APPELLATE CIVIL.

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

KRISHNABHUPATI DEVU (PLAINTIFF), APPELLANT,

v.

VIKRAMA DEVU (DEFENDANT), RESPONDENT.*

1894. July 24, 25, 26, 30.

Code of Civil Procedure—Act XIV of 1882, *s.* 13—Res judicata.

Where all the conditions prescribed by section 13 of the Code of Civil Procedure as necessary to bar the trial in a subsequent suit of an issue adjudicated upon in a previous suit exist, the fact that in the first suit the defendant was an execution creditor and in the second he is a purchaser at an execution sale makes no difference as to the second suit being *res judicata*. A privity exists between an execution creditor and a purchaser at a Court-sale, the latter representing the former in so far as he had a right to bring the property to sale in execution of his decree. Thus when the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution sale, as his representative or as one claiming under him. *Surat Chunder Dey* v. *Gopal Chunder Laha* (L.R., 19 I.A., 203) followed.

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 28 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and *Subramania Ayyar* for appellant.

Subramania Ayyar for respondent.

JUDGMENT.—This appeal arises from a suit brought by the plaintiff (appellant) to obtain a declaration that the instrument of gift, (exhibit E) which his father, Lingam Lakshmaji, executed in his favour on the 13th October 1878, is true and valid; that he is entitled under it to the village of Venkatarajapuram and the hamlet of Sitanna Cheruvu Istuva, which is the property now in litigation, and that the execution sale at which respondent purchased them for Rs. 15,900 on the 15th October 1888 is void and inoperative as against him.

The sale was held in original suit No. 3 of 1885 on the file of the District Court of Vizagapatam, in which, one Chodimella Ramamurti, had obtained a decree against Lingam Lakshmaji for

* Appeal No. 162 of 1893.

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Rs. 6,456-10-0 for interest on Rs. 5,000 from the date of suit to date of decree at 9 *per cent. per annum*, for costs of the suit and for interest thereon at 6 *per cent. per annum* from date of decree to date of payment. Subsequent to the date of this decree (exhibit VI) viz., 29th June 1885, the decree-holder, Ramamurti, obtained two other decrees against Lingam Lakshmaji, one in original suit No. 374 of 1885 on the file of the District Munsif of Vizianagrum for Rs. 2,253 on the 8th October 1885, and the other in original suit No. 355 of 1886, on the file of the same District Munsif. In execution of the decree in original suit No. 374 of 1885, Ramamurti attached the village of Venkatarajapuram, together with some other lands, which are comprised in the deed of gift. The appellant intervened under section 271, Code of Civil Procedure, as a claimant, pleaded the gift of 1878 in support of his claim, and prayed that the village, &c., might be released from attachment; but his claim was disallowed and his application dismissed on the 9th March 1887. He then instituted original suit No. 13 of 1887 on the file of the District Court of Vizagapatam to have his title recognized and the property released from attachment. The parties to that suit were the decree-holder, Ramamurti, and the plaintiff in the present suit, and the third issue fixed in that suit was "whether the deed of gift or settlement on which the plaintiff "bases his claim to the property is valid and can be given effect "to, or void and inoperative." The District Judge decided it against the present appellant and dismissed his suit with costs. In support of his decision he observed as follows: "The property "attached admittedly belonged at one time to Lingam Lakshmaji. "In 1878, he was in jail for forgery, but was released about the "middle of the year. He is now undergoing a long sentence of "imprisonment in the Vellore Central Jail for another forgery. "These facts are notorious and were admitted at the trial. In "1878, just after his release, he executed in favour of his minor son, "the plaintiff, then about two years old exhibit E transferring to "him property admittedly worth at least Rs. 60,000. The property "now in suit is part of the property so transferred. There is "no evidence that this document has ever been given effect to. "Ramayya, first defence witness, who was formerly Lakshmaji's "confidential agent, deposes that Lakshmaji told him that it was "nominal only, intended to shield him from creditors. The wit- "ness has since collected the rents of the village and paid them

"over to Lakshmaji. The witness for the plaintiff was the writer "of E and the only reason he can assign for the transfer is that "the Madugole Zamindar asked Lingam Lakshmaji to make it. "It has been found in another case similar to this, in which case "the son was the plaintiff and Lakshmaji one of the defendants; "that the alleged transfer evidenced by E was nominal only, in- "operative and one that could not be given effect to. My finding "is that the plaintiff has not made out any title to the land, and "that his suit must therefore be dismissed with costs."

In execution of his decree against Lingam Lakshmaji in original suit No. 355 of 1886, C. Ramamurti again attached the village of Venkatarajapuram. On this occasion appellant did not intervene as a claimant, but he brought in the District Court original suit No. 19 of 1888 to establish his title to the property under the same instrument of gift, but the District Judge dismissed that suit also with costs. He remarked in his judgment (exhibit XVII) that the case was "clearly barred under section 13;" that the plaintiff, Lakshmaji's son, brought the then suit "to show that "the village is under the deed of gift his, and not his father "Lakshmaji's," and that this was "the very point in issue in the "former suit and which was decided against the plaintiff."

In execution of the decree in original suit No. 3 of 1885, the village of Venkatarajapuram, together with the hamlet Sitanna Cheruvu, was again attached on the 12th January 1888, the decree-debt due on the 19th April 1888 being Rs. 8,809-3-11, and it was advertised for sale on the 12th May 1888. After various adjournments, it was brought to the hammer on the 15th October 1888 and purchased by the respondent—Venkatarajapuram for Rs. 14,350 and Sitanna Cheruvu Istuva for Rs. 1,550. Although the sale took place in original suit No. 3 of 1885, it appears from exhibit XIV that the property was sold not only on account of the decree-debt therein, but also on account of three other debts, viz., the debt in original suit No. 374 of 1885 already mentioned, the debt due under the decree obtained by one Putta Ramanna against Lingam Lakshmaji in original suit No. 688 of 1886 on the file of the District Munsif of Vizagapatam, and the debt due to one Palakurti Ramamurti under the decree in original suit No. 1 of 1886 on the file of the same District Munsif. During the period of attachment and prior to the sale in original suit No. 3 of 1885 the appellant did not intervene, though his father objected to the sale and failed. The District Munsif of Vizagapatam disallowed the

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objections of Lingam Lakshmaji to the sale on the 9th March 1889 by his order (exhibit XII) and made over possession of the property to the purchaser by his order (exhibit C), dated the 22nd February 1890. The appellant brought this suit on the 25th August 1890.

His case is that the property now in dispute vested in him under the instrument of gift in 1878, and ceased at once to belong to his father, Lingam Lakshmaji, and its sale in 1888 as the latter's property and in satisfaction of a decree passed against Lakshmaji did not operate to divest appellant of what had already become his property. Respondent contended that the gift set up by appellant was a mere sham contrived to defraud Lakshmaji's creditors. The sixth issue raised the question whether the gift was valid and *bonâ fide*, and the Judge determined it in the negative.

Apart from the objection to the claim on the merits, respondent raised four preliminary questions, viz.:

(i) whether the suit is maintainable under section 42, Specific Relief Act;

(ii) whether the plaint is properly valued;

(iii) whether it is barred by the Law of Limitation, and

(iv) whether the suit is *res judicata*.

He abandoned the second preliminary ground of objection, and the Judge held that the suit was neither *res judicata* nor barred by limitation, but he held that the suit was not maintainable for two reasons, viz., (i) that appellant's omission to intervene as a claimant under section 278 when he was in a position to do so could not better his position, but rendered him liable to the same consequences as if he had intervened and his claim had failed, and (ii) that it was in the discretion of the Judge either to pass or decline to pass a declaratory decree under section 42 of the Specific Relief Act, and that he would exercise the discretion unwisely if he granted a declaratory decree under the circumstances mentioned in paragraph 7 of his judgment. Whilst stating in paragraph 10 of the judgment that the suit is not *res judicata*, he observes that, though the principle of *res judicata* may not apply, the effect of *res judicata* is indirectly produced. In the result, he dismissed appellant's suit with costs, and against this decision the plaintiff has appealed. The defendant supports it on the ground that the claim is *res judicata* and that the plaintiff is now estopped from relying on the gift as a valid transaction by reason of the decision in original suits Nos. 13 of 1887 and 19 of 1888 which have become final.

The only question which it is necessary to decide for the purposes of this appeal is whether the suit is *res judicata*. We are of opinion that the question raised by the sixth issue in the present suit is clearly *res judicata*, and that the adjudication upon it in original suit No. 13 of 1887 is conclusive. The appellant is not at liberty to re-open it, and is estopped from doing so by section 13 of the Code of Civil Procedure.

The suggestion made by the Judge that appellant was in a position to have intervened as a claimant under section 278 during the execution of the decrees in original suits Nos. 3 of 1885 and 355 of 1886, and that his omission to do so rendered him liable to the same consequences that would have ensued if he had intervened and his claim had been dismissed, is one to which we cannot accede. Section 278 of the Code of Civil Procedure is permissive; it does not impose an obligation on persons having claims to prefer to property attached in execution to prefer them during such execution and annex in cases of failure to do so, forfeiture of their right to establish their title to the property by a regular suit. As regards the one year's limitation prescribed by article 12, second schedule, Act of Limitations, the article presupposes an order already made under sections 280, 281 and 282, and it has no application in cases in which no claim has been preferred and no order has been made.

Nor do we see our way to adopting the opinion of the Judge that it would be unwise on his part to pass a declaratory decree in appellant's favour, even if he established his title under section 42 of the Specific Relief Act, which vests in him (the Judge) a discretion to refuse to make a declaration. The discretion given by that section is a judicial discretion, and the ground upon which it is exercised must be open to no legal objection. It is clearly a mistake to treat section 278, which is permissive, as imperative, and to adopt this erroneous construction as the basis of the discretion to be exercised under section 42 of the Specific Relief Act.

Again, it is not clear how, if the principle of *res judicata* does not apply, its effect can be produced either indirectly or directly. The decision reported in *Ram Kirpal Shukul* v. *Mussumat Rupkuari*(1) proceeds on the ground that a final decision in execution proceedings cannot be questioned at a later stage of those

(1) L.R., 11 I.A., 37.

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proceedings upon general principles of law or, in other words, the principle of *res judicata* applies, although section 13 does not mention execution proceedings.

Upon the facts already stated, however, it is clear that the decision in original suit No. 18 of 1887 is conclusive on the question raised by the sixth issue in the present suit, and that, on this ground, the appeal must fail. All the conditions prescribed by section 13 as necessary to bar the trial in a subsequent suit of an issue adjudicated upon in a previous suit exist in this case. The issue was substantially the same in both suits, and the District Court which investigated the former suit is competent to entertain the present suit. The question whether the gift was valid and *bonâ fide* or a mere sham was a matter directly and substantially in issue in both suits. The only difference is that in the previous suit the execution-creditor, Ramamurti, was defendant, whereas in the present suit the purchaser at the execution sale is the defendant. Does this make a difference? We are of opinion that it does not. It is a well-known principle that a purchaser at a Court-sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of sale, and represents the execution creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of his decree. Hence it follows that the purchaser is a party claiming in this case under the execution-creditor, Ramamurti, within the meaning of section 13, and the Judge has apparently overlooked the privity in law which exists between the two. The decision in *Surat Chunder Dey* v. *Gopal Chunder Laha*(1) is a clear authority for the proposition that when the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution sale as his representative or as one claiming under him.

The cases cited at the hearing by the learned Advocate-General in *Shivram Chintaman* v. *Jivu*(2), *Hira Lal Chatterji* v. *Gourmoni Debi*(3), *Zanki Lal* v. *Jawahir Singh*(4), *Jagat Narain* v. *Jag Rup*(5), and *Viraraghava* v. *Venkata*(6) are only decisions on the question how far a purchaser at an execution sale represents the judgment-creditor for the purposes of section 244 of

(1) L.R., 19 I. A., 203. (2) I.L.R., 13 Bom., 34. (3) I.L.R., 13 Calc., 326.
(4) I.L.R., 5 All., 94. (5) I.L.R., 5 All., 452. (6) I.L.R., 16 Mad., 287.

the Code of Civil Procedure, and they do not appear to us to touch the doctrine of privity in law as part of the doctrine of *res judicata*. The case in *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon*(1) was not that of a purchaser.

It is provided by section 244 that no separate suit shall be brought by a party to the decree or his representative for the determination of questions arising between them and relating to the execution of the decree. The question considered in the cases cited was whether the purchaser was entitled to maintain a separate suit and whether he was a representative within the meaning of that section. The question arising for determination in the case before us is whether a plea of estoppel which would be available if the judgment-creditor were a party to the present suit is likewise available to the purchaser who is a party to it. Moreover, the appellant was not the holder of the decree in the execution of which respondent became purchaser and the respondent was not a party to it but a stranger who represents the execution-creditor and execution-debtor only to the limited extent already mentioned.

We confirm the decree of the District Judge and dismiss this appeal with costs on the ground that the plaintiff is estopped from insisting on the gift in his favour as valid against the respondent.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

In re MANTEL AND MANTEL. *

Insolvent Act (11 *and* 12, *Vic. c.* 21), *s.* 63—*Insolvency of married woman—Property settled on her for separate use without power of anticipation—Whether comprised in the vesting order or not—Married Women's Property Act—Act III of* 1874, *s.* 8.

A creditor's right to be satisfied out of the separate property of a married woman is, in the case of post-nuptial debts, restricted to the property as to which there is no restraint on anticipation. Section 8 of Act III of 1874 was not intended to give married women the power of evading such restraint—*Hippolite* v. *Stuart*(2) dissented from.

APPLICATION in insolvency. The Official Assignee and the Official Trustee appeared in person.

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(1) L.R., 4 I.A., 66.

* Insolvency Petition No. 115 of 1894.

(2) I.L.R., 12 Calc., 522.