

contracted for necessary purposes, and the action of the respondent in giving his wife an allowance sufficient for necessary purposes excludes the supposition that he intended to authorize her to contract debts on his account.

Munchi Kashi Prasad in reply.

OLDFIELD and BRODURST, JJ.—This suit has been brought to recover the amount of money lent by the plaintiff to the defendant, Mrs. Crawford, on her notes of hand, and has been brought against her and her husband. The lower appellate Court has disallowed the claim against the husband, and hence this second appeal. The appeal in our opinion must fail. The Judge has rightly held that the liability of a husband for his wife's debts depends on the principles of agency, and he can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done. In the present case, the Judge has held that there is no express or implied agency, and the circumstances under which the debts were contracted support this view. It is not a case where agency might be implied, as for instance, of money lent to a wife to meet some emergent need, but of successive borrowings over a considerable period, the debt having increased by high rates of interest. We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Pywell.

KUDRAT AND OTHERS (DEFENDANTS) *v.* DINU AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, s. 13—Suit dismissed "as brought"—Res judicata.

In a suit in which the plaintiffs claimed exclusive possession, and, in the alternative, joint possession of certain land, evidence was taken upon the issues raised; but the Court, without discussing the evidence, held that the alternative claims were "contradictory," and the plaintiffs' claim, therefore, "uncertain," and accordingly ordered "that the plaintiffs' claim, as brought, be dismissed with

* Second Appeal No. 117 of 1886, from a decree of J. M. C. Steimbelt, Esq., District Judge of Azamgarh, dated the 14th November, 1885, confirming a decree of Babu Nihal Chandar, Munsif of Azamgarh, dated the 26th June, 1885.

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costs." The plaintiffs did not appeal from this decision, but subsequently brought a suit against the same defendants, claiming joint possession of the same property.

Held that the suit was barred by s. 13 of the Civil Procedure Code, the Court in the former suit not having reserved to the plaintiffs the right to bring a fresh action.

Ganesh v. Kalka Prasad (1), *Muhammad Salim v. Nabian Bibi* (2), and *Watson v. The Collector of Rajshahye* (3) referred to by Tyrrell, J.

THE plaintiffs in this case, in 1884, brought a suit against the defendants, in which they asked that they might be given exclusive possession of certain land, or, if it were found that the parties were entitled to joint possession of the land, that they might be given possession jointly with the defendants. The third issue framed by the Court (Munsif of Azamgarh) was in effect whether the plaintiffs could properly claim the alternative reliefs which they had claimed. The Court dismissed the suit with reference to this issue, holding upon it as follows:—

"I propose to record my finding first on the third issue. As regards this issue, I observe that, with reference to the allegations contained in the petition of plaint, the plaintiffs are not entitled to ask for joint possession; for when they say that they were in exclusive possession of the land in dispute, how can they be allowed, by asking for the other relief, to say that they were in joint possession? for, unless they say so, they cannot get the other relief. The effect, therefore, of adding the other relief is that the plaintiffs make two contradictory statements, and thus come to the Court with an uncertain case. The plaintiffs' pleader was asked as to whether he would apply for the second part of the relief being expunged from the plaint, but his reply was that he would rather ask for the expungement of the first of the reliefs. This, I think, he cannot be allowed to do, for the remaining relief would then be quite contrary to the allegations made in the plaint. The plaintiffs, therefore, having come to Court with an uncertain claim, as has been said above, cannot get any decree from the Court, for it does not know which of the two allegations is correct. It is therefore (without recording any finding on the other issues, because it is unnecessary) ordered that the plaintiffs' claim, as brought, be dismissed with costs."

(1) I. L. R., 5 All. 595. (2) I. L. R., 3 All. 282.
(3) 13 Moo. I. A., 160.

The plaintiffs did not appeal from this decision, but in 1883 brought the present suit against the defendants, claiming joint possession of the land.

One of the defences to the suit was that it was barred by s. 13 of the Civil Procedure Code, with reference to the decision in the former suit.

This contention the Court of first instance disallowed, and it gave the plaintiffs a decree, which was affirmed on appeal by the defendants.

In second appeal the defendants again raised the plea of *res judicata*.

Munshi *Kashi Prasad*, for the appellants.

Munshi *Hanuman Prasad*, for the respondents.

EDGE, C. J.—This is a suit brought to assert a joint interest in land. The defence to the suit was estoppel under s. 13 of the Civil Procedure Code. The respondents, in 1884, brought a suit against the appellants in respect of the same land, in which they then claimed exclusive possession and, alternatively, joint possession. The questions raised in that suit having been brought into issue and evidence having been taken, the action was dismissed by the Munsif on grounds with which we would probably not agree if that suit had been made the subject of appeal. The Munsif, in dismissing the suit, did not reserve to the respondents the right to bring a fresh action. In the present suit we cannot go into the question whether the former suit was properly dismissed or not. It is sufficient to say that the judgment in that suit has not been appealed, and that it is a bar to the respondents' claim in this action. We allow the appeal with costs, setting aside the decrees of the Courts below.

TYRRELL, J.—I fully concur, and would only add that this suit is exactly similar to *Ganesh v. Kalka Prasad* (1). The ruling in that case has been questioned subsequently by Mr. Justice Mahmood—*Muhammad Salim v. Nabian Bibi* (2)—who dissented from the law as laid down therein. But the learned Judge did not discern that the case of *Ganesh v. Kalka Prasad* (1) was essentially distinguished from the three cases he had to determine. In *Ganesh v. Kalka*

(1) I. L. R., 5 All 595. (2) I. L. R., 8 All. 282.

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Prasad the Court had heard the parties, framed issues after taking evidence, and proceeded to judgment. In the cases before Mahmood, J., the plaintiff was non-suited on the preliminary ground of misjoinder. The radical principle of the cases is insisted on in the Privy Council ruling in *Watson v. The Collector of Rajshahye* (1) and in conformity with their Lordships' views expressed in that case, as well as with the plain provisions of the present Civil Procedure Code on this question, it was held in *Ganesh v. Kalka Prasad* (2), as we have held in this appeal to-day, that the decree in the former suit, which was allowed to become final, bars the second suit.

Appeal allowed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAMSIDH PANDE (PLAINTIFF) v. BALGOBIND AND OTHERS (DEFENDANTS).^a

Charge—Suit for money charged upon immoveable property—Instrument purporting in general terms to charge all the property of obligor—Maxim "certum est quod certum reddi potest"—Act IV of 1882 (Transfer of Property Act), ss. 98, 100—Act XV of 1877 (Limitation Act), sch. ii, No. 132.

The obligor of a bond acknowledged therein that he had borrowed Rs. 153 from the obligee at the rate of Re. 1-8 per cent. per mensem, and promised to pay the principal with interest at the agreed rate upon a date named. The bond continued thus:—"To secure this money, I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void. For this reason, I have of my free will and consent executed this hypothecation-bond, that it may be of use when needed." The amount secured by the bond became due on the 6th May, 1879. The bond was registered under the Registration Act as a document affecting immoveable property, and the obligor was a party to such registration. On the 9th May, 1885, the obligee sued the heir of the obligor to recover the principal and interest due upon the bond by enforcement of lien upon and sale of immoveable property belonging to the defendant.

Held that the bond showed that the intention of the parties was to create a charge upon all the property of the obligor for the payment to the plaintiff of the principal monies borrowed, together with interest at the agreed rate. *See Julla Mulla v. Nusir Mistri* (3) referred to.

^a Second Appeal No. 188 of 1886, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 13th November, 1885, reversing a decree of the District Judge of Ballia, dated the 2nd July, 1885.

(1) 12 Moo. I. A. 160. (2) I. L. R., 5 All 505.

(3) I. L. R., 7 C. 105.