

Hakim Rai  
v.  
The State  

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Passey, J.

application for the copy had been submitted to the Sub-Judge 2nd Class Kapurthala, and that was not disbelieved but taking that application to have been made to a wrong authority the request for time was discarded. The learned District Judge appeared to think that the application for the copy must have been made to the officer incharge of the Record Room and not to the Sub-Judge. He should have allowed the appellant to produce the copy irrespective of the quarter he had approached for it as the statutory time for producing it had not run out. I consequently accept the revision, quash the order of the learned District Judge, dated 9th July, 1955 and direct that the copy of the order of S. Raghbir Singh, dated 30th June, 1954, will be allowed to be produced by Hakim Rai and his appeal decided on merits.

APPELLATE CIVIL

*Before Falshaw, J.*

SETH RADHE LAL,—Appellant

*versus*

LADLI PARSHAD,—Respondent

**Execution First Appeal No. 24-D of 1956.**

**1957**

**Jan., 7th**

*Transfer of Property Act (IV of 1882)—Section 100—Decree creating a charge—Such decree whether comes within the scope of section 100—Charged property, whether can be sold in execution of the decree or recourse must be had to a separate suit to enforce the charge.*

*Res judicata—General principles of—Whether apply to execution proceedings.*

*Held, that a charge created by a decree does not come within the scope of Section 100 of Transfer of Property Act as it is neither a charge created by the act of the parties nor by operation of law, so when property has been made subject to a charge in a decree, the charged property*

can be brought to sale in execution of the decree and the charge need not be enforced by a separate suit.

*Held further*, that although Section 11, Civil Procedure Code, does not apply to execution proceedings, the general principle of *res judicata* applies to such proceedings including the principle of constructive *res judicata* embodied in Explanation 4 to Section 11, and the principle of *res judicata* applies not only to matters decided in prior execution proceedings but also to matters decided in the same proceedings.

*V. S. V. Thangavelu Mudaliar v. G. Thirumalswami Mudaliar and another* (1), *Debendra Nath Giri v. Smt. Trinavani Dasi* (2), *Mst. Prem Kaur v. Ram Lagan Rai and others* (3), *Seth Ghasiram Seth Dal Chand Palliwal v. Mst. Kundanbai and others* (4), *Raja Brajasunder Deb v. Sarat Kumari* (5), *Sheonandan Pandey v. Mst. Asarfi Kuer* (6), *Durga Prasad v. Mst. Tulsa Kuer* (7), *Jagdamba Misir v. Ram Jit Singh and others* (8), *Mazzem Hossein Mondal and others v. Sarat Kumari Debi* (9), *Mohan Lal Goenka v. Benoy Krishna Mukerjee and others* (10), relied upon. *Abdul Ghaffar Khan and another v. Ishtiaq Ali and others* (11), *Rustamalli Goharalli Mirza v. Aftabhusein Khan Najafallickhan Mirza and others* (12), not followed. *Banu Mal v. Paras Ram and another* (13), *Kanhaiya Lal Chanbe v. Jangi* (14), *Abdul Wahab and others v. Mustafa Khan and others* (15), *Sir Ganga Ram Trust Society, Lahore v. Mehta Sunder Lal and another* (16), distinguished.

*Execution First Appeal from the order of Shri Pritam Singh, Commercial Sub-Judge, Delhi, dated the 14th February, 1956, dismissing the second objection petition with costs.*

RANG BEHARI LAL, for Appellant.

GURBACHAN SINGH, for Respondents.

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- (1) A.I.R. 1956 Mad. 67.
  - (2) A.I.R. 1945 Pat. 278.
  - (3) A.I.R. 1948 Pat. 199.
  - (4) A.I.R. 1940 Nag. 163.
  - (5) 38 I.C. 791.
  - (6) A.I.R. 1946 Pat. 216.
  - (7) A.I.R. 1939 All. 579.
  - (8) A.I.R. 1953 All. 253.
  - (9) 5 I.C. 89.
  - (10) 1953 S.C.R. 377.
  - (11) A.I.R. 1943 Oudh. 354.
  - (12) A.I.R. 1943 Bom. 414.
  - (13) A.I.R. 1930 Lah. 110.
  - (14) A.I.R. 1926 All. 520.
  - (15) A.I.R. 1935 Lah. 753.
  - (16) A.I.R. 1940 Lah. 27.

## JUDGMENT.

Falshaw, J.

FALSHAW, J.—These three execution appeals Numbers 24-D, 76-C and 110-C of 1956, have been filed by Seth Radhey Lal in the following circumstances. Seth Mathura Parshad, who is the respondent in two of the appeals, carried on a partnership firm called Mathura Parshad and Company along with his sons Seth Radhey Lal appellant and Seth Ladli Parshad, who is the respondent in the other appeal. In 1950 Ladli Parshad and Radhey Lal instituted a suit against their father for dissolution of partnership and rendition of accounts. The disputes between the parties were referred to the arbitration of Raja Ram and Ram Sarup who delivered their award on the 31st of October, 1951.

The objections filed by Ladli Parshad and Mathura Parshad to the award were ultimately dismissed and the award was made a rule of the Court on the 9th October, 1954. The partnership firm had apparently owned and been operating three factories, the Lakshmi Ice Factory at Kauria Pul, the Ganesh Ice Factory and Seth Oil Mills at Ajmeri Gate and the Imperial Ice Factory to which a bungalow is attached in New Delhi. The arbitrators assessed the values of these properties respectively at Rs. 2,00,000, 2,50,000 and 450,000 and allotted the Lakshmi Ice Factory to Mathura Parshad, the Ganesh Ice Factory and Seth Oil Mills to Ladli Parshad and the Imperial Ice Factory along with the bungalow to Radhey Lal. In view, however, of the disparity in value between these properties it was ordered that Radhey Lal should pay Rs. 1,00,000 to Mathura Parshad and Rs. 50,000 to Ladli Parshad with future interest at the rate of 4 per cent per annum for

the first year from the date of the award and, thereafter, at 6 per cent per annum until the date of realisation, and it was provided in the award that Mathura Parshad and Ladli Parshad should have a lien on the Imperial Ice Factory and the attached bungalow in respect of the sums thus payable to them.

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Thereafter in June, 1955, Mathura Parshad, and in July, 1955, Ladli Parshad, filed execution applications for the sums due to them in this way under the award including interest, which they sought to realise by the sale of the property on which these sums had been charged in the award and the decree based thereon. In both these execution applications Radhey Lal filed objections under section 47, Civil Procedure Code, in which he alleged that the Imperial Ice Factory had been run in the period following the award by Mathura Parshad and Ladli Parshad and he, therefore, claimed that they were liable to render accounts to him regarding the running of the factory for the period from the 31st of October, 1951 to the 9th of October, 1954, when the award was made a rule of the Court. In the case of Mathura Parshad's execution application Radhey Lal also raised objections that certain sums were payable to him by Mathura Parshad under the terms of the award. Both Mathura Parshad and Ladli Parshad raised the objection that the question of going into the accounts of the Imperial Ice Factory for the period following the delivery of the award of the arbitrators was not one which could be gone into under section 47, Civil Procedure Code, by the executing Court, which simply had to execute the award and decree as it stood. Mathura Parshad also raised an objection regarding the sums claimed by Radhey Lal under the award from him that the sums of money out of which these sums were to be paid to Radhey Lal had already been disposed of in making certain payments by agreement between all the three partners, and on this account he denied liability for payment.

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In both the execution petitions the preliminary issue was framed whether the objections of the judgment-debtor lay under section 47, Civil Procedure Code, i.e., his claim that he was entitled to rendition of accounts for the period between the making of the award and its being made a decree. In both the execution petitions this matter was decided against Radhey Lal judgment-debtor by the orders of the Court, dated the 28th of October, 1955. This meant the total dismissal of the judgment-debtor's objections in Ladli Parshad's execution petition, but in Mathura Parshad's petition a number of issues were framed relating to the other points in dispute between these two, and the recording of evidence was started on those issues in which apparently the onus had been placed on Mathura Parshad and, therefore, he was leading his evidence to prove that he was no longer liable to make the payments claimed by Radhey Lal in terms of the award.

Shortly after the order of the 28th of October, fresh objection petitions under section 47, Civil Procedure Code, were filed in both the executions by Radhey Lal, who now claimed to be entitled to rendition of accounts from both Mathura Parshad and Ladli Parshad in respect of the Imperial Ice Factory on the ground that between the date of the award and the date of the decree they had remained in possession and enjoying the use of the factory in the case of Mathura Parshad as 'lienholder' and in the case of Ladli Parshad as mortgagee. The objection was also raised that the decree was not executable as it merely created a charge on the property in question and that charge would have to be enforced by a separate suit. On these objections the Court framed issues—

- (1) Whether the decree is not executable for the reasons given in the objection petition?
- (2) Whether this objection petition is not legally maintainable?

- (3) Whether the trial of the issue raised in the objection petition of the judgment-debtor is barred by section 11, Civil Procedure Code, and also by principles of *res judicata*? Seth Radhey Lal v. Ladli Parshad
- (4) Whether the decree-holders have been in possession of the factory in dispute from the 31st of October, 1951, to the 9th of October, 1954? Falshaw, J.

Both the decree-holders maintained that the decrees in their favour were executable against the property without any further proceedings, and objected that the judgment-debtor could not again raise the plea that he was entitled to rendition of accounts regarding the factory from the 31st of October, 1951, to the 9th of October, 1954, after the same claim had already been over-ruled on his previous objection petition. They also denied on the merits that they had been in possession of the factory during the period in question or were liable to render accounts on this score under section 76 of the Transfer of Property Act.

In both the petitions the lower Court has held that the decree was executable as it stood without any further proceedings and that the further plea of the judgment-debtor for rendition of accounts on a different ground was barred by the principles of constructive *res judicata*. The finding was also given that the decree-holders in consequence of the award were not placed in the position of mortgagees in possession of the factory, the result being the dismissal of the judgment-debtor's objections under section 47 in both cases. Two of the present appeals are against these orders of dismissal.

The third appeal relates to the remaining dispute between Radhey Lal and Mathura Parshad arising out of his first objection under section 47, Civil Procedure Code. While the evidence of Mathura Parshad was

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still being recorded Radhey Lal filed an objection under sections 47 and 151, Civil Procedure Code, in which he claimed that since the Court had decided that he was not entitled to any rendition of accounts regarding the period following the date of the award, Mathura Parshad was also debarred on analogous grounds from seeking to avoid liability for the payments which he was ordered by the award to make to Radhey Lal by pleading subsequent adjustments and it was, therefore, prayed that the recording of evidence should be stopped and Mathura Parshad be referred to original proceedings in a civil Court with reference to the matters in dispute. This objection petition was dismissed by the lower Court on the ground that in reply to the judgment-debtor's claim for recovery of certain sums from Mathura Parshad the latter was trying to prove by evidence that in consequence of certain payments made by agreement between the parties he was no longer liable for those sums, and that this was altogether different from Radhey Lal's claim to rendition of accounts regarding the Imperial Ice Factory for the period subsequent to the award, and it was pointed out that the points being decided arose directly out of the judgment-debtor's own objections. He was told that if he did not want these matters to be decided it was open to him to withdraw the objections.

On behalf of Mathura Parshad it was contended that no appeal lay either against the order of the 14th of February, 1956, dismissing Radhey Lal's second claim to rendition of account regarding the factory or against the order of the 8th of May, 1956, to which I have just referred, since neither of these was a final order in the objection proceedings going on under section 47, Civil Procedure Code, between Radhey Lal and Mathura Parshad. In fact evidence was being recorded on the remaining issues framed in the original objection petition. It is certainly quite obvious that the second of these orders is not appealable as it is not in

any sense a final order and merely left these matters pending for a subsequent final decision.

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Regarding the second appeal it seems to me that the objection is a highly technical one and one which in the circumstances of the present case should not have been pressed, even if raised at all. There is no doubt some authority for the proposition that where only part of a petition under section 47, Civil Procedure Code, is dealt with an appeal will not lie against that order unless and until the whole of the matter in dispute is decided. In *Mahamya Prasad Singh and others v. Musammatt Sukhdiya Kaur* (1), Sharfuddin and Roe JJ., of the Patna High Court held that where a judgment-debtor objected to execution on the grounds, firstly, that the decree was not capable of execution and, secondly, that there was nothing due under it, and the Court decided the first ground of objection against him, no appeal lay against that decision before the second issue was gone into. Similarly, in *Kammaraja Pandia Naicker v. Kamarajapandia Naicker and others* (2), Beasley C.J., and Bardswell, J., held in a case where among other objections the judgment-debtor had raised preliminary objections that the Court had no jurisdiction to execute the decree and the execution petition was barred by the twelve years' rule of limitation and these objections had been over-ruled, that there was still no order which could be the subject of an appeal.

In the first place it seems to me that the present case is somewhat different in that the plea which was over-ruled in the present case was the subject of a separate petition under section 47, and it was a self-contained plea with no reference to the other matters in dispute, the order under appeal being final as regards that particular objection raised by the judgment-debtor, but apart from this it is not disputed by the learned

(1) 40 I.C. 517.

(2) A.I.R. 1933 Mad. 500(1).

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counsel, who represents Ladli Parshad as well as Mathura Parshad, that a practically similar order is appealable in the case of Ladli Parshad against whom no other objections had been brought by the judgment-debtor. In these circumstances it hardly seems to me to be worth while to raise the objection in the case of Mathura Parshad, since it would obviously be inconvenient and waste of time of the Court if the points arising had now to be considered in the case of Ladli Parshad and then again at some future date, after the passing of the final orders regarding the other objections raised against Mathura Parshad, in the case of Mathura Parshad. The same plea was in fact taken by the judgment-debtor against both the decree-holders and the same arguments applied in both the cases. I, therefore, propose to deal with the points raised simultaneously in both the appeals.

Although the lower Court has devoted a good deal of time to the consideration of the question in what capacity Ladli Parshad and Mathura Parshad decree-holders were in possession of the disputed property between the date of the award and the date of the decree based thereon, this point has not been argued before me, and the two points on which arguments had been addressed were whether the decree is executable as it stands or, in other words, whether the award merely had the effect of creating simple mortgage which it was necessary to enforce by separate proceedings, and whether the decision in Radhey Lal's original objection petitions that he was not entitled to a claim to rendition of accounts for the period between the date of the award and the date of the decree operated as constructive *res judicata* and debarred him from raising the same plea in a different form in his subsequent petitions.

On the first of these points the first case relied on by the learned counsel for the judgment-debtor was

*Banu Mal v. Paras Ram and another* (1), in which there was a compromise decree for the payment of a certain sum by instalments with a proviso that in default of payment of any instalment for two years the plaintiff would be entitled to take possession of certain land. On a default the decree-holder had applied to be put in possession of the land in execution proceedings, and Dalip Singh, J., held that the last part of the decree was wrong and it must be taken to be merely declaratory and so the decree was not executable. This case obviously referred to something quite different from the creation of a charge. Reliance is next placed on *Abdul Ghaffar Khan and another v. Ishtiaq Ali and others* (2), in which it was held by a Full Bench that a charge created by a decree of Court based on an award is a charge created by operation of law and comes within section 100 of the Transfer of property Act. In *Rustamalli Goharalli Mirza v. Aftabhuseinkhan Najafalkhan Mirza and others* (3), Lokur, J., held—

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“There is no difference in principle between a charge created by a decree and one created by contract. In either case the charge is not a transfer of an interest in the property. Where, therefore, a particular right is charged on specific immovable property, such right cannot be enforced against a subsequent transferee for valuable consideration and without notice of the charge.”

All that was held in the other case cited, *Kanhaiya Lal Chaube v. Jangi* (4), was that a charge similar to the one in the present case on certain property allotted in arbitration proceedings to one party for payment of a sum which he was ordered to pay to

(1) A.I.R. 1930 Lah. 110.  
(2) A.I.R. 1943 Oudh. 354.  
(3) A.I.R. 1943 Bom. 414.  
(4) A.I.R. 1926 All. 527.

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On the other hand it is the view of the Madras, Patna and Nagpur High Courts as expressed in *V.S.V. Thangavelu Mudaliar v. G. Thirumalswami Mudaliar and another* (1), *Debendra Nath Giri v. Smt. Trinavani Dasi* (2), *Mt. Prem Kaur v Ram Lagan Rai and others* (3), and *Seth Ghasiram Seth Dalchand Palliwal v. Mt. Kundanbai and others* (4), that a charge created by a decree does not come within the scope of section 100 of the Transfer of Property Act as it is neither a charge created by the act of the parties or a charge created by operation of law. Moreover, the cases *Raja Brajasunder Deb v. Sarat Kumari* (5), *Sheonandan Pandey v. Mt. Asarfi Kuer* (6), *Durga Prasad v. Mt. Talsa Kuar* (7), and *Jagdamba Misir v. Ram Jit Singh and others* (8), are all authorities for the proposition that where property has been made subject to a charge in a decree the charged property can be brought to sale in execution of a decree and the charge need not be enforced by a separate suit. I accordingly hold that the lower Court rightly decided that the decree is executable as it stands.

There remains the question whether, after the judgment-debtor had raised the plea that he was entitled to rendition of accounts from the two decree-holders in respect of the property in dispute for the period between the date of the award and the date of the decree on account of the usual occupation of the property as partners and this plea had been rejected on the ground that it could only be brought in a separate

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- (1) A.I.R. 1956 Mad. 67.
  - (2) A.I.R. 1945 Pat. 278.
  - (3) A.I.R. 1948 Pat. 199.
  - (4) A.I.R. 1940 Nag. 163.
  - (5) 38 I.C. 791.
  - (6) A.I.R. 1946 Pat. 216.
  - (7) A.I.R. 1939 All. 579.
  - (8) A.I.R. 1953 All. 253.

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suit and not in execution proceedings, the judgment-debtor could in the subsequent petition claim the same relief on different grounds, namely that he was entitled to rendition of accounts from the decree-holders as mortgagees or charge-holders.

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There can be no doubt that the principle of *res judicata* applies in execution proceedings. This was held by Mookerjee and Tennon, JJ., of the Calcutta High Court in *Mazzem Hossen Mondal and another v. Sarat Kumari Debi* (1), and also by a Full Bench consisting of Tek Chand, Bhide and Beckett, JJ., in *Gauri v. Ude and others* (2), in which the learned Judges have held that although section 11 does not apply to execution proceedings, the general principle of *res judicata* applies to such proceedings including the principle of constructive *res judicata* embodied in Explanation IV to section 11, and the principle of *res judicata* including the principle of constructive *res judicata* applies not only to matters decided in prior execution proceedings but also to matters decided in the same proceeding. To settle the matter finally the same view has also been taken by the Supreme Court in *Mohanlal Goenka v. Benoy Krishna Mukherjee and others* (3).

As against this two decisions have been relied on behalf of the judgment-debtor. The first of these was *Abdul Wahab and others v. Mustafa Khan and others* (4), in which Addison and Din Mohammad, JJ., held that where it was found that the plaintiffs could not have raised their present ground of attack in the previous suits without creating great confusion, and the evidence which they could lead to support it would have been inconsistent with the evidence they had to adduce otherwise, the second suit was not

(1) 5 I.C. 89.

(2) A.I.R. 1942 Lah. 153.

(3) 1953 S.C.R. 377.

(4) A.I.R. 1935 Lah. 753.

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barred by the provisions of section 11, Civil Procedure Code. Almost the same words were used again by Din Mohammad, J., in *Sir Ganga Ram Trust Society Lahore v. Mehta Sundar Lal and another* (1). Those decisions, however, were based on the particular facts of the cases decided by them, and while there can be no quarrel with the proposition laid down, it does not seem to me to be at all applicable in the present case, in which quite obviously it was open to the judgment debtor in his first petition under section 47, Civil Procedure Code, to claim rendition of accounts for the period in question on the alternative grounds that the decree-holders were enjoying use and occupation of the property in dispute either as partners or as mortgagees or charge-holders. The essential basis of the claim was the same and it could not possibly have caused any confusion to have claimed the relief on these alternative grounds. In the circumstances, I consider that the matter was correctly decided by the lower Court and I accordingly dismiss all the three appeals with costs.

## APPELLATE CRIMINAL

*Before Kapur and Passey, JJ.*

JIT SINGH AND OTHERS.—Appellants

*versus*

THE STATE,—Respondent

**Criminal Appeal No. 199 of 1956.**

1957  
 Jan., 9th

*Indian Penal Code (XLV of 1860)—Section 149—Common object and common intention—Difference between—‘Prosecution of the Common object’—Meaning of.*

*Held*, that common object is different from common intention in that it does not require prior consent and common meeting of minds before the attack and an unlawful object can develop after the people get together. So

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(1) A.I.R. 1940 Lah. 27.