1963 reads as follows--

> "Applicant files a petition for time O. P. files hazri. Petition for time is rejected. Case called out again and again but no response to repeated calls on behalf of the applicant. O. P's Advocate, Sri K.N. Ram is present. Let the case be dismissed for default,
>
> Sd. Illegible,
>
> A.S.J.I."

There is nothing further recorded in this order, which can be said to have held or impliedly decided that the objection was not tenable and the execution must proceed. But Mr. S. K. Sarkar, learned Advocate for respondent No. 1, drew our attention to order No. 90 dated 19-7-1963 which directed in execution of the decree "attachment of the sale proceeds to the extent of Rs. 22285.60 np. of Ex. Case No. 16/61" and ordered the attachment accordingly. In my opinion, order No. 90 by necessary implication decided that the decree under execution was not invalid, was fit to be executed and execution was directed to proceed by attachment of a considerable sum of money lying in deposit in another execution case (No. 16 of 1961) in furtherance of this execution for realisation of Rs. 48,107.98 np. On the principles of law

discussed above, there is no escape from the position that although order No. 63 dated 29-3-1963 is no bar in the way of miscellaneous case 15 of 1963 on the principle of res judicata, order No. 90 dated 19-7-1963 clearly brings about such a bar on the principle of constructive res judicata, as the miscellaneous case was filed on 6-8-1963 after the making of the said order.

27. In answer to the point thus presented by Mr. Sarkar, Mr. S.C. Sinha, learned Advocate for the appellant, referred to order No. 106 dated 21-8-1963 and submitted that the matter of attachment was actually decided by this order which was made subsequent to the filing of miscellaneous case 15 of 1963. It seems to me, however, that this argument has been advanced under some misconception of facts. On 19-7-1963, as order No. 90 indicates, the decree-holder had filed 3 petitions. In one the prayer was for amendment of the execution petition, in the second petition the prayer was for attachment of the amount of Rs. 22,285.60 np., the sale proceeds lying in deposit in execution case 16 of 1961 which concerns the present appellant and in the third petition the prayer was for realisation of another amount of Rs. 11.949.54 np. against five other judgment-debtors by sale and attachment of the decree in favour of those judgment-debtors passed in title suit 36 of 1932 dated 4-12-1959. The second petition for attachment of the amount of Rs. 22,285.60 np. had been disposed of by order No. 90. But the third petition for attachment of the decree of judgment-debtors 1 to 7 passed in title suit 36 of 1932 was allowed by order No. 106 dated 21-8-1963 after hearing the parties. It is, therefore, obvious that this order does not relate to or affect order No. 90 by which attachment of Rs. 22,285.60 np. had already been ordered.

28. On the facts of this case, the following question of law is framed and will be deemed to have been framed and referred to the Full Bench by the Division Bench--

> 'Whether, on the facts and in the circumstances of this case, the objection of the judgment-debtor appellant filed on 6-8-1963 in miscellaneous case 15 of 1963 was barred on the principles of res judicata?'

29. For the reasons stated above, 1 would answer the question in the affirmative and hold that although the order of dismissal of miscellaneous case 4 of 1962 made on 29-3-1963 did not bar the maintainability of miscellaneous case 15 of 1963 on the principles of constructive res judicata order No. 90 dated 19-7-1963 clearly brought about such a bar. The case will now be placed for final adjudication by the Division Bench which referred it.

Tarkeshwar Nath, J.

30. I agree.

K.B.N. Singh, J.

31. I agree.