

[302] APPELLATE CIVIL.

*The 18th November, 1879, and 20th September, 1881*

PRESENT :

SIR CHARLE A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE  
KINDERSLEY.

Bailur Krishna Rau.....(First Defendant), Appellant in 474 and  
Respondent in 483  
*and*  
Lakshmana Shaubhogue..... (Plaintiff), Respondent in 474 and  
Appellant in 483.\*

*Hindu Law—Right of Survivorship defeated by attachment of share of  
deceased coparcener—Civil Procedure Code, Section 246—Estoppel.*

In the Madras Presidency, where the interest of an undivided member in the joint property of a Hindu family has been attached in execution of a decree for the personal debt of such member and the judgment-debtor dies pending attachment, a valid charge is constituted in favour of the judgment-creditor which will prevent the accrual to the other coparceners of the right of survivorship.

Section 246 of Act VIII of 1859 is the same in effect as Section 283 of Act X of 1877.

L in execution of a decree against S, a member of an undivided Hindu family, for a personal debt, attached the interest of S in certain lands alleged to be the joint property of the family of S. K intervened and objected to the attachment on the ground that the property was not family property or partible. This objection was disallowed under Section 246 of the Code of Civil Procedure (Act VIII of 1859). No suit was brought by K within one year from the date of the order, but L, who purchased the right of S in the lands attached and sold, did bring a suit within a year from the date of the order to obtain what he had bought at the Court sale from K and others.

*Held* that K was estopped from again pleading that the same property was not family property or partible.

THE facts and arguments appear sufficiently, for the purpose of this report, in the judgment of the Court (TURNER, C.J., and KINDERSLEY, J.).

*Ramachandra Rau Sahib* for Appellant.

*Ramachandrayyar* for Respondent.

**Judgment:**—The plaintiff Lakshmana Shanbhogue obtained a money-decree against one Subba Rau for a personal debt, and, in [303] execution of his decree, attached the interest of his judgment-debtor in certain immoveable properties which he alleged were held by the family, of which Subba Rau was member, as undivided family property.

The first defendant Bailur Krishna Rau, the father of Subba Rau, presented an objection to the attachment on the 14th August 1875. In this objection he asserted that properties Nos. 3, 4, and 16 were the self-acquisition of his brother Ananthaya who was undergoing transportation; that a part of No. 12 and the whole of No. 15 was the self-acquisition of his brother Rama Pai who had died and whose property had passed to the petitioner; that lands

\* Second Appeal Nos. 474 and 483 of 1879 against the decrees of K. R. Krishna Menon, Subordinate Judge of South Canara, confirming the decrees of J. P. Fernandez, District Munsif of Udipi, dated 26th May 1879.

Nos. 9 and 11 were under conditional permanent lease; that No. 8 had been given to his father in gift on condition of his not alienating it, and No. 19 had been devoted to religious purposes; and that the other properties, which he admitted to be ancestral, were burdened with the obligation of maintaining certain members of the family and for providing the expenses of ceremonials. He prayed that the properties, which he alleged were not liable to partition, should be released, and that, if the Court should order the sale of the judgment-debtor's interest in the properties liable to partition, the sale should be made subject to the charges for maintenance and other family purposes to which in the hands of the family they were subject.

On the 19th August 1875 the Munsif disallowed the claim in respect of properties alleged to have been self-acquired, on the ground that, at the time of acquisition, the acquirers were living as members of a joint family, and the self-acquisition was not shown. He ordered that the properties mentioned in the deed of gift and deed of permanent lease, as well as property bearing the Janjir,\* No. 6, and a portion of property No. 8, assessed at Rs. 120, should be released from attachment, and that the other properties under attachment should be sold subject to the charges of the marriage of Parvati, the daughter of the petitioner, and the maintenance of Venkamma, the widow of his brother, and another Venkamma, the widow of his son.

Subba Rau died on the 13th September 1875. On the 22nd November the plaintiff purchased at auction the right, title, and [304] interest of Subba Rau in the properties remaining under attachment.

In May 1876 the first defendant wrote to the plaintiff a letter (Exhibit C) in the terms following:—

“Though I communicated to you on several occasions that you purchased at auction Subba Rau's share in some of the properties attached in satisfaction of the decree obtained against the defendant Subba Rau, and that you should, therefore, pay maintenance and marriage expenses charged on the share and obtain the same, you have not done so. I am, therefore, compelled to address you about this in writing as time has drawn near. If you at least now pay me the sum lawfully charged on the share you obtained at auction within five days from this date, I am ready to allow you to have Subba Rau's one-tenth share in the Mulegeni lands, and to deliver you one-tenth of each of the other lands. If you do not settle the matter accordingly, I do not hold myself responsible for any loss that may be incurred in respect thereof. I have an exact copy of this letter. Please keep this letter with you in order to produce it when I desire.”

On the 24th June 1876 the plaintiff instituted the present suit to obtain the one-tenth share he claimed to have acquired by his purchase and mesne profits.

The first defendant resisted the claim on the ground that, as Subba Rau had died before the sale, his share had lapsed to the surviving members of the family, and he repeated his objections that certain of the properties were not liable to partition as joint family property, that the property had been set aside for religious purposes, and that the properties which, as joint family estate, might have been liable to partition, were liable to charges for maintenance and other purposes. He also pleaded that the boundaries and areas mentioned in the plaint were erroneously stated, and that the sum claimed for mesne profits was exaggerated. The minor daughter of Subba Rau appeared by her guardian and claimed that provision should be made for her maintenance and marriage expenses.

\* A Chain—(Wilson). Serial.

The plaintiff, it would seem, pleaded in reply that the first defendant could not take objection to the sale of any portion of the property as joint family property, inasmuch as he had not brought [305] a suit within a year to contest the order the Court of the 19th August 1875.

The Munsif overruled this objection on the ground that the right to sue had not been lost at the time the present suit was instituted. He held that, on the death of Subba Rau before partition, his interest lapsed to the other members of the family, but that, inasmuch as the first defendant had by his claim (Exhibit A) admitted that certain properties were liable to partition and had even after the sale by his letter (Exhibit C) consented to the delivery of the share in those properties to the auction-purchaser, the plaintiff was entitled to the share of Subba Rau in those properties. He noted that the plaintiff did not object to the liability of the property purchased by him to contribute to the charges for maintenance and other family purposes, but, inasmuch as all the parties entitled to the benefit of those charges were not before the Court, and the suit concerned only a portion of the family property, he considered he was not in a position to determine specifically the amount to be contributed by the property decreed.

He accepted, in the absence of evidence, the statement of the first defendant as to the boundaries and areas of the several properties, and he reserved the question of mesne profits for determination in execution of decree. He therefore gave the plaintiff a decree for a one-tenth share in the properties he considered the first defendant had admitted to be ancestral, according to the extent and boundaries specified by the first defendant, but without prejudice to any claim that might be established by the minor daughter of Subba Rau for maintenance and marriage expenses.

The plaintiff and the first defendant presented appeals from this decree, but the Subordinate Judge affirmed it substantially on the grounds which the Munsif had recorded in support of it. The plaintiff and the first defendant have respectively presented second appeals to this Court. The plaintiff urges that, inasmuch as the judgment-debtor Subba Rau was alive at the time of the attachment, the interest which he then had in any joint family property included in the sale passed to the auction-purchaser, and that the claim to the properties excepted by the Courts below should have been decreed.

[306] The first defendant urges that the Courts below have misconstrued the documents A and C; that neither of those documents constituted an admission nor a agreement on his part estopping him from contending that the properties were not joint family property, nor that the interest of Subba Rau lapsed on his death; that the auction-purchaser was not induced by any representation in A to change his position; and that if C be read as an offer, it was not accepted; if it be read as an agreement, it was made without consideration and, therefore, is inoperative as a contract. In *Suraj Bansi Kær v. Sheo Proshad Singh* (L. R., 6 I. A., 88), Adit Sahai, the father of the appellants, had contracted a debt of such a nature that it was not binding on his sons by reason of their liability to pay their father's debts (p. 108). To secure this debt he had executed a mortgage of joint family property on which the mortgagee brought suit and obtained a decree ordering the sale of the property for the realization of the debt. A date was fixed for the sale, but before it arrived Adit Sahai died, and the proceedings were revived against his heirs, the appellants, and a fresh date fixed for the sale. Before this date arrived the appellants filed a petition of objections asserting their claims as coparceners under the Mitakshara law. The Court executing the decree, without determining the

rights of the appellants, referred them to a regular suit, and the sale proceeded. The property was purchased by the respondents who, the Privy Council held, purchased under the circumstances with actual or constructive notice of the appellants' objections and their result. Their Lordships, while setting aside the sale of the entire estate on the ground that the debt was not of such a nature that, in virtue of the general liability of sons for their father's debts, the appellants were bound to pay it, sustained the sale to the extent of one-third of the estate which, on a partition in his lifetime, would have fallen to the share of the father.

In that case arising under the Mitakshara law as administered by the Courts of Bengal, it could not be contended that the original mortgage was good to the extent of the father's interest, and that the decree ordering the sale gave effect to the alienation. The decision turned on the question whether proceedings in execution [307] had arrived at such a stage in the lifetime of the father as to prevent the lapse of the share on the father's death to his sons as surviving coparceners, and the Privy Council ruled that the proceedings in execution had "gone so far as to constitute in favour of the judgment-creditor a valid charge on the land to the extent of Adit Sahai's undivided share or interest therein which could not be defeated by his death before the actual sale." It appears that, in the case before the Privy Council, not only was there an order for sale in the decree itself, but in execution of the decree the property had been attached and an order to carry out the sale made before the death of the coparcener, but the observations of their Lordships went beyond this. In the course of the judgment they noted the decision of the High Court of the North-West Provinces in *Goor Pershad v. Sheodeen* (4 N. W. P., 137). In that case the judgment-debtor had died after his interest in coparcenary property had been attached, but before any order for its sale had been made, and the Court held that there remained no interest in the judgment-debtor which could be brought to sale.

In declaring that the ruling they were pronouncing was opposed to that of the High Court in the case cited, the Privy Council in effect pronounced that the interest of the judgment-debtor had, by the attachment, been brought under the control of the Court for the purpose of executing the decree so as to preclude the accrual of a title by survivorship in the event of the death of the judgment-debtor before an order for sale was made. In the case before the Court it appears the order for sale was made before the death of the judgment-debtor, but, whether this be so or not, we feel ourselves bound by the ruling of the Privy Council.

We have next to consider whether the defendant can resist the plaintiff's suit in respect of the lands to which his claim was rejected, seeing that he did not contest the order in the manner prescribed by the Code within the period allowed by law. It is urged on his behalf that, at the time this suit was brought, it was still open to him to have brought a suit to establish his right, and that he may avail himself in his defence of any right he could enforce by action. Had the order disallowing the claim been passed under Section 283, Act X of 1877, it would not be open [308] to question that the order would estop defendant from setting up the title he alleges, for it is by Section 283 expressly provided that the order shall be conclusive, subject to the result of the suit, if any, which he is authorized to bring to contest it. Although the terms of the corresponding provisions in the former Code are not so express, we arrive, though with some hesitation, at the conclusion that their effect is the same. The order was and was intended to be a summary declaration of a want of title in the objector, which

declaration would amount to a final decision of the question between the parties, if the party aggrieved did not take the course indicated by the institution of a suit to supersede it. In this view it is unnecessary for us to determine whether the Courts below were right in attributing to the statements in the claim and in the letter C the effect of admissions binding on the defendant, though we feel bound to say that we should have felt some difficulty in affirming their judgments on this issue. We must allow the appeal of the plaintiff and dismiss that of the defendant with costs.

**NOTES.**

**[I. EFFECT OF ATTACHMENT.**

In 4 Mad. 302, this Court held that the effect of the attachment was to create a charge. In view of the decision of the Privy Council in *Moti Lal v. Karrabuddin* (1896) 25 Cal. 179 that an attachment merely prevented alienation and did not give title, we think the Madras decision to which we have referred cannot be relied on. We do not think that the attachment gives the attaching creditor any higher right than to have the property kept in *custodis legis* pending the determination of his rights:—(1909) 32 Mad. 429. See also (1907) 30 Mad. 413, and the notes to (1879) 5 Cal. 148 P. C.

**II. ESTOPPEL OF THE UNSUCCESSFUL INTERVENOR.**

On this point See (1885) 8 Mad. 506 ; (1887) 10 Mad 357 ; (1897) 22 Bom. 640.]

---

[4 Mad. 308]

APPELLATE CIVIL.

---

*The 7th and 12th March, 1881.*

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Thyila Kandi Ummatha.....(Plaintiff), Appellant

*and*

Thyila Kandi Cheria Kunhamed.....(Third Defendant), Respondent.\*

---

Res judicata—*Civil Procedure Code, section 13 (3).*

In 1878 plaintiff sued to recover certain land from defendant on the ground that she being the owner had made an oral lease of the land to the defendant in 1876.

Issues were framed both as to title, and as to the letting, but the Munsif, without trying the question of title, dismissed the suit on the ground that the oral lease was not proved.

Held that a fresh suit to recover possession of the land on the ground of title was not barred as being *res judicata*.

---

\* Second Appeal No. 738 of 1880 against the decree of J. W. Reid, District Judge of North Malabar, reversing the decree of E. K. Krishnan, District Munsif of Tellichery, dated 22nd July 1880.