

making first defendant liable for all the costs hitherto incurred, as it was entirely due to his conduct that the suit was instituted and remanded. The second appeal fails and is dismissed with costs, two sets.

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v.  
RAMABADRA.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

GNANAMBAL (DEFENDANT), APPELLANT,

v.

PARVATHI (PLAINTIFF), RESPONDENT.\*

1892.  
March 23, 29.

*Civil Procedure Code, ss. 13, 279, 280, 283—Party to proceedings in execution—  
Order in execution—Estoppel—Res judicata.*

A claim in execution to a house which had been attached was dismissed, and the claimant now sued the decree-holder to establish her title to it. It appeared that the house had been previously attached in execution of another decree obtained against the same judgment-debtor and his father (since deceased); that the present plaintiff had then preferred a claim, which was allowed; that the judgment-debtor had taken no steps to have the order allowing the claim set aside; and that a suit filed by the decree-holder with that object had been dismissed:

*Held*, that the plaintiff's claim was not *res judicata*, and the defendant was not estopped from contesting it.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 577 of 1890, reversing the decree of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 447 of 1889.

Suit for a declaration that a certain house was the property of the plaintiff, and that it was not liable to be sold in execution of the decree in original suit No. 325 of 1888 in the Court of the District Munsif of Kumbakonam obtained by Gnanambal Ammal, the present defendant, against Rangasami Ayyan. The plaintiff had preferred a claim in execution without success. It appeared that Rangasami Ayyan was the plaintiff's husband, and that his father Subbayyan (deceased) was her maternal grandfather. The above decree was obtained on a bond executed by Subbayyan.

In original suit No. 31 of 1884 in the Court of the District Munsif of Kumbakonam, one Naranappa obtained a decree against

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\* Second Appeal No. 1050 of 1891.

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Subbayyan and Rangasami Ayyan, and, in execution, attached the house in question in the present suit. The present plaintiff then preferred a claim, which was allowed by an order, dated 25th October 1884 and filed in this suit as exhibit F. Subbayyan had notice of the plaintiff's claim, and he was named as one of the parties in the heading to that order, and he took no steps to contest it. The decree-holder then filed a suit (original suit No. 331 of 1885) to have that order set aside, but it was dismissed.

The District Munsif held that the order (exhibit F) created no estoppel and dismissed the suit on the merits. His decree was reversed, on appeal, by the District Judge, who held that the "defendant is estopped from setting up Subbayyan's right, because it is *res judicata* by the order (F), dated 25th October 1884."

The defendant preferred this second appeal.

*Ramachandra Ayyar* for appellant.

*R. Subramanya Ayyar* for respondent.

BEST, J.—The question for decision in this appeal is whether the District Judge is right in holding the suit to be barred as *res judicata* by the order (F), dated 25th October 1884.

This order (F) allowed a claim preferred by the present respondents to this same house on its being attached in execution of a decree obtained by one Naranappa (in original suit No. 31 of 1884) against Subbayyan and Rangasami Ayyan, the former of whom is this respondent's maternal grandfather and also father-in-law, being the adoptive father of the latter (Rangasami Ayyan), who is respondent's husband. It appears that, on respondent's claim to the house being allowed as above, the then plaintiff brought a suit under section 283 of the Code of Civil Procedure (original suit No. 331 of 1885) which was dismissed (see exhibit G).

The present appellant does not claim through the former plaintiff (Naranappa). She obtained her decree in original suit No. 325 of 1888 against Subbayyan's son (Rangasami Ayyan respondent's husband) for a debt on a bond executed by Subbayyan. On appellant's attaching the house in execution of this decree, respondent again put in a claim to the house under section 378 which was dismissed, and she thereupon brought the present suit under section 283.

The District Munsif dismissed the suit, but, on appeal by the present respondent, the District Judge, without going into the

merits, set aside the District Munsif's decree and passed a decree in the respondent's favour on the simple ground that the defendant (now appellant) is estopped from setting up Subbayyan's right, because it is *res judicata* by the order (F).

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He explains, it was then decided that Subbayyan had no claim to the property and the suit brought by the then claimant against that order was dismissed. Subbayyan himself did not contest the order, and it is now too late for him to do so, more than a year having elapsed since it was made, and, that being the case, the defendant can have no right to attach the property as Subbayyan's, while Subbayyan himself has lost his right to it.

Even assuming that the fact of Subbayyan having had notice of his daughter-in-law's claim in 1884 is sufficient to make him a party, against whom that order was passed, and to debar him or his legal representatives from now denying the respondent's right to the house, I am unable to agree with the District Judge in holding that the appellant is equally bound by that order, to which she was no party; and the mere fact of her being the creditor of Subbayyan is not sufficient to constitute her his legal representative. Her suit is, therefore, not affected by section 283 of the Code of Civil Procedure or by the limitation of one year prescribed for such suits.

Without considering, therefore, whether Subbayyan or his son would or would not be barred by the order (F) from disputing the respondent's right to the house in question, I am clearly of opinion that the appellant is not barred by that order.

I would therefore allow this appeal, and, setting aside the Lower Court's decree, remand the case to the Lower Appellate Court for replacement on the file of appeals and disposal according to law.

I would further direct respondent to pay appellant's costs of this second appeal.

MUTTUSAMI AYYAR, J.—I am also of opinion that the claim is not *res judicata* either by reason of the order (F) or of decree in suit No. 331 of 1885. To neither the present defendant Gnanambal was a party, and, though the plaintiff was a party, that circumstance is not sufficient to create the identity of parties necessary to sustain the plea of *res judicata*, as there is no mutuality, and, as without mutuality, there can be no estoppel. Assuming that both Subbayyan and his son were parties to the order (F) and

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that neither could now sue to set it aside, the present defendant is not under the same disability. Though she attached it as the property of Subbayyan or his son, she did so, not as their privy or representative, but by virtue of a right inherent in her to attach what was really their property at the date of attachment. It would be open to her to show that Subbayyan and his son were in collusion with the plaintiff. There is nothing on the record to indicate that the notice of claim was served on Subbayyan's son. However this may be, the defendant is not their representative. This circumstance distinguishes this case from the cases cited by the District Judge.

I therefore concur in the order proposed by my learned colleague.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

AMMOTTI HAJI (PLAINTIFF), APPELLANT,

v.

KUNHAYEN KUTTI (DEFENDANT), RESPONDENT.\*

*Malabar law—Ottidar, right of pre-emption of—Waiver—Election not to purchase.*

An ottidar in Malabar loses his right of pre-emption if he refuses to bid at a Court-sale of the land comprised in his otti, held in execution of a decree against the karnavan and senior anandravan of the tarwad, in which the jenm right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the Court-sale.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 432 of 1891, affirming the decree of V. Kelu Eradi, District Munsif of Pynad, in original suit No. 163 of 1891.

Suit by an ottidar, alleging that the lands comprised in his otti had been purchased by the defendant for a sum of Rs. 161 at a sale held in execution of a decree against the jenmi, and praying for a declaration that the jenm right should vest in him on payment by him to the defendant of the sum of Rs. 161. It appeared that a notice had been sent to the plaintiff at the date of the sale, calling on him to exercise his right of pre-emption, and

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\* Second Appeal No. 1772 of 1891.