

THIS was a suit brought on the 21st July 1885 against C. Stuart and his wife in the Calcutta Court of Small Causes to recover a sum of Rs. 260 due as principal and interest on a promissory note dated the 26th of February 1885.

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It appeared that the plaintiff had, in January and February 1885, advanced to Mrs. Stuart, through a Mrs. Cox, one hundred and sixty-two rupees, eight annas, on interest at the rate of two annas per rupee per month, and that on the 26th February 1885 Mrs. Stuart had executed a promissory note for Rs. 200 with interest at the rate of two annas per rupee per month in favor of the plaintiff. At the date of suit none of the principal having been repaid, the sum of Rs. 260 was owing to the plaintiff.

On the evidence given at the trial the learned Judge found—

(1). That these advances had been made to Mrs. Stuart without the knowledge or authority, express or implied, of her husband, and were made for the purpose of carrying on a millinery business on her own account of which the husband was unaware.

(2). That Mr. and Mrs. Stuart were married on the 25th November 1871.

(3). That Mr. Stuart was in receipt of a monthly income of Rs. 580, and Mrs. Stuart to the interest on a sum of Rs. 50,000 under her father's will.

(4). That the contract was made with reference to Mrs. Stuart's separate property, and on the faith that her obligation would be satisfied thereout.

(5). That as regarded this sum of Rs. 50,000, it had been left to her by her father (who had died in 1881) under a clause in his will which was as follows: "I direct that my trustees shall stand possessed of my trust property in trust for all my children in equal shares if my said trust property shall not exceed in value rupees two lacs, but in case my trust property shall exceed that value, then as to Rs. 50,000 in trust for my daughter Eliza Sarah, the wife of Charles Stuart, Esq., an assistant in the Bank of Bengal.....and I direct and declare that my said trustees shall stand possessed of the shares of my daughter upon trust, from time to time, to pay the annual

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income accruing therefrom unto the proper hands of my said daughter entitled to receive the same for and during her life, so that the same may be for her sole and separate use and benefit without power of anticipation or disposing of the income or capital thereof, otherwise than by will. The income thereof to be enjoyed by her as an inalienable personal possession free wheresoever she shall be covert from the control and enjoyment of her husband, and for which income her receipt alone shall be a sufficient discharge to my trustees."

On these facts the learned Judge dismissed the suit against Mr. Stuart, and as regarded the liability of Mrs. Stuart to meet the demand out of her separate property, gave the following judgment. :—

"The law which governs the postnuptial contracts of married women is contained in s. 8 of the Indian Married Woman's Property Act of 1874. (Here followed s. 8 *in extenso*). I think the present contract was made with reference to the second defendant's separate property, and on the faith that her obligation arising out of such contract would be satisfied thereout. No difficulty, therefore, arises upon the construction of those words. But can a person so contracting recover as against a married woman's separate property where that is subject to a restraint upon anticipation. Sir Richard Couch in *Peters v. Manuk* (1) expressed an opinion that he could. The point, however, does not appear to have been taken in argument by the defendant's counsel in that case, and Mr. Stokoe submitted in the present case that this was not the proper construction of the section. 'I see no reason,' says Pontifex, J., in *Peters v. Manuk* (1), 'why this protection (of restraint upon anticipation) is less needed since the recent legislation (*viz.*, s. 4 of the Succession Act), or why it should not be continued. Females still require, and Courts of Equity ought, in my opinion, to still afford them the protection which was originally afforded them. Certainly it is one thing to say that a creditor with whom an unmarried woman contracts ought not to suffer by reason of a subsequent marriage, and quite another thing to abolish the restraint altogether. For this is really what it amounts to.

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

In England, notwithstanding the sweeping changes introduced in the law by the Married Woman's Property Act, 1882, this restriction has been expressly preserved—see s. 19. I think, therefore, the presumption is in favour of the defendants, but this cannot override what Pontifex, J., calls 'a deliberative legislative intention.' Is there evidence of such here?

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The preamble to Act III of 1874 recites that the Indian Succession Act, 1865, "does not expressly provide for the enforcement of claims by or against women to whose marriages it applies. But these words do not throw much light on the construction of s. 8. If anything, they are in favour of the defendants as hardly preparing one for any sweeping change in the law in the respect I have mentioned. Mr. Stokoe argued that s. 8 must be read as a procedure section, enabling a creditor to sue a married woman without joining the husband. But the section seems in that case at once insufficiently precise, and unnecessarily cumbrous, and it is difficult to say what effect can then be given to the concluding words of s. 7. 'And a married woman shall be liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried.' And the side note to s. 8, if it is allowable to refer to it, is against such a view. On the other hand the heading to this part of the Act, 'legal proceedings by and against married women,' rather favors it. Upon the whole, I think the solution of the meaning of s. 8 must be found in s. 9. That section enacts that 'a husband married after the 31st day of December 1865 shall not, by reason only of such marriage, be liable to the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and shall, to the extent of her separate property, be liable to satisfy such debts as if she had continued unmarried.' Now these words closely resemble the language of s. 12 of the English Married Woman's Property Act, 1870, and so closely that the resemblance cannot, in my opinion, be treated as a coincidence. Section 12 provides that 'a husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to

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satisfy, such debts as if she had continued unmarried.' Now s. 12 has been held to extend to separate property subject to a restraint on anticipation. This was in the case of *Sanger v. Sanger* (1), decided by Lord Romilly in 1871, and that authority has never been questioned, and ss. 12 and 9 being so similar, I regard *Sanger v. Sanger* as an authority also on the construction of s. 9, and I am of opinion, therefore, that s. 9 relates to property subject to a restraint upon anticipation. But it seems to me that the words 'to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree' in s. 8 correspond to the words 'to satisfy such debts as if she had continued unmarried' in s. 9, and I consider that the two sections were intended to be parallel sections. I think, therefore, that they must be construed in the same way. Mr. Stokoe laid great stress on the fact that in the English Act the property was expressly made liable, whereas in s. 8 of the Indian Act the only words referring to the property affected were the words 'and to the extent of her separate property,' and that this was rather a restrictive than an enlarging phrase. But this argument, if it is a sound one, would extend to s. 9 also, and upon the whole I am of opinion that s. 8 was intended to include property subject to a restraint on anticipation, and that the plaintiff is entitled to proceed against Mrs. Stuart's separate estate. Mr. Stokoe asked me if my judgment was unfavourable to him on this part of the case to refer the point to the High Court. I entertain some doubt on the question, and the point being a very important one in itself, and the amount really at stake so large (for I understand that this is in the nature of a test case), I have thought it right to make my judgment contingent upon the opinion of the High Court. The question I desire to refer is, whether s. 8 of Act III of 1874 extends to separate property of a married woman subject to or restrained upon anticipation?"

Mr. Pugh appeared on the reference for Mrs. Stuart, and referred to s. 4 of Act X of 1865 and s. 8 of Act III of 1874, citing *Stanley v. Stanley* (2) to show that restraint upon alienation

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

(2) L. R., 7 Ch. D., 589.

could not be evaded ; also *Buckton v. Hay* (1) as to the doctrine of restraint on alienation, and also referred to and distinguished *Sanger v. Sanger* (2), and cited *Peters v. Manuk* (3) to show that it is a limited interest that the wife takes in property under a restraint upon alienation. [WILSON, J.—You are relying on a point which O'uch, J., expressly says was not before the Court.] Whatever doubt there may be thrown on the woman's interest in *Peters v. Manuk* (3) is cleared up by s. 10 of the Transfer of Property Act, which expressly provides that property may be transferred to a woman so that she shall not have power to charge the same or any interest therein during marriage. This section was not brought to the notice of the Judge in the Court below. The following cases show the charging of property is prohibited where there is a clause against anticipation—*Roberts v. Watkins* (4) ; *Stanley v. Stanley* (5) ; *Chapman v. Biggs* (6).

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The case of *Pike v. Fitzgibbon* (7) shows that the debt can only be enforced against so much of the interest as is due on separate estate at the time the debt was contracted. It cannot be presumed that the Legislature intended in the Married Woman's Property Act to make any alteration in the law further than therein is explicitly declared in express terms or unmistakeable implication. See Maxwell on Statutes, pp. 95-96.

The question of the liability of Mrs. Stuart's separate estate was, I submit, rightly raised at the hearing and not in execution. [WILSON, J.—Yes, it is a condition precedent to the suit proceeding that the married woman has separate property.]

The Married Woman's Property Act is an act amending s. 4 of the Succession Act ; and *Miller v. The Administrator-General* (8), lays down that s. 4 of the Succession Act did not apply where either of the parties had an English domicile. Mrs. Stuart's domicile is English, and therefore the Act of 1874 does not apply to her.

No one appeared for the plaintiff.

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| (1) L. R., 11 Ch. D., 645. | (5) L. R., 7 Ch. D., 589.    |
| (2) L. R., 11 Eq., 470.    | (6) L. R., 11 Q. B., D., 27. |
| (3) 13 B. L. R., 383.      | (7) L. R., 17 Ch. D., 454.   |
| (4) 46 L. J., Q. B., 552.  | (8) L. L. R., 1 Calc., 412.  |

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The following opinions were delivered by the Court (GARTH, C.J. and WILSON, J.

GARTH, C.J.—The question which is submitted to us by this reference is, whether s. 8 of Act III of 1874 extends to separate property of a married woman, which is subject to a restraint upon anticipation.

It seems to me that the view which has been taken of this point by the learned Judge of the Small Cause Court is perfectly correct; and that the reasoning by which he arrives at his conclusion is quite satisfactory.

Mrs. Stuart, the lady against whom this suit is brought, had a sum of Rs. 50,000 settled upon her by her father and placed in the hands of trustees for her benefit. The interest was to be paid to her from time to time by the trustees, and she was only to have a power of disposing of the property by will.

Mrs. Stuart, it appears, carried on a sort of millinery business on her own account, and for the purposes of that business borrowed money of the plaintiff. It is found that he lent the money upon the credit of her separate estate; and the question is, whether having regard to s. 8 of the Married Woman's Property Act (III of 1874), the defendant's separate property is liable for the debt.

Mr. Pugh contended that, if this were the effect of s. 8, it would take away the power now allowed by law of settling money upon a married woman with a restraint upon alienation; and he referred us to s. 10 of the "Transfer of Property Act" to show that this was not the intention of the Legislature. But it is clear that the Married Woman's Property Act was not intended to alter the rule in that respect. The only question is, whether ss. 8 and 9 of that Act were not intended to introduce a modification of the rule in certain cases.

Now we have direct authority in the English Courts, as to the proper meaning of s. 12 of the English "Married Woman's Property Act, 1879," which is very similar in its terms to s. 9 of the Indian Act; and I think we may take s. 9 as a guide, in construing s. 8, with which we are now dealing. The authority to which I allude is the case of *Sanger v. Sanger* (1) which, so far as I am aware, has never been questioned.

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

In that case Mr. Sanger gave his wife by will an annuity of £300 for her separate use, without power of anticipation, and after his death a fund was set apart, out of his property, to answer this annuity.

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After the passing of the English Married Woman's Property Act, 1870, a creditor brought an action against Mrs. Sanger to recover a debt which had been incurred by her after the death of the testator; and on the 19th of January 1871 judgment was entered up by the plaintiff in that suit for £346.

On the same 19th January, but earlier in the day, Mrs. Sanger intermarried with William Hutchinson; and the question then arose, how far s. 12 of the Married Woman's Property Act, 1870, protected the settled property, during the marriage with William Hutchinson, from the judgment debt thus incurred by Mrs. Hutchinson.

Now by s. 12 her separate property was made liable for debts incurred by her before her marriage *in the same way as it would have been if she had continued unmarried*, which provision is substantially the same as that contained in s. 9 of the Indian Married Woman's Property Act of 1874.

An application was then made to Mr. Justice Lush to charge Mrs. Hutchinson's separate property (the fund which had been set apart to answer the annuity) with the payment of the judgment-debt of £346; and Mr. Justice Lush made an order accordingly.

An application was then made to the Master of the Rolls to protect the fund against the charging order, upon the ground that, as it was settled to Mrs. Hutchinson's separate use without power of anticipation, it could not be taken from her.

But the Master of the Rolls was clearly of opinion, that the charging order was right; and that, although Mrs. Hutchinson was married, her property was answerable for the payment of any debts which she had incurred before marriage, precisely as if she had continued unmarried.

Now then let us see what is the effect of s. 8 of the Indian Act. It says that, if a married woman possesses separate property, and if any person enters into a contract with her on the faith that her obligations arising out of such contract will be

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satisfied out of such property, then such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered in such suit *had she been unmarried at the date of the contract and continued unmarried at the date of the execution of the decree.*

Now it seems to me impossible (for the purposes of our present question) to distinguish the terms of that section from those of s. 9.

Section 9 says that, to the extent of her separate property, a married woman is liable to satisfy all debts contracted before her marriage, as if she had continued unmarried. Section 8 says that she is liable to satisfy out of her separate property any debt which she has incurred upon the faith of the creditor being paid out of that property.

The creditor, under such circumstances, is to be entitled to recover against her *what he might have recovered had she been unmarried at the date of the contract.*

Now it is conceded that, if she had been unmarried, and the property had been settled upon her as it is now, it might have been taken in execution in payment of the debt; and the section says that, having incurred the debt after her marriage, the creditor is to be entitled to recover what he might have recovered if she had remained unmarried.

It seems to me, therefore, that the only reasonable construction of s. 8 is that which has been put upon it by the Court below.

I do not feel any difficulty with regard to the question of domicile which was raised by Mr. Pugh; because it seems to me that the Act of 1874 applied (and I do not see any reason why it should not apply) to persons having an English, as well as to those having an Indian domicile. In fact I consider that this point was virtually decided here some years ago in the case of *Allumuddy v. Braham* (1).

I think, therefore, that we should answer the question referred to us in the affirmative. We make no order as to costs.

WILSON, J.—I am entirely of the same opinion. With regard to the question of domicile I have nothing to add. With regard to the main question which has been argued before us, it appears

(1) I. L. R., 4 Calc., 140.

to me that the words of s. 8, by themselves, are clear and definite. It appears to me clear that the separate property of a married woman means *all* her separate property; and it appears to me clear also that, if a married woman possesses separate property and any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, then, in order to ascertain how far her property is liable under the section, we must look at the last words of it, which say that it is liable to the same extent as if she had been unmarried at the date of the contract and continued unmarried at the execution of the decree; so that in each case we must treat the matter as if, instead of being a married woman, she had become a widow before each of those dates.

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That seems the plain and natural construction of the section, but we have also ample authority to the same effect.

In the first place I can see no distinction, for this purpose, between the words of s. 8 and of s. 9, nor between the words of s. 9 of this Act and the words of s. 12 of the English Act 32 and 33 Vic. c. 93, and the words of s. 12 of the English Act were considered by Lord Romilly and apparently also by Mr. Justice Lush in the case which has been referred to by the Court below.

Then we have authority on the same subject in this Court in the case of *Peters v. Manuk*. That was a suit in which it was sought to charge the property of a married woman settled to her separate use without power of anticipation. It was held by Mr. Justice Pontifex in that case that the property could not be charged under the Succession Act. The learned Judge expressed his opinion that it was as essential then, *i.e.*, at the time he was speaking of, as it ever was, that a married woman should have the protection of the clause restraining alienation. Apparently, the learned Judge had not had his attention drawn, and there was no reason why it should have been, to the Act we are now considering until towards the close of his judgment; and he merely pointed out that it did not apply.

The Court of appeal dealt with the case again. They agreed with Mr. Justice Pontifex that the Succession Act had not the effect of overriding the clause restraining alienation; but they

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went on deliberately to consider the effect of the section which is now before us, and the Chief Justice expresses a perfectly clear and distinct opinion that the effect of it was that which the learned Judge of the Small Cause Court has held it to be.

At first sight it may seem as if that were not an actual decision, but I am disposed to think that it is an actual decision, and for this reason.

If s. 8 has not the effect which we attribute to it, what effect has it? All the separate property of a married woman not subject to restraint against anticipation could, without the aid of s. 8, be made liable to satisfy contracts entered into by her with respect to that property. What then is the effect of s. 8.

It was contended that it is at most a section affecting the mode of procedure without making her property specifically liable. But what did the Court of appeal in the case to which I have referred say on this subject. They held that the Act was not retrospective. Couch, C.J., said that "if it could be considered to be a law of procedure only, it might be held to have a retrospective effect." But it is not a law of procedure. It is a law by which an effect is given to a contract with a married woman which it had not before.

That is an express decision that this is not a section of procedure but that it gives a substantive right.

Then we were asked to hold that whatever may have been the law before the Transfer of Property Act it is different now, and we were referred to s. 10 of that Act as bearing out that contention.

Now s. 10 says that, where property is given absolutely, but subject to a condition or limitation in restraint on alienation, the gift shall be good, and the condition or limitation void, and it is only by way of exception to that general rule that the case of a married woman is introduced. It is said that property may be transferred to or for the benefit of a woman, so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein. This merely excepts from the general rule of the section this particular case. It does not give to a restraint on alienation any greater force than it had before, but merely preserves to it the effect it had

previously. It therefore leaves the Married Woman's Property Act of 1874 and the decisions upon it untouched.

Attorney for the defendant: Mr. *Hechle*.

T. A. P.

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## APPELLATE CIVIL.

*Before Mr. Justice Field and Mr. Justice Macpherson.*

MATHURA NATH KUNDU, ON HIS DEATH HIS SONS DEBENDRA NATH KUNDU AND OTHERS (PLAINTIFFS) v. O. STEEL AND OTHERS (DEFENDANTS).<sup>6</sup>

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February 8.

*Bengal Act VIII of 1869, s. 27—Limitation Act (XV of 1877), Sch. II, Art. 69—Suit for money paid in excess of Road Cess.*

In a suit to recover money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road cess: *Held* (reversing the decisions of the Courts below) that the suit was governed not by the special law of limitation contained in s. 27, Bengal Act VIII of 1869, but by Art. 96, Sch. II of the Limitation Act XV of 1877.

THE principal defendants in this suit were the talukdars of the mehal Dhubail, and the plaintiffs were holders of small taluks within the mehal, of which the road and public works cesses were payable to the talukdars of the mehal. The suit was brought on the allegation that these defendants had fraudulently realized from them road and public works cesses from 1280 to 1286 (1873—1879) in excess of what was rightly due, through the principal defendant's authorized agent, the second defendant, by whom the cesses were collected. Some of these cesses were realized by decrees, and some under private receipts. \* The suit was instituted on 11th July 1882 for the excess payments, amounting to Rs. 614-7 annas. The only defence material to this report was that the suit was barred by the one year's period of limitation provided in s. 27, Bengal Act VIII of 1869. Both the lower Courts dismissed the suit on this ground.

\* Appeal from Appellate Decree No. 166 of 1885, against the decree of Baboo Nuffer Chandra Bhutto, Subordinate Judge of Nuddea, dated the 10th of November 1884, affirming the decree of Baboo Bepin Behari Sen, Second Munsiff of Khooshtea, dated 28th of December 1882.