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preted as a decree against the father alone, and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, that is, the right to demand partition to the extent of the father's share. In this last mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares, upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder."

Our order in these two appeals, therefore, is that, so far as the plaintiffs claim to exempt their rights and interests in the attached property under the decree of the third defendant, Bhataile Harbans Rai, the appeals must be dismissed.

The remainder of the plaintiffs' claim to exemption must be decreed. The decrees of the Subordinate Judge will therefore be varied in both cases, so as to exempt the rights and interests of the plaintiffs from execution proceedings under the decree of defendants Nos. 1 and 2 for Rs. 1,724-5-3.

The costs, both in this and the lower Court, will be in proportion to the claim decreed and dismissed in both suits.

TYRRELL, J.—I concur.

Appeals partly allowed and partly dismissed.

FULL BENCH.

1886 *November* 20 *and December* 14.

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

GIRDHARI LAL (PLAINTIFF) *v.* W. CRAWFORD (DEFENDANT).*

Husband and wife—Agency—Authority of wife to pledge husband's credit—Civil Procedure Code, ss. 565, 566, 587—Second appeal—Determination of issues of fact by High Court.

Held by the Full Bench that s. 587 of the Civil Procedure Code, does not make ss. 565 and 566 applicable to second appeals, so as to enable the High Court,

* Second Appeal No. 1468 of 1885, from a decree of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 1st June, 1885, modifying a decree of Babu Bepin Behari Mukerji, Munsif of Cawnpore, dated the 15th September, 1884.

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in cases where the lower appellate Court has omitted to frame or try any issue to determine any essential question of fact, to itself determine the same upon the evidence on the record; but the High Court in such cases must remit issues for trial to the lower appellate Court. *Bal Kishen* v. *Jasoda Kuar* (1) and *Deokisnen* v. *Bansi* (2) overruled on this point.

Held by the Division Bench that the liability of a husband for his wife's debts depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done.

In a suit by a creditor to recover from his debtor and her husband the amount of money lent by the plaintiff to the former on her notes of hand, it appeared that the defendants had always lived together, that the wife had an allowance wherewith to meet the household expenditure and all her personal expenses, and that the money had been borrowed without the husband's knowledge and not to meet any emergent need, but to pay off previous debts, and had been raised by successive borrowings over a considerable period, the debt having increased by high rates of interest. It was also found that it had not been shown that the plaintiff looked to the husband's credit, or that the husband had ever previously paid his wife's debts for her.

Held that under these circumstances no agency on the wife's part for her husband had been established, and that the husband was therefore not liable to the claim.

THIS was a suit for recovery of Rs. 589-2-9, principal and interest, due upon certain *ruqqas* or notes of hand given by Mrs. W. Crawford, defendant No. 1, and wife of Mr. W. Crawford, defendant No. 2, to the plaintiff Girdhari Lal. The rate of interest claimed was half an anna per rupee per mensem. The *ruqqas* dated from the 5th April, 1882, to the 9th October, 1883. The defendant No. 1 pleaded that she had borrowed Rs. 223 only from the plaintiff, and had fully repaid that amount. The defendant No. 2 pleaded that he had no knowledge of the plaintiff's monetary dealings with his wife, the defendant No. 1, and that he was not liable in respect of the plaintiff's claim.

With reference to the plea of defendant No. 2, there was evidence to the following effect:—The two defendants were married in 1855, and had always lived together. At the time when the debts were contracted, Mr. W. Crawford was employed in the Ordnance Department on a salary of Rs. 375 a month. Out of this he gave an allowance to his wife of Rs. 220 a month, with which she had to meet the household expenditure and all her own expenses. The defendants had a large family, but Mrs. Crawford deposed that the

(1) I. L. R., 7. All. 765. (2) I. L. R., 8 All. 172.

allowance of Rs. 220 would have been sufficient for all purposes if she had not had to pay heavy interest upon monies borrowed by her from time to time. She further stated that for nine or ten years past she had been borrowing money in her own name; that the *ruqqas* held by the plaintiff represented borrowings for the purpose of paying interest on old debts; that one of the loans was applied to the payment of the first debt, which was incurred for payment of medicine; that her husband knew nothing about these loans; and that he never authorized her to borrow money. Mrs. Crawford was the only witness who gave evidence upon these points.

The Court of first instance decreed the claim, but allowed interest at the rate of 6 per cent. per annum only. Upon the issue of the husband's liability, the Court observed:—"There cannot be the least doubt that the defendant No. 1 acted as the agent of her husband, the defendant No. 2, and that she had to borrow the money in order to meet the household expenditure. She admits that she was never extravagant, and that the first debt was incurred by her in order to pay for medicines during her illness. I am therefore of opinion that the husband of the defendant No. 1 is liable for the debts incurred by her, and I decide this issue in favour of the plaintiff."

The defendants appealed to the District Judge of Cawnpore. The Judge dismissed the appeal of Mrs. Crawford. With respect to the appeal of Mr. W. Crawford on the point of his liability to the plaintiffs' claim, the Court observed:—"The husband in this case contends that he is not liable for his wife's debts. It is contended that, being a Government servant, his family could have got medical advice without paying for it, and that Mrs. Crawford was not justified in borrowing without her husband's knowledge to pay off previous debts. I think the transactions are merely simple loan transactions, and no implied agency on the part of the wife can be proved in this case. It is not shown that plaintiff looked to the husband's credit, or that the husband ever paid his wife's debts for her on any previous occasion. It does not appear that Mr. Crawford was to be called on to execute the bond in favour of plaintiff. I therefore dismiss the appeal of Mrs. Crawford and accept the appeal of Mr. Crawford, and find him not liable for the debt."

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The plaintiff appealed to the High Court from the part of the Judge's decree which was adverse to him, upon the following grounds:—

1. Because, according to law and the custom of European families, the respondent's wife must be held to have been acting as the agent of the respondent.

2. "Because, with reference to the nature of the debts as admitted by Mrs. Crawford and as shown by the evidence, the respondent is liable to pay the debt due to the appellant.

3. "Because the *onus* of proof was upon the respondent, but he has failed to prove that his wife was not acting as his agent."

The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Mr. *A. Strachey*, for the respondent.

Upon the hearing of the appeal before Oldfield and Mahmood, JJ., their Lordships were disposed to regard the findings of the District Judge upon some of the issues of facts raised by the case as insufficient, and to remit these issues to him for determination under s. 566 of the Civil Procedure Code. The issues in question related to the fact of the two defendants living together, the objects of the various loans, and the allowance made by the respondent to his wife. It was objected by Mr. *Strachey* for the respondent that, with reference to the decisions of the Full Bench in *Bal Kishen* v. *Jasoda Kuar* (1) and *Deokishen* v. *Bansi* (2), the Court had no power to remit the issues to the District Judge, but must itself determine them upon the evidence on the record. Their Lordships passed the following order:—

"We refer to the Full Bench the question whether, with reference to the decisions of the Full Bench in *Bal Kishen* v. *Jasoda Kuar* and *Deokishen* v. *Bansi*, the Division Bench is competent to refer to the lower appellate Court issues of fact for decision in this case, or is bound to determine the same on the evidence on the record."

Mr. *A. Strachey*, for the respondent.—It is impossible to distinguish this reference from those which were answered in *Bal*

(1) I. L. R., 7 All. 765. (2) I. L. R., 8 All. 172.

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Kishen v. *Jasoda Kuar* (1) and *Deokishen* v. *Bansi* (2). The first of these cases was decided on the 4th June, 1885, and the second, which was referred to the Full Bench for the express purpose of reconsidering the first, on the 20th January, 1886. Upon both occasions the matter was fully discussed, and it would be highly inexpedient to disturb two such recent Full Bench rulings by raising again for the third time the question which they decided. By s. 587 of the Civil Procedure Code, the provisions of Chapter XLI., including ss. 565 and 566, are made applicable "as far as may be" to second appeals; and this no doubt means so far as may be consistent with Chapter XLII., and in particular with s. 584, specifying the grounds on which second appeals lie to the High Court. But although in general it is true that the determination of issues of fact in second appeal would be inconsistent with those provisions, it is not true in all cases; and the common impression that the High Court is under an invariable and absolute disability to deal with such issues in second appeal is erroneous. No doubt, where as usually happens, the Courts below do not omit to determine the necessary issues of fact, the High Court cannot interfere with the findings upon those issues, because the Legislature obviously intended that in regard to findings of fact there should be one appeal only. S. 584, moreover, limits the grounds of second appeal to error in substantive law or procedure, and where the necessary issues have been determined, no such error may exist. But where they have not been determined, the case is different, because this amounts to an error in procedure within the meaning of s. 584 (c), and therefore gives the High Court jurisdiction to interfere in second appeal. In such a case the question is not whether the appeal lies, but what the Court may do; and there is nothing in Chapter XLII which warrants the inference that in this particular class of cases at all events the High Court may not determine issues of fact. The reasons which in ordinary cases prevent the High Court from determining issues of fact do not here apply; for the Legislature's intention that two Courts only should be competent to determine such issues is duly complied with. It is unlikely that in such cases, where the High Court has before it all the materials which the lower appellate Court could have, the Legis-

(1) I. L. R., 7 All. 765. (2) I. L. R., 8 All. 172.

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lature should have intended the parties to be subjected to the expense and delay involved by a remand. [(He referred to *Hinde* v. *Brayan* (1)]

The Hon. Pandit *Ajudhia Nath* for the appellant.—I am not concerned to oppose the course advocated by the other side; but until *Bai Kishen* v. *Jasoda Kuar* (2), the practice of the Court was uniformly opposed to that which has since been followed. [He referred to *Ramnarain* v. *Bhawanideen* (3) and *Sheoambar Singh* v. *Lallu Singh* (4).]

Mr. *A. Strachey*, in reply.

OLDFIELD, J.—The answer to this reference depends on whether the provision in s. 565 of Chapter XLI of the Civil Procedure Code is to be followed by the High Court in disposing of second appeals, by which, when the evidence on the record is sufficient to enable the appellate Court to pronounce judgment, the appellate Court shall, after resettling the issues if necessary, finally determine the case. If it is, it would be incumbent on this Court to try issues and determine questions of fact essential to the right decision of the suit, in all cases when the evidence on the record is sufficient to enable the Court to do so, and it could only refer issues when the case falls under s. 566, that is, when the evidence on the record was not sufficient.

But the provisions of Chapter XLI are by s. 587 to be applied in second appeal only "as far as may be." Those words may, I think, be taken to mean so far as the provisions are consistent with the due discharge of the functions of the High Court as a Court of second appeal. Now, looking to the provisions of Chapter XLII, which deals with second appeals, it was not the intention of the Legislature that the High Court, sitting as a Court of second appeal, should determine questions of fact on the evidence. The only grounds on which second appeals are cognizable, are those mentioned in s. 584, which relate to errors of law or usage having the force of law, or substantial error or defect in procedure which may possible have produced error or defect in the decision of the case on the merits. Those are the only grounds of which notice

(1) I. L. R., 7 Mad. 52.
(2) I. L. R., 7 All. 765.
(3) *Ante*, p. 29.
(4) *Ante*, p. 30.

can be taken, and I do not think it was contemplated that after an appeal has been admitted on such grounds the whole case would be opened, so as to enable the High Court to deal with it under s. 565. The Court would be constituting itself a Court of first appeal.

I am of opinion therefore that, in the cases referred to, this Court is at liberty to remit issues for determination by the Court below. Such, too, has been the practice of this Court for years, and it is undesirable to alter it. I am constrained therefore to modify the opinion I expressed in *Deokishen* v. *Bansi* (1).

EDGE, C. J.—If the practice in this Court had not invariably been that the Division Benches in second appeals should not determine issues of fact, I might have thought it a matter of some doubt whether or not s. 566 of the Code applied to second appeals. But as I find that this has been the practice of the Benches of this Court for many years, during which the Court has been composed of many Judges of great eminence and experience, I think that the prevailing practice should guide us as to the construction to be placed on s. 587. The question has practically been raised only recently, and if the practice had been wrong in the opinion of the Bar and the Court, it would, I assume, have been raised before, and the practice would not have become established. Moreover, I find that the practice of the Calcutta High Court is the same, and I infer from a judgment which was mentioned during the argument yesterday that there is the same practice at Madras also (2). Under these circumstances, I do not feel myself justified in differing from my brother Oldfield, or in expressing any doubt in the matter.

STRAIGHT, J.—It is with much satisfaction that I have heard the remarks of my brother Oldfield with reference to the decision of the Full Bench in *Deokishen* v. *Bansi* (1) to which he was a party, and in regard to which he now says that he has modified his former opinion. I think that, in a matter of this kind, the maxim *optimus interpres rerum est usus* is applicable, and that what has been the unvarying practice of the Court in regard to s. 566 of the Code, at all events since I have been a member of the Court, should continue to be followed until it has been shown

(1) I. L. R., 8 All. 172.
(2) *Hinde* v. *Brayan*, I. L. R., 7 Mad. 52.

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that it is so unreasonable and unsatisfactory that injustice is caused by following it. I adhere entirely to all that I said in the case of *Balkishen* v. *Jasoda Kuar* (1), which, in the case of *Deokishen* v. *Bansi* (2), I re-affirmed; and I cannot but again express any satisfaction that, in accordance with the opinion of my brother Oldfield, we are about to return to our old practice.

BRODHURST, J.—I adhere to the opinion I expressed on a former occasion, and I concur in the judgment of my brother Oldfield.

TYRRELL, J.—The Court's practice being now settled in the matter, I have nothing further to say on the subject.

[The case again came before a Division Bench, which consisted of Oldfield and Brodhurst, JJ., and Brodhurst, J., not having been a member of the Bench before whom it was originally heard, it was re-argued.]

Munshi *Kashi Prasad*, for the appellant.—The lower appellate Court should, upon the evidence, have held that the respondent's wife in contracting the debts in question acted as his agent. The parties were cohabiting together, the household management was in the wife's hands, and the debts appear to have been contracted for the purpose of obtaining money to be applied in the purchase of medicines and other necessaries. Although at common law it has been held that there is a distinction between debts contracted for necessary purposes and loans taken for the purpose of paying such debts, no such distinction obtains in equity.

Mr. *A. Strachey*, for the respondent.—This case is governed by the principle laid down by the House of Lords in *Debenham* v. *Mellon* (3), namely, that the liability of a husband for debts contracted by his wife depends upon the general principles of agency, and that whether agency has or has not been proved in a particular case is always a question of fact. This is so, even where the husband and wife are living together, and where the debts are contracted for necessary purposes. If, however, it is merely a question of fact, the lower appellate Court has recorded a distinct finding upon that question, and there is no ground for interference in second appeal. Further, it has not been shown that the debts in this case were

(1) I. L. R., 7 All. 765. (2) I. L. R., 8 All. 172.

(3) 6 App. Cas. 24; L. R., 5 Q. B. D. 394.

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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 authorise her to contract debts on his account.

Munshi *Kashi Prasad* in reply.

OLDFIELD and BRODHURST, 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 Tyrrell.

1886 December 10.

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. Steinbelt, 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.