

(1915) 05 AHC CK 0026

Allahabad High Court

Case No: None

Dambar Singh

APPELLANT

Vs

Munawar Ali Khan and
Another

RESPONDENT

Date of Decision: May 11, 1915

Citation: AIR 1915 All 420 : (1915) ILR (All) 531

Hon'ble Judges: Piggott, J; Chamier, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Chamier, J.

One Sri Krishan Das obtained a decree for possession of property and for costs against several persons including the respondents. When execution was taken out in 1905 the respondents protested that they had never been anything but pro forma defendants and that the decree should not be interpreted as making them jointly liable for costs along with other defendants who had contested the suit. A petition of compromise was filed on April 20th, 1906, in which the decree-holder admitted in express terms that he had no claim against the respondents under the decree, and this compromise was made the basis of an order of the court releasing the property of the respondents from attachment. Shortly after that the decree-holder sold the decree to the appellant who in 1907 took out execution against the respondents. They put in an objection and the court decided that the respondents were no longer liable under the decree. The appellant brought the case before this Court on appeal, and this Court held expressly that there had been a complete adjustment of the decree as between the original decree-holder and the respondents and that the appellant was bound thereby. Notwithstanding the decision of this Court the appellant in April, 1910 again took out execution against the respondents and attached a sum of Rs. 28-8-0, which happened to be in court to their credit, and at the same time he asked for the attachment of a much larger sum as against the other judgment-debtor. The respondents put in a petition of objection pleading that they had been discharged from

liability under the decree, that property attached previously had consequently been released, and that the application for execution was contrary to previous orders passed by the court. But the respondents allowed their objections to go by default with the result that the application for execution was allowed and the money attached was paid out of court to the appellant. The present application for execution was presented in June, 1913. The respondents objected on the ground that it has been held more than once during the course of the execution proceedings that they are no longer liable under the decree. The appellant's contention was and is that the court's order dismissing the respondents' objection in 1910, coupled with its order allowing the decree to be executed against the money belonging to the respondents, has the effect of wiping out the previous decisions passed in favour of the respondents, and on the principle of *res judicata* debars the respondents from pleading that the decree has been adjusted, so far as they are concerned. It is conceded that the later of two inconsistent decisions in the course of execution proceedings must prevail against the earlier, *Mallu Mal v. Jhamman Lal* (1904) 1 A.L.J. 416 and *Rai Sham Kishore v. Ugrah Narain Singh* (1909) 6 A.L.J. 49. The question is whether the order passed against the respondents in 1910 should be regarded as a decision that the decree had not been adjusted so far as the respondents are concerned and that they were still liable for the balance of the costs decreed. The respondents' contention is that the order of the court decided no more than that the respondents were in 1910 liable for a sum of Rs. 28-8-0. I am unable to accept this contention. The respondents' petition of objection distinctly raised the question whether they were liable under the decree or had been discharged from liability by the orders previously passed. No question of the extent of the respondents' liability was before the court. The dismissal of their objections resulted no doubt in the sum of Rs. 28-8-0, only being paid out of court to them, but the court did not apply its mind to the question of the extent of the respondents' liability. It must in my opinion be taken to have decided that the decree had not been adjusted as alleged by the respondents, consequently execution might proceed as against them. It was also suggested that the appellant's application for execution, directed as it was against other persons than the respondents, was calculated to put them off their guard and to lead them to suppose that as only a small sum of money belonging to them had been attached and a much larger sum had been attached as against other persons, they had only to allow the small sum of Rs. 28-8-0 to be paid to the respondents in order to be rid of the whole business. The answer to this is that the respondents were in no way misled by the appellant's application. They came in at once with a petition of objections and their failure to press it is not explained.

2. I am reluctantly driven to the conclusion that the decision of 1910 neutralised the previous decisions and left the respondents liable for the balance, of the decree for costs. I would therefore allow this appeal set aside the order of the court below dismissing the application for execution, and direct that the application be restored to the pending file and disposed of according to law. Costs of this appeal should be costs in the cause.

Piggott, J.

3. I concur.

4. By the Court - The order of the Court is that the appeal is allowed, the order of the court below is set aside with this direction that the application for execution be restored to the pending file and disposed of according to law.