1886.

EVANS v. THE TRUSTEES OF THE PORT OF BOMBAY AND SIRDÁR DILER DOWLAT BAHA'DUR.

tiff here should be exempted from the ordinary rule by which a successful party gets his costs paid, I order the costs of the Port Trustees to be paid by the plaintiff and out of the damages if recovered. As regards the usual costs of the pauper plaintiff and his Court fees, I order the second defendant to pay them.

The second defendant appealed. The only point argued at the hearing of the appeal was as to the amount of damages, which the Court (Sargent, C. J., and Bayley, J.,) reduced to Rs. 17,000.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1887. *February* 11.

CURSETJI PESTONJI TA'RA'CHAND, (PLAINTIFF), *v.* RUSTOMJI DOSSA'BHOY AND GOOLBAI AND MANCHERJI CURSETJI BHATGARA, (DEFENDANTS),*

Married Woman's Property Act III of 1874—*Husband and Wife—Settlement—Property settled on married woman to her separate use and without power of anticipation—Power of married woman to charge such property with payment of debts incurred subsequently to marriage.*

Held (following *Hoppolite* v. *Stuart*(1), but doubting) that, under section 8 of Act III of 1874, a married woman has power to charge property settled upon herself, for her separate use without power of anticipation, with the payment of debts incurred by her subsequently to her marriage, and that such a charge is valid and binding.

THE second defendant, Goolbai, was the wife of the first defendant.

By an indenture, dated the 10th April, 1876, it was agreed and declared that the defendants, Rustomji Dossábhoy and Mancherji Cursetji, (defendants Nos. 1 and 3), should stand possessed of Government four per cent. promissory notes of the nominal value of Rs. 2,500 upon trust, to pay the interest, dividends, and income thereof to the defendant Goolbái, (defendant No. 2), for her separate use, and without power of anticipation during her life, and after her death in trust to pay and divide the same absolutely to and among such persons as, according

* Suit No. 408 of 1886.

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

1887.

CURSETJI PESTONJI TÁRÁCHAND v. RUSTOMJI DOSSÁBHOY AND OTHERS.

to the law for the time being in force for the distribution of the estates of intestate Pársis, should be the heirs of the said Goolbái.

The said Government promissory notes were deposited in the Bank of Bombay, and the interest thereof was paid to the defendant Goolbái.

By a writing, dated the 15th December, 1879, executed by the defendants, Rustomji Dossábhoy and Goolbái, the said defendants acknowledged that the defendant Goolbái with the consent of her husband, Rustomji Dossábhoy, had on that day borrowed Rs. 500 from the plaintiff, and promised to repay the same, with interest thereon, at the rate of 1¼ per cent. per month, within twenty months, by instalments of Rs. 25 per month; and, as security for the repayment of the said sum and interest, the defendant Goolbái charged the interest of the said notes payable to her by the said bank, and authorised the plaintiff to recover out of the said interest his principal moneys and interest, and to receive the said interest as it fell due.

On the 13th December, 1879, the defendant Goolbái addressed the following letter to the Secretary of the Bank of Bombay:—

"Sir,

"In pursuance of the instructions given to you by Messrs. Rustomji Dossábhoy and Mancherji Cursetji to pay me the amount of interest due on Government notes for Rs. 25 recovered by you under their power of attorney, I now beg to inform you that the amount of interest payable to me, as aforesaid, should henceforth be paid to the bearer, Mr. Cursetji Pestonji Táráchand, until further order. I hereby withdraw and cancel the similar letter given by me to my husband, Rustomji Dossábhoy, some time ago.'

On the 5th June, 1880, the plaintiff advanced to the defendant Goolbái a further sum of Rs. 100, which the defendants, Rustomji Dossábhoy and Goolbái, promised to repay with interest within four months, and as security for the repayment thereof the defendant Goolbái further charged the interest of the said Government promissory notes, payable to her, by a writing of that date executed by her and her husband.

1887.

CURSETJI PESTONJI TÁRÁCHAND v. RUSTOMJI DOSSA'BHOY AND OTHERS.

The plaintiff received the said interest upon the said notes from the bank until the 3rd June, 1885, but received no other moneys in payment of the said debt.

After the 5th June, 1885, the defendant Goolbái gave notice to the bank not to pay the said interest to the plaintiff, and the bank accordingly refused to pay it to the plaintiff.

The plaintiff alleged that the sum due to him in respect of the said loans amounted to Rs. 648-6-0, and claimed to have a charge in respect thereof upon the interest of the said Government promissory notes.

The plaintiff prayed that the first and second defendants should be ordered to pay him the said sum of Rs. 648-6-0 with interest, and that he should be declared to have a lien or charge upon the life-interest of the defendant Goolbái in the Government promissory notes for Rs. 2,500 specified in the indenture of the 10th April, 1876, and in the interest and dividends thereof; and that, in default of payment of the said sum with interest by the defendants, the interest of the defendant Goolbái in the said notes and the interest and dividends thereof should be sold, and that the proceeds of such sale should be applied in payment of what was due to the plaintiff, or that the defendants should be foreclosed from all right and equity of redemption in the said notes, and for injunction, &c.

The only issues raised at the hearing were the following:—

1. Whether the mortgage of the 15th December, 1879, was effectual to charge the defendant Goolbái's interest under the trust-deed of the 10th April, 1876.

2. General issue.

Lang and *Dhairyaván* for the plaintiff.

Rustomji Dossábhoy and Mancherji Cursetji, defendants Nos. 1 and 3, appeared in person.

Reference was made to Act III of 1874, sec. 8; *Hippolite* v. *Stuart*[1]; *Peters* v. *Manuk*[2]; *Sanger* v. *Sanger*[3].

February 14. FARRAN, J.:—The defendant Goolbái was entitled to a life-interest in certain Government promissory notes under an

(1) I. L. R., 12 Calc., 522. (2) 13 Beng. L. R., 383. (3) L. R., 11 Eq., 470.

ndenture of the 10th April, 1876. The income, to which she was entitled, was settled on her to her sole and separate use without power of anticipation. The promissory notes, in pursuance of the provisions of the indenture, were lodged in the Bank of Bombay; and the trustees of the indenture, who are defendants in this suit, had executed an authority in her favour under which she drew the interest as it accrued due.

On the 15th December, 1879, the plaintiff lent a sum of Rs. 500 to Goolbái and her husband, and the former charged her interest in the trust notes with the repayment of the same with interest at the rate of 15 per cent. *per annum*. The plaintiff subsequently advanced a further sum of Rs. 100 to Goolbái and her husband, which with interest was also charged upon Goolbái's interest in the said notes. The present suit is brought by the plaintiff to enforce these charges against Goolbái's interest in the notes, and to obtain a decree against her and her husband, the defendant Rustomji Dossábhoy, for the amount now due.

The question for determination is, whether the above charges, having regard to the fact that Goolbái's interest in the notes is settled to her sole and separate use without power of anticipation, and that she was a married woman when she purported to create them, are valid and binding. The answer to it depends upon the proper construction to be put on section 8 of the Married Woman's Property Act III of 1874. The plaintiff relies upon the cases of *Peters* v. *Manuk*[1] and *Hippolite* v. *Stuart*[2]. The latter authority, which is founded upon the earlier one, is in point; and, sitting as a Judge of original jurisdiction, I feel bound to follow it, as I am not prepared to say that it has been incorrectly decided. I must leave it to an Appellate Bench to dissent from it, if they consider the decision one which ought not to be acted upon.

The extreme importance of the question and the wide-reaching consequences of my decision justify me, I consider, in expressing the doubt I entertain as to whether the section has been correctly interpreted. Section 12 of the English Married Woman's Property Act of 1870 provides that a husband shall not be

(1) 13 Beng. L. R., 383. (2) I. L. R., 12 Calc., 522.

1887.

CURSETJI PESTONJI TÁRÁCHAND v. RUSTOMJI DOSSÁBHOY AND OTHERS.

answerable for a wife's antenuptial debts; but that the wife shall be liable to be sued, and her separate property shall be liable to satisfy such debts as if she had continued unmarried. In other words, as far as antenuptial debts are concerned, the creditor's position shall not be affected by the woman's marriage. Upon this it was decided in *Sanger* v. *Sanger*[1], that the statute applied as well to property settled upon the woman for her separate use without power of anticipation or alienation, as to her property generally. Manifestly, this must be so. Over property so settled an *unmarried* woman has as absolute control as over her other property; and, as her marriage is to have no effect upon her antenuptial engagements, it does not affect the creditor's rights against any of her property, whether settled to her separate use without power of anticipation or not. To the extent of the engagements, which she has entered into, she has, in effect, before marriage disposed of her separate property. Section 9 of the Indian Act III of 1874 is to the same effect, and should, no doubt, be similarly construed. That construction, however, does not necessarily involve the construction which the Calcutta High Court has placed upon section 8. According to English law, a testator or donor cannot give property absolutely, and at the same time impose a restriction on the legatee's or donee's power of disposing of it or alienating it; but upon that law, Courts of Equity engrafted an exception for the protection of married women from their husband's influence, which enabled a relation or friend to make an absolutely secure provision for a married woman, or a woman likely to marry, in whom he was interested. That exception gave effect to the expressed intention of a donor to restrain the donee during her marriage from alienating or anticipating the benefits of his bounty. The donee became incapable of alienating or anticipating the income, not because she was a married woman, but because the law gave effect to the intention of the donor while she was such.

The object of the Legislature in passing Act X of 1866 and Act III of 1874 was to assimilate the position of a married woman to that of an unmarried one, as far as regards her dealings with her own property. Section 4 of the former,

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

combined with section 7 of the latter Act, enables women married since the 1st of January, 1866, to possess and to sue and be sued in respect of such property as though they were unmarried. These sections do not, however, deal with their capacity to contract. Section 8 deals with that capacity, and applies to women married as well before as after the 1st of January, 1866, and provides that such women can contract as though they were unmarried at the date of the contract, but that on such contracts they will be liable only to the extent of their separate estate. If the law allowed property to be settled on an *unmarried* woman without power of anticipation, a person dealing with her could not obtain a charge upon such property, not because she was a woman, but because the donor gave her property subject to that condition; and the law, *ex hypothesi*, enabled him to do so. In the case of a *married* woman, the law does allow property to be so settled, and the married woman is unable to charge it, not because she is a married woman, but because a condition against anticipation or alienation is validly attached to the property itself. It is like the pension of a military officer, only that his inability to charge arises from the will of the Legislature and not the expressed wish of the settlor —*Lucas* v. *Harris*[1]. To enact, or to declare by enactment, that a person can enter into a contract with a married woman, and that she shall be liable upon such contract to the extent of her separate property as if she were unmarried at the date of such contract, does not seem necessarily to give her the power of contracting with reference to property, which, by reason of the condition imposed upon it by the settlor, she is unable to deal with, and not by reason of any restraint, which her coverture imposes upon herself. If she were unmarried at the date of the contract, and then possessed property validly settled to her separate use, without power of anticipation, she could not contract with reference to such property; but the law ordains that, in such a case, she cannot, *when unmarried*, possess property subject to such a condition. How, it may fairly be asked, can a person contract with a married woman with reference to property over which she has no control, or on the faith that her

(1) L. R., 18 Q. B. Div., 127.

1887.

CURSETJI PESTONJI TA'RÁCHAND v. RUSTOMJI DOSSÁBHOY AND OTHERS.

obligation will be discharged out of such property? The nature of the property itself would seem to forbid it.

The limited intention expressed in the preamble to the Act seems to support the result to which the above chain of reasoning would lead; and the improbability of the Legislature effecting such an important change in the law, without express words indicative of their intention to do so, points in the same direction. Section 10 of the Transfer of Property Act IV of 1882, which 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 her marriage, is difficult to reconcile with a construction of section 8 of the Married Woman's Property Act III of 1874, which, in effect, declares that, with reference to such property, a *feme covert* can contract as though she were a *feme sole*. The present case is an instance of a married woman being deprived of the provision intended to insure her, at all events from want, by her complying apparently too readily with her husband's wishes. That husband has become insolvent. The doubtful nature of the security I suppose justifies the lender in obtaining 15 per cent. interest from the lady. The loan has hitherto practically absorbed the whole of her maintenance in paying interest. The result of this decree will preclude her from ever freeing it from the result of her want of foresight.

For the above reasons, I doubt whether I should not have arrived at a different conclusion to that which a critical examination of the wording of section 8 of the Act has led the Calcutta High Court. The opinion of Pontifex, J., would have supported me in that conclusion. It is, however, safer to defer to authority, which with reluctance I do in this case. The wording of section 8 is indisputably susceptible of the meaning which that authority has declared to be the true meaning of the section. Had I thought otherwise, I should not have felt myself bound to follow it. The defendant Rustomji Dossábhoy being relieved from his liability personally by the Insolvent Court, there will be no decree as against him, in his personal capacity, for the amount due on

1887.

CURSETJI PESTONJI TÁRÁCHAND v. RUSTOMJI DOSSÁBHOY AND OTHERS.

the bond. There is a slight error in the manner in which the account annexed to the plaint is made up. On the 3rd June, 1885, the principal debt ought to have been reduced by about Rs. 55. The account must be re-calculated on the correct basis, and the exact amount of the principal due on the 3rd June, 1885, ascertained. For that amount, with interest thereon at the rate of 15 per cent. *per annum* till this day, there will be a decree with costs. The suit, apparently, having regard to the remedy sought against the trust estate, could not have been brought in the Small Cause Court. There will be interest on the decree at six per cent. Declare the defendant Goolbái's interest under the indenture of the 10th April, 1876, charged with the payment of the amount of this decree. Declare that, in default of payment of the amount of the decree within six months from this day, the plaintiff shall be at liberty to apply for a final decree for purchase and sale of the property so charged.

Attorney for the plaintiff:—Mr. *Mirza Hussein Khán.*

Defendants in person.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1889. *September* 30.

MORO ABA'JI, DECEASED, BY HIS SON AND HEIR, ATMA'RA'M MORESHWAR THA'KUR, (ORIGINAL DEFENDANT), APPELLANT, *v.* NA'RA'YAN DHONDBHAT PITRE AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Res judicata.

In a suit by A., the *inámdár*, against B., the *khot* of a certain village, it was decided that A. was the proprietor of the forest or waste lands attached to the village.

Held, that this decision did not operate as *res judicata* between A. and B. so as to estop B. in a subsequent suit from setting up a proprietary title, as against A., to the *cultivated* lands in the village.

THESE were cross special appeals from the decree of Dr. A. D. Pollen, Acting Assistant Judge of Ratnágiri, in cross appeals Nos. 344 and 356 of 1874.

Cross Special Appeals, Nos. 257 and 307 of 1875.