ORIGINAL CIVIL.

Before Ameer Ali J.

In the Matter of Trust created by GEORGE BRIDGE, *deceased.*

1933

Jan. 31; *Feb.* 3.

Husband and Wife—Married woman, Liability of—Separate estate—Restraint on anticipation—Married Women's Property Act (III of 1874), ss. 8, 9—Transfer of Property (Amendment) Act (XXI of 1929), ss. 2, 15.

By a will dated September 1, 1924, G. B. settled a certain share of his estate upon his daughter J., then unmarried, for her separate use without power of anticipation. Upon the death of G. B., his estate vested in the Official Trustee, who was to pay certain moneys to J. J. subsequently married and borrowed in 1936 a sum of Rs. 20,000 from the plaintiff, who filed the present suit and obtained a simple money decree against J. By consent of the parties, a receiver was appointed of the moneys payable to J. by the Official Trustee. The Official Trustee thereupon applied to Court for directions.

Held: (*i*) that the clause against alienation in the will operated as a restraint during coverture and was valid;

(*ii*) that, even without the proviso added by s. 2 of Act XXI of 1929 in s. 8 of the Married Women's Property Act, a creditor would be debarred from attaching or obtaining receiver of the income payable to J.;

Hippolite v. *Stuart* (1) not followed;

(*iii*) that the creditor's rights accrued after April, 1930, and the proviso added by Act XXI of 1929 to s. 8 of the Married Women's Property Act was applicable;

(*iv*) that the Official Trustee could dispose of the income of the settled fund irrespective of the decree in the suit.

Position of married woman as regards her separate property discussed.

Material facts of the case and arguments of counsel appear sufficiently from the judgment.

Westmacott for the Official Trustee of Bengal.

B. N. Ghose for the creditor, Lal Mohini Dasi.

K. Bose for Jessie Hill.

Cur. adv. vult.

(1) (1886) I. L. R. 12 Cal. 522.

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AMEER ALI J. This matter again arises out of the will of George Bridge dated September 1, 1924. Of this will the Official Trustee is now trustee and the matter comes before me on an application for directions.

It is by no means the first time that the effect of this will has had to be considered by this Court. On November 26, 1936, I dealt, on an application in execution, with the same point which is raised in the present application.

The facts are as follows: Mrs. Jessie Hill, a married woman, borrowed from Sm. Lal Mohini Dasi, on February 27, 1936, a sum of Rs. 20,000. Lal Mohini Dasi filed a suit on September 17, 1937, and on September 27, 1937, a decree was passed by consent, whereby M. L. Khaitan, the attorney, was appointed receiver without security of the income and other moneys payable to the defendant by the Official Trustee of Bengal out of the estate of her father, George Bridge. There was a scheme for payment to various creditors including the plaintiff, the Official Trustee to act on counsel's endorsement without the order being drawn up. It should be mentioned that the decree is a plain money decree in favour of the plaintiff for principal and interest.

In the plaint, para. 2, is set out an agreement for repayment, which indicates that the money was borrowed with reference to the income to be received by J. C. Hill, under the settlement contained in her father's will. This agreement, however, was not proved at the trial.

In these circumstances, the Official Trustee asks to be advised whether he should make the payments directed by the consent decree of September 27, 1937.

Under the will of George Bridge, so far as it is material, a certain share of the testator's estate was settled upon his daughter J. C. Bridge (she being then unmarried) "during her life for her separate "use without power of anticipation".

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The Official Trustee relies upon my judgment of November 26, 1936, whereby I held that no creditor of Mrs. J. C. Hill in respect of debts incurred by her while a married woman could attach income already accrued or to accrue, having regard to the restraint on anticipation contained in the will, and to the provisions of the proviso contained in s. 2, Act XXI of 1929.

The principal point argued before me on that occasion by the creditor was that income already accrued due in contrast with income to become due was not protected by the restraint on anticipation. This point has not been reargued before me.

On this application, Mr. B. N. Ghose has appeared for the creditor and, while acknowledging that my previous decision is in point, asks for an opportunity to reargue the matter. Of this opportunity Mr. Ghose made full use. Mr. Ghose's points were as follows:—

(*i*) That the restraint being in general terms and not in terms confined to restraint during coverture, this amounts to an absolute restraint against alienation and is, therefore, void. This was a point which was raised on the previous application before me and which I decided adversely to the creditor. Mr. Ghose relies upon a statement in the text of Halsbury's Laws of England, Vol. 16, p. 639 and the case of *In re Wolstenholme* (1), (Halsbury, Art. 1009).

An explanation of this is to be found in Lush on Husband and Wife, p. 192. In my opinion the clause against the alienation must be read as operating upon the marriage of the beneficiary to which extent the restraint is valid in law.

The next point argued by Mr. Ghose is that by reason of s. 15 of the Act XXI of 1929 the transaction in this case is not hit by the proviso introduced

(1) (1881) 43 L. T. 752.

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into s. 8 of Act III of 1874 by s. 2 of the amending Act. Having regard to the wide terms of s. 15, this point appeared arguable and I, therefore, desired that the matter should be considered irrespective of the amending Act. As I shall ultimately decide that s. 15 does not exclude the operation of s. 2, the discussion becomes, to some extent, superfluous. On the other hand, so much emerged during the course of that discussion,—it became so obvious that I had in dealing with the last application so superficial a grasp of the matter—that I consider it desirable to state the result. Moreover, from the result it becomes apparent that there are difficulties in the way of creditors of married women to be seriously considered, entirely independent of s. 2 of the Act of 1929.

It has been usual to regard the liability of married women as general, limited only by the proviso introduced by s. 2 of the Act of 1929. This is wrong.

Mr. Ghose conceded that even if he is able to exclude the proviso of s. 2 of the Act of 1929, the decision in *Hippolite* v. *Stuart* (1) is against him and this decision, though differed from by other Courts in India, is binding upon them. He invited me, however, to consider the *ratio decidenda* of that case.

In that case which fell to be decided under Act III of 1874, the Subordinate Judge held that the initial requirements of s. 8 were fulfilled, *i.e.*, the married woman had "contracted in respect of..... .....her separate property." The point of law which he referred to the High Court was whether, having regard to the concluding portion of the section, the property was or was not protected by the restraint. This view which was endorsed by the High Court was based upon a similarity in the wording of s. 9 and the later part of s. 8.

(1) (1886) I. L. R. 12 Cal. 522.

By s. 9, ante-nuptial debts were made payable out of separate property after marriage. Under the corresponding section of the English Act of 1870, s. 12, the Courts have held that against such ante-nuptial debts the separate property was not protected by restraint: *Sanger* v. *Sanger* (1).

The decision of *Sanger* v. *Sanger* obviously applied to the debts mentioned in s. 9 of the Indian Act. The language of the last part of s. 8 appeared to the Judges indistinguishable from that in s. 9. Hence, they concluded that ante-nuptial debts and post nuptial debts must stand on the same footing with regard to restraint.

This is the *ratio decidenda* in *Hippolite* v. *Stuart* (*supra*).

It is a possible construction of the terms of the statute, but it disregards certain important principles which, had they been considered might, I think, have led the Judges to a different conclusion.

Before 1870, married women had no rights at law material to the present discussion. Their rights to property were limited to those created by separate use in equity. They had no power to contract in the ordinary sense, though in some cases and under limited conditions they had power to render available their separate property for discharge of obligations. See Lush, p. 273.

If she induced another person to advance her money or to undertake the burden or liability on the face of her promise to repay him out of her separate estate, Equity would compel her to make that promise good.....If she promised to repay money lent her out of her separate estate; if she bound the estate with the burden of the obligation she entered into, Equity would enforce her promise against her estate. Her separate estate was clothed with a kind of entity

(1) (1871) L. R. 11 Eq. 470.

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of its own which the married woman could bind almost as an agent binds his principal.

A person who sought to obtain in Equity a remedy against the separate estate of a married woman had first to prove that she had actually bound it ; or, as it was said, to prove that her " engagement " was entered into on the faith of and with reference to her separate estate. (Lush, p. 276.)

No general presumption was raised where a married woman entered into an engagement that she meant to bind her separate estate, and the onus of proving that she had done so was upon the person who sought to make it liable. (Lush, p. 277.)

In Equity, further, a married woman could only bind separate estate that belonged to her and over which she had a disposing power. If she was possessed of separate property settled upon her without power of anticipation, she could not render either the corpus or the future dividends subject to her debts and engagements. (Lush, p. 205.)

In England, prior to the Act of 1870 (Married Women's Property Act, 1870, 33 & 34 Vict., c. 93), married women had neither power to contract nor separate estate except in Equity. This Act contemplates a limited separate estate at law. By s. 12, it continued the liability for ante-nuptial debts after marriage. It did no more.

The Married Women's Property Act of 1882 (45 & 46 Vict., c. 75) revolutionised the position of women at law. This Act created the general separate property of married women and also recognised their capacity to contract [see s. 1, sub-s. (*ii*)]. This power is still limited. A contract must be in respect of and to the extent of her separate property. By s. 1, sub-s. (*iii*), every such contract was to be deemed to be a contract entered into by her with respect to her separate property, unless the contrary was shown. By s. 1, sub-s. (*iv*), every such contract bound her separate property, whether existing at the date of the contract or subsequently acquired.

The nature of married women's contract under this Act was frequently agitated in the Courts with the following result :—

(*i*) That the contract would have no effect unless at the time of the contract the married woman actually had separate property.

(*ii*) That the presumption contained in s. 1, sub-s. (*iii*) was in all cases subject to rebuttal.

(*iii*) That the presumption would be rebutted automatically in the case of separate property, subject to restraint.

See *Palliser* v. *Gurney* (1); *Harrison* v. *Harrison* (2); *Leak* v. *Driffield* (3).

Now these decisions were based upon the nature of the power to contract contained in s. 1, sub-s. (*ii*). They were not based upon s. 19, which saved the effect of settlements containing restraint. In point of fact, s. 19 restricted rather than extended the recognised effect of restraint in Equity.

The Act of 1893, therefore, was passed to extend the liability upon contract with married women. By sub-s. (*a*), her separate property became automatically bound, whether she had any property at the date of the contract or not. The proviso saved the effect of restraint. It is this proviso that has been added by Indian Act of 1929 to s. 8 of the Indian Act of 1874. The effective provisions of the Act of 1874 have not been amended.

The course of legislation in India has been peculiar. Section 4 of the Succession Act of 1865 anticipated the creation of separate property in England. Its wording is peculiar and so far as it is material may be paraphrased as follows :—

No husband shall, by marriage, acquire any interest in the property of the wife and no wife shall

(1) (1887) 19 Q. B. D. 519. (2) (1888) 13 P. D. 180.

(3) (1889) 24 Q. B. D. 98.

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become incapable of doing any act in respect of her own property which she could have done if unmarried.

This appears to give the wife an independent power of disposing with her own property.

Is it intended to deal with the married women's power to contract irrespective of her property? Is it intended to affect restraint on anticipation? The terms are wide enough to do so. See *Peters* v. *Manuk* (1). I think not. I am of opinion that this section has nothing to do with the power of married women to contract.

The Act of 1874 created a further statutory separate property in the case of married women's earnings and by s. 8, as I think, for the first time gave legal effect to married women's contracts. In my opinion, it merely recognised the principle of Equity already stated. I consider its terms and effect to be probably narrower but certainly not wider than those of s. 1 of the English Married Women's Property Act.

I consider, therefore, that the cases already referred to, which have determined the position of married women's contracts, under the English Act of 1883, to be relevant to contracts made by married women in India under the Act of 1874.

Applying these considerations to the case of *Hippolite* v. *Stuart* (*supra*) the result is, I think, as follows:—

The words of the later portion of s. 8 do not determine the matter. The question is whether the contract of the married women was at all covered by the operative part of the section. Was it such a contract that the Court could find it to have been entered into.....?

Applying the principles I have mentioned, it was not.

(1) (1874) 13 B. L. R. 383.

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The finding, therefore, of the Subordinate Court was, in my opinion, erroneous. This finding was not considered by the High Court, as the point above discussed was not raised.

If I am right as to the effect of s. 8 of the Act of 1874, it means that, apart altogether from the proviso, before a creditor can obtain a decree against a married woman on her contracts, much more has to be done than mere proof of the contract and breach. Moreover, the decree, when obtained, will not be an ordinary money decree, as has been made in this suit, apart from the terms as to payment. The decree must be in the form laid down in *Scott* v. *Morley* (1).

In my opinion, since as to the main question we are still at a stage 1874 India 1883 England, the insertion of the proviso by Act of 1929 was logically and legally unnecessary. It is to some extent misleading because it creates an impression that the liability of married women is more extensive than it is. It produces an atmosphere of the English Act of 1893.

Clearly, therefore, the Act of 1874 requires re-drafting and, when it is re-drafted, the necessity of including provisions such as are contained in a later English Act giving jurisdiction to the Courts to remove restraint should be considered.

On the above grounds, therefore, even without the proviso added by Act XXI of 1929, I should have been of opinion that the creditor is debarred from attaching, obtaining receiver of the income payable by the Official Trustee to J. C. Hill.

I hold, however, that the proviso does apply. The creditors' rights have all accrued since April, 1930. It is suggested that it is sought to apply the proviso to some incident of the disposition, *i.e.*, the will of George Bridge made in 1924. I think not. The restraint is certainly an incident of that disposition but it is no more valid or effective after

(1) (1887) 20 Q. B. D. 120.

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April 30, than it was before. By the Act of 1874, on a view which I myself have rejected, a contract made before 1930 could operate against property, notwithstanding the restraint. Any contract made after 1930, by reason of the proviso, cannot do so.

In the circumstances, I direct the Official Trustee to dispose of the income of the settled funds, irrespective of the decree dated September 27, 1937.

Attorneys for plaintiff: *Sandersons & Morgans.*

G. K. D.