

1881¹

CHANDAN
KUAR
v.
TIRKHA RAM.

extends the section to decrees of the Judicial Committee of the Privy Council, and apparently to all suretyships for the due performance of appellate decrees. does not go further but stops there. The section would be quite remodelled if we were to hold that under it a surety-bond, executed at the moment of sale, promising to satisfy the decree in one year, if the judgment-debtor did not do so, could be summarily enforced by the execution of the original decree against the surety, in the same manner as a decree may be executed against a defendant. We reverse the order of the Judge and decree the appeal with costs.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

KHUB CHAND (DEFENDANT) v. NARAIN SINGH (PLAINTIFF).*

Res judicata—Act X of 1877 (Civil Procedure Code), s. 13—“Same parties.”

G sold an estate nominally to the minor son of *K*, but in reality to *K*. *K* brought a suit in his minor son's name against *N*, the mortgagee of such estate, to redeem the same. *N* set up as a defence to such suit that such sale was invalid under Hindu law, as such estate was a share of certain undivided property of which he was a co-sharer and had been made without his consent. It was finally decided in that suit that such estate was a share of such undivided property and not the separate property of *G*, and that such sale was invalid, having been made without the consent of *N* a co-sharer of such undivided property. *G* subsequently redeemed such estate, and having done so sold it a second time to *K*. *N* thereupon sued *K* to set aside such sale on the same ground as that on which he had defended the former suit. *Held* that the issue in such suit whether such estate was a share of undivided property or the separate property of *G* was *res judicata*, inasmuch as *K*, though not in name, yet in fact was a “party” to the former suit in which such issue was raised and finally decided.

THE plaintiff in this suit, Narain Singh, and one Ganesh Singh were the proprietors in equal shares of a two biswas share of a certain village. Ganesh Singh's one biswa share of the estate was mortgaged to Narain Singh. He sold such share, nominally to Gajadhar Singh, the minor son of the defendant in this suit, Khub Chand, but in reality to Khub Chand. Khub Chand brought a suit in his minor son's name against Narain Singh for the redemption of such share. Narain Singh defended that suit on the ground that such sale was

* Second Appeal, No. 992 of 1880, from a decree of F. E. Elliot, Esq., Judge of Mainpuri, dated the 22nd June, 1880, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 25th August, 1879.

1881

 KHUB CHAN
 v.
 NARAIN
 SINGH.

invalid under Hindu law, the estate being joint undivided property, and such sale having been made without his consent. On the 20th December, 1873, the appellate Court dismissed that suit, allowing the defence set up to it by Narain Singh. Khub Chand subsequently sued Ganesh Singh for a refund of the purchase-money, and obtained a decree on the 14th February, 1874. Ganesh Singh subsequently sued Narain Singh for possession of his one biswa share of the estate, alleging that the mortgage had been redeemed, and on the 22nd April, 1875, obtained a decree which became final. On the 12th October, 1878, Ganesh Singh again sold his one biswa share of the estate to Khub Chand. Thereupon Narain Singh instituted the present suit against Khub Chand to set aside such sale on the same ground as that on which he had defended the former suit, *viz.*, that the estate was joint undivided property, and the alienation of his moiety thereof by Ganesh Singh, without the plaintiff's consent, was invalid under Hindu law. The defendant set up as defence to the suit that the estate was not a joint undivided estate but had been partitioned, and such alienation was therefore not invalid under Hindu law. Both the lower Courts held that, as the question whether the estate was a joint undivided one and an alienation of his share by Ganesh Singh without the consent of his co-sharer was invalid under Hindu law had been heard and finally determined in the former suit, in 1873, such question was *res judicata*; and gave the plaintiff a decree setting aside the second sale.

On second appeal the defendant contended that the question of the validity of the second sale was not *res judicata*, with reference to the decision in the former suit in 1873; and that there had been a partition since the date of that decision.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—We are of opinion that the principle of *res judicata* is applicable to the present case, and that the lower Courts

1881
 JUB CHAND
 v.
 NARAIN
 SINGH.

have properly held, subject to the determination of the effect of the decree subsequently obtained by Ganesh against the respondent, that the appellant was bound by the decision of 1873. It has been distinctly found both by the Subordinate Judge and the Judge that, in the suit which was brought in the name of Gajadhar Singh, minor son of the defendant-appellant, in that year, the appellant was the real plaintiff, and that the sale-deed of the one biswa by Ganesh to Gajadhar Singh, while ostensibly professing to be made to the minor, was actually executed to the appellant, who himself found the consideration. The transaction therefore being *be-nami* in respect of Gajadhar Singh, it follows that he was a mere dummy in the subsequent suit for redemption instituted against the respondent, and we must hold that, though not in name, yet in fact, the appellant was a "party" to that litigation. That the joint ownership by the respondent and Ganesh of the two biswas, one of which has been sold to the appellant by the sale-deed of the 12th October, 1878, was directly raised and determined is obvious, and the decree of the 20th December, 1873, finally concluded the point as between the appellant and the respondent to that date.

The only further question that then arises is whether there was any subsequent partition; and the sole ground upon which it is urged that there was is the circumstance that Ganesh brought a suit for redemption of the one biswa mortgaged to the respondent, and got a decree for it in 1875. We cannot concur in the argument of the appellant's pleader that this is conclusive evidence of a separation of estate. The mortgage transaction was by one joint owner to the other, and the mortgage being admittedly made with the consent of the co-sharer, the title of the mortgagor did not really come into question. On the other hand, it is clear that the respondent has always resisted any alienation or assertion of a separate right by Ganesh to a divided share of the two biswas. We think, therefore, that the lower Courts have rightly decided the case, and that the sale-deed of the 12th October, 1878, has been properly held invalid and of no effect in consequence of the incapacity of Ganesh to execute it without the consent of his co-sharer. The appeal must therefore be dismissed with costs.

Appeal dismissed.