argued before us, it is unnecessary to finally pronounce on this additional ground on which the respondent wants us to uphold the dismissal of the appellant's suit.

For the foregoing reasons this appeal fails and is dismissed, but without any order as to costs.

D. K. MAHAJAN, J.—I concur.

K.S.K.

REVISIONAL CIVIL

Before Shamsher Bahadur and Prem Chand Pandit, JJ.

PHUMAN SINGH,—*Petitioner*

versus

LAL SINGH,—*Respondent.*

Civil Revision No. 518 of 1965

July 11, 1967

Code of Civil Procedure (Act V of 1908)—S. 11 and 47—Doctrine of constructive res judicata—*When applicable to execution proceedings.*

Held, that where an objection to the execution is one of principle, the doctrine of constructive *re udicata* would apply, but if the execution sought to be levied is, in respect of an amount which, on the face of it, is in excess of the decree itself, an objection to the execution has to be entertained although in previous execution proceedings such an objection had not been raised. It is plain that a mistake which is manifest and patent on the record should be corrected by the executing Court. Obviously, an executing Court cannot be asked to levy execution proceedings for an amount which is plainly in excess of the decretal amount as the executing Court cannot go behind the decree itself.

Petition under section 115 of the Code of Civil Procedure for revision of the order of Shri Harish Chandra Gaur, Senior Sub-Judge, Barnala, dated 24th April, 1965, affirming that of Shri Nirpinder Singh, Sub-Judge, 1st Class, Malerkotla, dated 9th November, 1964, dismissing the petition.

RAM SARUP, ADVOCATE, for the Petitioner.

S. K. SANWALKA, ADVOCATE, for the Respondent.

JUDGEMENT.

SHAMSHER BAHADUR, J.—This petition for revision which came for hearing before Grover, J., on 1st December, 1965, has been sent to this Bench for decision in pursuance of his recommendation to this effect made to the Hon'ble the Chief Justice.

A decree for a sum of Rs. 756 together with costs amounting to Rs. 120 was passed on 30th of January, 1956, in favour of the respondent decree-holder Lal Singh against the petitioner Phuman Singh. As submitted by the counsel at the Bar, a sum of Rs. 400 was to be paid on or before 15th of June, 1956, and the balance before 15th of January, 1957. The judgment-debtor failed to comply with the terms of the decree, and the decree-holder accordingly took out execution proceedings for the first time in 1959. His property having been attached, the judgment-debtor filed his objections on 25th of January, 1960. It was stated in the objections that the property was not liable to attachment, being exempt under section 60 of the Code of Civil Procedure on account of it being agricultural land used for tethering cattle. The objections were dismissed on 1st of September, 1960. According to the statement of the case made by the counsel for the decree-holder, and not controverted by Mr. Ram Sarup, the counsel for the petitioner, a sum of Rs. 60 only had been paid in satisfaction of the decree by that time. At the time when the objections were dismissed, it was directed that the balance of the amount due from the judgment-debtor would be paid in instalments of Rs. 100 each. Only one instalment was paid and the second execution was filed by the decree-holder on 20th of July, 1961. Objections, which were substantially the same as on the previous occasion, were filed by the judgment-debtor on 21st of September, 1963. This objection petition was dismissed on the same day. The son of the judgment-debtor filed objections on 26th of June, 1964, and these were dismissed on 1st of September, 1964. The judgment-debtor, while the second execution was still pending, filed further objections on 26th of September, 1964; this time on the ground that the transaction is hit by the rule of *Damdupat*. The executing Court holding that the objections could not be entertained on the principle of constructive *res judicata* dismissed them on 9th of November, 1964, and directed the auction of the attached property to take place on 13th of December, 1964. An appeal from this order was dismissed by the Senior Subordinate

Judge, Barnala, on 24th of April, 1965, the order being in these terms:—

"Cost is not paid. So, it is dismissed."

From the appellate order of the Senior Subordinate Judge, the judgment-debtor has preferred this petition for revision and from the order of Grover, J., before whom it was placed for disposal on 1st of December, 1965, it appears that the point urged by the counsel for the judgment-debtor was stated to be of importance and there being no decision of this Court on it, the learned Single Judge made a recommendation that the matter may be placed for decision by a Division Bench.

Mr. Ram Sarup, the learned counsel for the petitioner, has contended that the judgment-debtor should have been allowed by the executing Court to substantiate his plea as in substance it was urged that the amount which was sought to be executed was in excess of what had been decreed. The learned counsel has not challenged the proposition that the principle of constructive *res judicata* is applicable to execution proceedings as held by the Supreme Court in *Mohanlal Goenka* v. *Benoy Kishna Mukherjee* (1). The plea that the decree could not be executed is based on section 30 of the Punjab Relief of Indebtedness Act, sub-section (1) of which says that:—

> "In any suit brought after the commencement of this Act in respect of a debt as defined in section 7, advanced before to commencement of this Act, no court shall pass or execute a decree or give effect to an award in respect of such debt for a larger sum than twice the amount of the sum found by the Court to have been actually advanced . . .".

Reliance has been placed by Mr. Ram Sarup on a Bench decision of the Madras High Court by Kumaraswami Sastri and Walsh, JJ., in *Ulaganatha Mudaliar* v. *Molaveedu Alagappa Mudaliar* (2), where it was held that:—

> "The mere fact that a judgment-debtor does not in a previous execution proceeding object that the amount for which the execution is taken out is in excess of the decree itself,

(1) A.I.R. 1953 S.C. 65.
(2) A.I.R. 1929 Mad. 903.

does not bar the judgment-debtor from raising that objection in subsequent execution proceedings. To hold otherwise implies that the decree is itself superseded by orders in execution."

In my opinion, the *ratio decidendi* of this case is that if the amount sought to be executed is in excess of the decree itself, the objection of the judgment-debtor shall have to be entertained although in previous execution proceedings such an objection had not been raised. It is plain that a mistake which is manifest and patent on the record should be corrected by the executing Court. Obviously, an executing Court cannot be asked to levy execution proceedings for an amount which is plainly in excess of the decretal amount as the executing Court cannot go behind the decree itself.

The plea which is sought to be raised in this petition is clearly not on the same footing, as the one which was before the Bench of the Madras High Court. The principle of the decision in Madras case may be taken to be an exception to the general rule enunciated by the Supreme Court that the doctrine of constructive *res judicata* is applicable to execution proceedings. The exception to the rule was upheld by Bhargava, J., in *Raja Babu Kothari* v. *Sayed Mohammad* (3), where it was stated at page 230 that though the principle of constructive *res judicata* is applicable to execution proceedings according to the decision of the Supreme Court in *Mohanlal Goenka* v. *Benoy Kishna Mukherjee* (1), the judgment-debtor can still object where execution was taken out for an amount in excess of the decree, although such an objection had not been raised in previous execution applications and reliance was placed on the decision of the Madras High Court in *Ulaganatha Mudaliar* v. *Molaveedu Alagappa Mudaliar* (2).

The decision in the Madras case, in my opinion, is based on sound principle, and in no way derogates from the authority of the decision of the Supreme Court in *Mohanlal Goenka* v. *Benoy Kishna Mukherjee* (1), where an objection to the execution is one of principle, as in the present case, the doctrine of constructive *res judicata* would clearly apply, but if the execution is sought to be levied in respect of an amount which on the face of it is in excess of the decree

(3) A.I.R. 1961 Raj. 227.

itself, an objection can be taken any time. In my opinion, the facts of the present case do not attract the rule of the decision in Madras case but on the other hand is hit by the rule of constructive *res judicata* as propounded by their Lordships of the Supreme Court in Mohanlal Goenka *v.* Benoy Kishna Mukherjee (1).

This petition, therefore, must fail and is dismissed. In the circumstances, we would make no order as to costs.

PREM CHAND PANDIT, J.—I agree.

R N.M.

APPELLATE CIVIL

Before Shamsher Bahadur and Prem Chand Pandit, JJ.

AMAR NATH,—*Appellant*

versus

SUNDER LAL AND OTHERS,—*Respondents.*

Regular First Appeal No. 48 of 1956

July 12, 1967

Appeal—Records of the case lost irrecoverably—Reconstruction of the record—How to be effected—Duty of the appellant in the matter stated.

Held, that where the records of a case are irrecoverably lost in appeal, there is the inherent power in the appellate Court to reconstruct the records of the Court from which an appeal lies to it. But it remains the duty of the unsuccessful party to displace the judgment appealed from and, further, it is his duty to lead secondary evidence with regard to the matters on which he places reliance and, finally, that the successful party cannot be deprived of the fruits of the decree from which an appeal has been taken. The statements of witnesses cannot be recorded afresh, as that would amount to re-hearing which the Courts have repeatedly deprecated in such cases.