APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LAKSHMAN GOVIND AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* AMRIT GOPAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1900. *February* 28.

Evidence—Indian Evidence Act (I of 1872), Secs. 13 and 43—Judgments—Judgments not inter partes—Admissibility of such judgments—Documents not objected to in first Court—Appeal—Practice.

Judgments not *inter partes*, though not conclusive as *res judicata*, are admissible in evidence under section 13 of the Evidence Act (I of 1872) to show the conduct of the parties, or particular instances of the exercise of a right, or admissions made by the parties or their predecessors in title, or to identify property, or to show how it has been previously dealt with.

Where parties to a suit, in order to save delay or expense or for any other reason, have agreed or not objected to the admission of certain evidence given in some former proceedings, although it is not strictly admissible, and the first Court has allowed this to be done, it is not open to the Appellate Court to take objection to such a procedure and exclude the evidence.

A, B and C were members of a joint Hindu family, each having a third share in the family estate. A assigned his interest in the joint estate to the plaintiffs, who in 1897 filed this suit to recover by partition their one-third share in the property. B and C pleaded (*inter alia*) that A had already relinquished his share in their favour by a release dated 7th August, 1885.

The plaintiffs relied upon the judgments in a former suit brought by certain creditors of A to establish A's title to a third share in the property. In that suit it had been decided that the release relied upon by B and C was a fraudulent and colourable transaction.

Held, that the judgments in the former litigation, though not *inter partes*, were admissible under section 13 of the Evidence Act (I of 1872).

SECOND appeal from the decision of Ráo Bahádur Vaman M. Bodas, Joint First Class Subordinate Judge, A. P., at Dhulia.

Defendants Nos. 1, 2 and 3 were members of a joint Hindu family, each having a third share in the joint estate.

Defendant No. 1 assigned his interest in the estate to the plaintiffs, who thereupon in 1897 sued for a partition of the property.

Defendant No. 1 did not oppose the claim.

* Second Appeal, No. 657 of 1899.

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Defendants Nos. 2 and 3 pleaded that defendant No. 1 had relinquished his share in the property to them by a release dated 7th August, 1885.

This release had been held to be fraudulent and collusive in a former suit (No. 1556 of 1887) brought by certain creditors of defendant No. 1 to establish his title to a third share in the joint estate.

The Court of first instance sent for the record of the former suit and admitted in evidence the judgments of the original and Appellate Courts in the previous litigation as well as the depositions of certain witnesses who had been examined in that case.

The defendants did not object to the admission of this evidence in the first Court.

The Court held that the release was fraudulent and colourable, and awarded the plaintiffs' claim.

On appeal the Joint First Class Subordinate Judge, A. P., held that neither the depositions nor the judgments in the former suit were admissible in evidence. He further held that the release was a *bonâ-fide* transaction and rejected the plaintiffs' claim.

Against this decision plaintiffs preferred a second appeal to the High Court.

N. V. Gokhale, for appellants.

D. A. Khare, for respondent No. 3.

PARSONS, J.:—The Judge of the lower Appellate Court refused to look at certain evidence filed in the case. He says: "Exhibits 73 and 74 are copies of judgments in the two Courts. In the present case, the lower Court has solely relied on them in support of its conclusion. But it appears to me that those documents are not even relevant evidence in this case. The lower Court has also relied on Exhibits 75—79, which are certified copies of depositions of some of the witnesses examined in that case. It is admitted that all those witnesses are still living and yet none of them is examined in this case. It is clear then that Exhibits 75—79, as also the copies of judgments, Exhibits 73 and 74 in the former case, must be left out of consideration altogether."

It is pointed out to us that the statement is not quite accurate, for Exhibit 75 is the deposition of a witness who was examined in the present case (Exhibit 45). It is further argued that the judgments were, if not conclusive, at least relevant evidence, since in that former case the creditors of the defendant No. 1 claimed to attach the property as being that of the defendant No. 1, and the defendants Nos. 2 and 3 relied on the partition deed of the year 1885 to prove that the defendant No. 1 had given his share up to them, while in the present case the plaintiffs claimed the property as the purchasers from the defendant No. 1, and the defendants Nos. 2 and 3 set up the same partition deed in proof that the defendant No. 1 had no title, so that in both cases the point at issue, namely, the genuineness of the partition deed, was the same, and the parties also the same, namely, the defendant No. 1 by his creditors and assignees on the one side impeaching the deed, and the defendants Nos. 2 and 3 on the other contending for the deed.

There is a difficulty in accepting the argument as to the conclusive nature of the evidence, because the defendant No. 1 was not a party to the former suit, and his creditors and assignees do not litigate under the same title. The matter, therefore, is not *res judicata*, and the judgments would not be relevant,— that is, conclusive evidence under the provisions of section 40 of the Indian Evidence Act. The argument, however, that the judgments are relevant evidence must be accepted. The existence of a judgment declaring that the partition deed set up by the defendants No. 2 and 3 was fraudulent, colourable and void as against the creditors of the first defendant is relevant in a case where the assignee of the first defendant sues and the defendants Nos. 2 and 3 set up the same deed as a defence to the action. This is, we think, clearly provided for by section 43 of the Indian Evidence Act as deducible from the decision of their Lordships of the Privy Council in the case of *Bitto Kunwar* v. *Kesho Prasad* [1].

The relevancy of the evidence given by the witnesses in the former suit stands on a different footing. No doubt this evidence was not admissible in the present suit, because the witnesses who were alive ought to have been called and examined. The evidence

[1] (1896) 19 All., 277.

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was, however, allowed to go in without protest on the part of the defendants, and, as a consequence thereof, the plaintiff cancelled his application to have his witnesses summoned. Under these circumstances it was not fair of the Judge of the Appellate Court to have questioned the admissibility of this evidence or right of him to have left it out of consideration altogether. When the parties, in order to save delay or expense or for any other reason, had refrained from calling persons who were alive and had agreed or not objected to the admission of evidence given by them in some former proceeding, albeit it was not strictly admissible, and the Judge of the first Court had allowed this to be done, the Judge of the Appellate Court ought to have accepted the evidence, and it was too late for him to have taken objection to the procedure. He might, no doubt, have required the party who had tendered the evidence to bring the witnesses before him to be examined, but in that case he was bound to give him an opportunity of doing so. In no case was he justified in excluding the evidence altogether and deciding the case on the remaining evidence on the record.

For this reason we reverse the decree and remand the appeal for a fresh decision on the merits, making all costs hitherto incurred costs in the appeal.

RANADE, J.:—In this case, the original suit was brought by the appellant-plaintiffs as purchasers of the rights of respondent-defendant No. 1 to recover possession of his ⅓ share of the ancestral property which belonged in common to respondent-defendants Nos. 1, 2 and 3. Respondent-defendant No. 1 admitted the claim. Respondent-defendants Nos. 2 and 3 stated that respondent-defendant No. 1 had no rights left in the property, as he had relinquished his rights by executing a deed of partition in favour of respondent-defendants Nos. 2 and 3 on 7th August, 1885. In the Court of first instance, this release or partition was held to be colourable and fraudulent, and the appellants' claim as purchasers was decreed for a third share in the entire property. In arriving at this conclusion, the Court of first instance laid stress on the fact that in a previous suit, No. 1556 of 1887, brought by certain creditors of respondent-defendant No. 1 against present respondents Nos. 2 and 3 for a declaration that respondent No. 1

was entitled to a third share in the property, the partition deed of 7th August, 1885, had been held to be fraudulent and collusive. The decrees passed in Suit No. 1556 of 1887, and in appeal therefrom (Exhibits 73, 74), were recorded as evidence by the Court of first instance in the present case; and the depositions of defendants Nos. 2 and 3 and of certain other witnesses examined in the case (Exhibits 75—79) were also admitted as evidence. In appeal, the District Judge held that Exhibits 73 and 74, copies of judgments in the former litigation, were not relevant evidence in the present case, and the depositions in the former case (Exhibits 75—79) could not be admitted as evidence in the present case, as some of the witnesses were alive, and they had not been examined as witnesses in the present case. The lower Appellate Court accordingly excluded this evidence of the previous judgments and depositions, and held that the partition of 1885 was a *bonâ-fide* transaction, and rejected the claim for the ⅓rd share brought by the plaintiffs in the present case. In the appeal before us, the principal point argued was that the lower Appellate Court was in error in excluding the judgments in the former suit, which established the fraudulent and collusive character of the partition deed of 7th August, 1885, and that it was in error also in excluding the depositions, Exhibits 75—79, which had been admitted in evidence in the first Court without objection, and it was contended that the lower Appellate Court had no power to exclude this evidence from its consideration. The two principal points to be considered in the present appeal are thus: (1) whether the lower Appellate Court was wrong in holding that the judgments, Exhibits 73 and 74, were inadmissible in evidence, and (2) whether the depositions, Exhibits 75—79, were improperly excluded when no objection had been taken to their admissibility in the first Court.

On both these points I feel satisfied that the lower Appellate Court was in error in excluding the judgments and depositions from its consideration. The record of the case shows that the present appellant-plaintiffs applied to the Court on 1st December, 1897, to send for and examine the record in the previous suit, No. 1556 of 1887. This application, as also an application made on the same day for additional witnesses, Exhibit 57, was granted.

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The Court of the first instance examined the record in the former case and admitted the judgments in the former suit and appeal, Exhibits 73 and 74, as also the depositions of the defendants and other witnesses Exhibits 75—79 of the Court's own motion on the 19th January, 1898, and thereupon appellant-plaintiffs' vakil dispensed with the evidence called for by him in Exhibit 57 on the same day. The appellant-plaintiffs appear to have been satisfied with the evidence recorded by the Court of its own motion from the record of the former case; and, apparently, no objection was taken to this procedure by the pleader for the respondents. Under section 137 of the Civil Procedure Code, the Court of first instance had the right to send for the record of its own accord, or on the application of any of the parties to the suit, and inspect the same. Of course, this section does not empower the Court to use in evidence any document which would be inadmissible under the Indian Evidence Act. As stated above, no objection was made on behalf of the respondent-defendants Nos. 2 and 3, though in their appeal to the District Court they raised the point that the documents were not relevant evidence, and the judgments and depositions should not have been admitted as evidence. The lower Appellate Court upheld the objection raised about the admissibility of this evidence, but this it could not do under the circumstances stated above. At least, it should have remanded the case and permitted the appellants to give the evidence which they had dispensed with by reason of the recording of the judgments and depositions in the old case as evidence in this suit. In *Chimnaji* v. *Dinkar*[1], where a copy of a copy had been admitted in evidence in the first Court without objection, and the Appellate Court had excluded the evidence as inadmissible, it was held by Sir Raymond West that the Appellate Court had no power to reject such evidence at that stage. This was also the view taken in *Shivram* v. *Nawji*[2], where the District Judge had declared certain exhibits to be inadmissible in evidence. Under these circumstances, the rejection of the depositions solely on the ground that some of the persons were alive and might have been examined, seems to be without sufficient justification. At least the lower Appellate Court should have allowed the appellants an opportunity to give the evidence

(1) (1886) 11 Bom., 320. (2) P. J. for 1884, p. 219.

they had already tendered. That evidence included the examination of respondent No. 2 (Exhibit 76) and of respondent No. 1 (Exhibit 75).

As regards the judgments in the former suit, the appellants' contention was that the judgments operated as *res judicata*. The Court of first instance took this view, but the lower Appellate Court held that they were not *res judicata*, and were not even relevant evidence. There can be no doubt that the lower Court was right in holding that they were not *res judicata*, because the decision was not *inter partes*, though it related to the same subject-matter; but while the lower Court was right so far, it was wrong in holding that these judgments were not admissible in evidence. There has, no doubt, been some conflict of opinion on this point. On the one hand there is the judgment of the Full Bench in *Gujju Lall* v. *Fatteh Lall* (1), where it was held by four Judges that former judgments which are not of the nature of judgments *in rem*, nor judgments relating to public matters, cannot be admitted in evidence, where the parties are different, either as "transactions" under section 13 or as evidence of relevant facts under section 11 or under any other section of the Act. This ruling in *Gujju Lall* v. *Fatteh Lall* was followed in *Mahendra Lal* v. *Rosomoyi Dasi* (2), *Radha Gobind* v. *Rakhal Das* (3), *Surender Nath* v. *Brojo Nath* (4), *Ranchhoddas* v. *Bapu* (5), *Subramanyan* v. *Paramaswaran* (6). On the other hand, previous judgments not *inter parties* were held admissible as evidence, for certain purposes—*Ramasami* v. *Appavu* (7), *Nilakanta* v. *Imamsahib* (8), *Dost Mahomed Khan* v. *Soolochana Dabia* (9). The leading case is *Ramessur Persad Narain Sing* v. *Koonj-Behari Pattuk* (10), where the Privy Council admitted as evidence a certain *rájináma* made between the tenants and acted upon by the landlord, and held it to bind the landlord in a subsequent suit, though the plaintiff was not a party to the previous *rájináma*. In two more recent cases, the same principle was affirmed by the Privy Council. In the first

(1) (1880) 6 Cal., 171.
(2) (1885) 12 Cal., 207.
(3) (1885) 12 Cal., 82.
(4) (1886) 13 Cal., 352.
(5) (1886) 10 Bom., 439.
(6) (1887) 11 Mad., 116.
(7) (1887) 12 Mad., 9.
(8) (1892) 16 Mad., 361.
(9) (1864) 1 Cal. W. R., 270.
(10) (1878) 4 Cal., 633; L. R., 6 I. A., 33.

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of these cases—*Ram Ranjan* v. *Ram Narain Singh*[1]—certain decrees passed in 1817 and 1845, to which the plaintiff jamindar's predecessors in title were not parties, were admitted as evidence on behalf of the defendants' claim to ancient possession. In the other case—*Bitto Kunwar* v. *Kesho Prasad*[2]—a decree obtained against the defendant that the will was revoked was held not to be *res judicata* in a suit against him brought by other plaintiffs, but was held to be admissible as evidence against him. In an earlier Calcutta case—*Neamut Ali* v. *Gooroo Doss*[3]—Sir R. Couch had held that the word 'transaction' in section 13 included judgments, not conclusive, but still admissible as evidence for what they are worth, even when they might not be admissible under sections 40 to 43. The Allahabad High Court in a recent case of *The Collector of Gorakhpur* v. *Palakdhari Singh*[4] has noticed the decision in *Gujju Lall* v. *Fatteh Lall*[5] and held that though the judgment, as to whether a certain person was or was not heir, was not a transaction or fact under sections 13 and 11, yet it was admissible under section 13 as showing an instance in which the right was claimed; only in such cases the whole record, and not the judgment, should be admitted as evidence. Former judgments and other documents were held admissible on these and other grounds in *Venkatasami* v. *Venkatreddi*[6]; *Vythilinga* v. *Venkatachala*[7]; *Ashruffoonissa Begum* v. *Rughoonath Sohoy*[8]; *Roop Chand Bhukut* v. *Hur Kishen Doss*[9] It is not easy to reconcile this conflict of views in particular instances, but apparently, the cases, which decide that judgments, not *inter partes*, are not admissible in evidence proceed chiefly on the ground that those judgments are sought to be used as having the effect, more or less, of *res judicata*. For that purpose, a judgment *inter partes* alone can be admitted in evidence, but for other purposes where judgments are sought to be used to show the conduct of the parties, or show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously, they may be used under section 11 or 13 as exceptions recognised under

(1) (1894) 22 Cal., 533; L. R., 22 I. A., 60.
(2) 1896) 19 All., 277; L. R., 24 I. A., 10.
(3) (1874) 22 W. R., 365.
(4) (1889) 12 All., 1.
(5) (1880) 6 Cal., 171.
(6) (1891) 15 Mad., 12.
(7) (1892) 16 Mad., 194.
(8) (1865) 2 W. R., 267.
(9) (1875) 23 Cal. W. R., 162.

section 43, as relevant evidence—*Venkatasami* v. *Venkatreddi*[1]; *Naranji* v. *Dipa Umed*[2]; *The Collector of Gorakhpur* v. *Palakdhari Singh*[3]; *Krishnasami* v. *Rajagopala*[4]; *Omer Dutt Jha* v. *Colonel James Burn*[5]; *Gutlee Koiburto* v. *Bhukut Koiburto*[6]. In the present case, the judgments in the former suit raised the question now in issue in a pointed manner. It is true that the former suit was brought by certain creditors of respondent No. 1, while the present suit was instituted by a purchaser from respondent No. 1. This is, however, a difference which did not affect the merits. The real question at issue was the same, *viz.*, the *bond-fide* character of the partition deed of 1885. Though the decision in the former suit will not estop the respondent-defendants from contesting the claim as being *res judicata*, still the record and the judgment in that case, showing the conduct of the parties, and their admissions, would be admissible in evidence under section 13. The interpretation placed upon the words 'right' and 'transaction' in *Gujju Lall* v. *Fatteh Lall*[7] seems not to have been accepted by the Privy Council, and its correctness is questioned in the Full Bench judgment of the Allahabad High Court in *The Collector of Gorakhpur* v. *Palakdhari*[8], in so far as the exclusion of such judgments from being received as evidence under any section is concerned. Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property. The cases show that such judgments may have very high value as evidence, and may even shift the burden of proof—*Neamut Ali* v. *Gooroo Doss*[9]. In this view of the matter, it is clear that the lower Appellate Court was in error in excluding these judgments from its consideration. I would, therefore, reverse the decree of the lower Appellate Court, and remand the case for fresh decision after giving due consideration to the judgments (Exhibits 73, 74), and depositions, Exhibits 75 to 79.

(1) (1891) 15 Mad., 12.
(2) (1878) 3 Bom., 3.
(3) (1889) 12 All., 1.
(4) (1893-4) 18 Mad., 73.
(5) (1875) 24 Cal. W. R., 470.
(6) (1874) 22 Cal. W. R., 457.
(7) (1880) 6 Cal., 171.
(8) (1889) 12 All, 1.
(9) (1874) 22 Cal. W. R., 365.