1900.

RAMDAYAL v. JANKIDAS.

Singh (1); *Run Bahadur Singh* v. *Lucho Koer* (2); *Bholabhai* v. *Adesang* (3); *Rughunath* v. *Issur Chunder* (4). Here the first suit (No. 246 of 1896) was for a sum of Rs. 3,152, that is, for one instalment due under the bond, and it was heard and decided by the Second Class Subordinate Judge who had been deputed to assist the First Class Subordinate Judge. He was not competent to try the present suit, since it is for Rs. 6,525, that is, two instalments due under the bond, and is, therefore, beyond the limits of his pecuniary jurisdiction. For this reason his decision in the former suit cannot be *res judicata* in the present suit.

We reverse the decree and remand the suit for a trial on the merits. Costs to be costs in the cause.

Decree reversed and case remanded.

(1) (1882) 9 Ind. App., 197; 9 Cal., 439. (3) (1884) 9 Bom., 75.
(2) (1884) 12 Ind. App., 23; 11 Cal., 301. (4) (1884) 11 Cal., 153.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

1900.
April 18.

J. W. SEAGER (PLAINTIFF) *v.* HUKMA KESSA AND OTHERS (DEFENDANTS).*

Pledge—Husband and wife—Possession required for valid pledge—Contract Act (IX of 1872), Sec. 178.

The plaintiff sued to recover from the defendant the value of certain ornaments pledged with the defendant by the plaintiff's deceased wife. The plaintiff and his wife had lived together, and the latter, with the knowledge and consent of the plaintiff, had charge of the jewel-case containing the ornaments in question, which, however, belonged exclusively to the plaintiff. Without the knowledge or consent of the plaintiff his wife pledged these ornaments with the defendant as security for the repayment of certain promissory notes passed by her in favour of the defendant. After her death the defendant claimed payment of the promissory notes from the plaintiff. The plaintiff refused to pay, and sued the defendant for the value of the ornaments.

Held, that the plaintiff's wife had not in the beginning, nor did she subsequently acquire such possession as would validate the pledge by virtue of the provisions of section 178 of the Contract Act. To create a pledge under that section the pledgor must be in juridical possession of the goods; mere custody will not suffice.

* Small Cause Court Reference, No. 18775 of 1899.

1900.

SEAGER v. HUKMA KESSA.

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (Act XIV of 1882) by C. W. Chitty, Chief Judge:—

"1. This was a suit by the plaintiff to recover from the defendants a sum of Rs. 998 as the value of certain ornaments belonging to the plaintiff and pledged with the defendants by the plaintiff's deceased wife. The ornaments, with the exception of one item (two tolas of gold valued at Rs. 48), were produced in Court by the defendants. It was agreed that their value might be taken for the purpose of estimating the costs of the suit at Rs. 950, the ornaments themselves being returned to the plaintiff in the event of decree being passed in his favour. The ornaments are still lying in Court.

"2. The plaintiff and his late wife lived together, and his wife, with the plaintiff's knowledge and consent, had charge of the jewel-case in which were kept the ornaments in question and other trinkets belonging to the plaintiff's wife. The ornaments in question belonged exclusively to the plaintiff and were never worn by his wife. The wife also kept the plaintiff's cash box and had access to both that and the jewel-case, which remained in her wardrobe under her control.

"3. In the year 1892 Mrs. Seager commenced to borrow money from the defendants, and as security for the loan she deposited with them some of her own ornaments and the ornaments in question. This was done without the knowledge or consent of the plaintiff. The loan was renewed by Mrs. Seager from time to time and further advances made. The last promissory note passed by her appears to have been one of the 22nd July, 1897, for Rs. 1,809 (Exhibit B). In that all the ornaments pledged are enumerated, and the list includes those in question in this suit.

"4. Some five years ago the plaintiff wishing to see one of the ornaments, a diamond ring, asked his wife to show it to him. She then said at first that it was missing, afterwards she stated that she had sold it and the two chains in the bázár. The plaintiff was much annoyed, but thinking that the ornaments

1900.

SEAGER v. HUKIA KESSA.

were gone beyond recovery he did not press the matter further.

"5. In May, 1899, both the plaintiff and his wife were attacked with plague. On 17th May, 1899, Mrs. Seager died. After her death and the plaintiff's recovery he went through all his wife's things and found (*inter alia*) a number of cancelled promissory notes. He also came to know, on looking into the jewel-case, that all the jewels were gone. About the middle of August, 1899, one of the defendants came to the plaintiff and showed him the promissory note (Exhibit B), and he then came to know that the ornaments in question were in pledge with the defendants. The defendants called on the plaintiff to pay the amount due to them by his wife. This he refused to do, and filed this suit to recover from them the value of his ornaments which his wife had pledged. There was no question of *mala fides* in this case. That is to say, I was satisfied, on the evidence, that the ornaments belonged to the plaintiff and had been pledged by his wife for her own purposes without his own knowledge or consent. On the other hand, the defendants had no reason to suppose that the ornaments were not the property of Mrs. Seager, or that she had not a perfect right to pledge them.

"6. The sole question in the case is one of law—whether under the circumstances above set forth the pledge was valid as against the plaintiff.

"7. The question turns upon the proper construction to be put on section 178 of the Indian Contract Act. The only direct authority on the section is the case of *Biddomoyee Dabee* v. *Sitaram*[1]. That was a case of possession by a servant left in custody of his mistress' goods. A servant's possession seemed to me to be different from that of a wife, although for the purposes of the Indian Penal Code (section 27) they are classed together. A wife has a wider authority in dealing with the property of her husband than a servant would have, and what might amount to an offence on a servant's part would not be an offence on the part of a wife.

1) (1878) 4 Cal., 497.

1900.

SEAGER v. HUKMA KESSA.

"8. There are decisions on section 108 of the Indian Contract Act (see *Greenwood* v. *Holquette*[1] and *Shankar* v. *Mohanlal*[2]), but, in spite of the remarks of Messrs. Cunningham and Shepherd in their commentary, I was of opinion that some force must be given to the difference of the wording in the two sections. There also must be some distinction drawn between an out-and-out sale and a pledge conveying a limited interest in the property.

"9. For these reasons I was of opinion that the question should be answered in the affirmative, and I dismissed the plaintiff's suit. As, however, the point seems to me to be of much importance, although the plaintiff did not require a reference, I determined to refer the question for their Lordships' decision under section 617 of the Civil Procedure Code, and I made my judgment contingent on such decision. If the question is answered in the negative, there will be a decree for the plaintiff for the delivery to him of the ornaments and for payment to him by the defendants of Court costs on Rs. 950, and professional costs Rs. 90.

"10. As the reference is made by this Court *suo motu*, there is no deposit to meet the costs of reference."

Strangman (*amicus curiæ*) for plaintiff:—Apart from the Contract Act plaintiff must succeed. Marriage does not give the wife authority to pledge her husband's goods, and any pledge of his goods made by the wife would be invalid—Resolutions of the majority of Judges in *Manby* v. *Scott*[3].

Section 178 of the Contract Act will not assist defendants, for the wife in this case never had possession of the articles of jewellery. She merely had the bare custody of them, and had no authority to deal with them in any way whatever.

Her position was exactly the same as that of the servant in the only reported case on the word "possession" as used in this section—*Biddomoyee Dabee* v. *Sitaram*[4].

The term "possession" has the same meaning in section 178 as it has in section 108. It is the kind of possession which a factor or an agent has when the owner of the goods, although he has

(1) (1873) 12 Beng. L. R., 42.
(2) (1887) 11 Bom., 704.
(3) 2 Sm. L. Cas., 453.
(4) (1878) 4 Cal., 497.

1900.

SEAGER v. HUKMA KESSA.

parted with the possession, may give instructions to the person in possession what to do with the goods, and not a qualified possession as in the case when the possession is for a specific purpose: see *Greenwood* v. *Holquette*[1].

Here the possession was for a specific purpose, *viz.*, the safe custody of the articles in question. This seems to have been the extent of the authority, for apparently she had none to wear the jewels, at any rate the evidence is that she never did so. See also *Shankar Murlidhar* v. *Mohanlal Jaduram*[2].

Every person having possession of any moveable property within the meaning of sections 108 and 178 would have a right of action against any person disturbing that possession under section 10, Specific Relief Act (I of 1877). But supposing any person had wrongfully removed the jewellery in question from the plaintiff's house, his wife would have had no cause of action against the wrongdoer.

Section 7 of the Married Woman's Property Act (Act III of 1874) merely allows the wife to take legal proceedings in respect of her own property, and in the case supposed the husband would have been obliged to sue alone: see Dicey on Parties, Rule 88, page 394. Consequently it cannot be said that the wife had possession within the meaning of section 178.

If the wife ever did gain possession of the jewellery, then that possession was obtained by an offence, *viz.*, theft. Section 27 of the Indian Penal Code provides that when property is in the possession of a person's wife on account of that person, it is in that person's possession within the meaning of the Code.

From the point of view of the Indian Penal Code as long as the articles of jewellery were in the box they were in the plaintiff's possession. Directly she took them from the box with the intention of possessing them she committed theft, and so her possession of the articles of jewellery at the time she possessed them was possession obtained by an offence. There is no presumption, in law, in India that husband and wife constitute one person for the purpose of the criminal law, and if the wife removes her husband's property house from his with a dishonest

(1) (1873) 12 B. L. R., 42. (2) (1887) 11 Bom., 704.

intention she is guilty of theft: see Starling's Indian Criminal Law, 7th Edition, page 472, and *Queen-Empress* v. *Butchi*[1].

The plaintiff's action is not barred by article 48 of the Limitation Act, which gives plaintiff three years from the date when he first learnt in whose possession the property was. Here the property was lost by conversion.

Young for defendants (*amicus curiæ*):—Three things required by section are—(1) possession on part of pawnor; (2) good faith on part of pawnee; (3) lawful acquisition by pawnor.

"Possession" may bear its legal or its popular meaning: compare Pollock and Wright on Possession, pp. 1, 2, 6.

In the Contract Act "in possession" differs from "having possession": cf. cognate section 108, where the 1st exception speaks of a person being in possession and the 2nd and 3rd speak of persons having or having obtained possession. The words "in possession" are also used in the 2nd and 3rd exceptions, but only to include the possibility of the person having possession putting another in possession for the purposes of the sale.

If "to be in possession" differs from "to have possession" the difference must be that expressed by the Roman law "*non possidet, est tantum in possessione*;" and to be in possession would be equivalent to being in lawful custody. If so the terms of the section are complied with, since the second requirement of the section is found as a fact, and it is admitted that the original custodianship was lawfully acquired.

If it be urged that different words when used in the same section indicate a difference of meaning, and that, therefore, "in possession" cannot equal "in custody" since in custody is used at the end of the section, why should the same rule not be applied to the different phrases—"having possession" and "in possession" in section 108?

The pownor had from the first possession in the legal sense of the term.

Husband and wife, to whom Succession Act, section 4, applies, have full freedom to contract *inter se*.

(1) (1893) 17 Mad., 401.

1900.

SEAGER v. HUKMA KESSA.

That being so, the pawnor received the goods as a bailee and not a servant: compare Pollock and Wright on Possession, p. 163. Section 27 of the Indian Penal Code is confined to the Indian Penal Code.

In India a bailee is "in possession"—Contract Act, sections 148, 149, and it would seem to be the better opinion that the same is the law in England notwithstanding Lord Ellenborough's dictum (delivered in argument) referred to in *Shankar* v. *Mohanlal*[1]: compare Dicey on Parties, 352, 358; Pollock and Wright on Possession, 58, 59, 166; *Queen* v. *Cooke*[2].

The case of *Johnson* v. *Credit Lyonnais*, also referred to in *Shanker* v. *Mohunlal*, turned upon the question whether the vendor had possession under the Factors Act, and is not applicable.

Possession as a bailee may be determined, and the possession rendered trespassory, by showing an original *animus furandi* on the part of the bailee or by the bailee having broken bulk. It is not contended that there was any original *animus furandi* on the part of the pawnor, and it is found as a fact that she pledged all the articles in suit at one and the same time, and if so there was no breaking of bulk—Pollock and Wright on Possession, p. 222.

JENKINS, C. J.:—I desire to thank the learned counsel, who have argued this case as *amici curiæ*, for the great assistance they have afforded us by their able and lucid arguments.

I am of opinion, notwithstanding Mr. Young's ingenious argument, that, to create a pledge under section 178 of the Indian Contract Act (IX of 1872), the pledgor must be in juridical possession of the goods, and that mere custody will not suffice.

This view is supported by the previous decisions on the Contract Act, to which we have been referred, and also by the words of the section, which mark a clear distinction between possession and custody.

On the facts stated I have no doubt that Mrs. Seager simply had charge of the articles of jewellery as custodian on behalf

(1) (1887) 11 Bom. at p. 707. (2) (1871) L. R. 1 C. C. R., 295.

1900.

SEAGER v. HUKMA KESSA.

of her husband; that she held the articles subject to her husband's directions and control; and that the circumstances under which they came into her charge exclude the inference that she intended to deal with the articles otherwise than in accordance with her husband's directions, or to act in breach of the confidence reposed in her. Therefore, I hold she had not in the beginning, nor did she subsequently acquire such possession as would validate the pledge by virtue of the provisions contained in section 178. But then it has been argued that even if Mrs. Seager had not the requisite possession, still by the plaintiffs' negligence a title by estoppel has been created in the defendants' favour. An estoppel of this character and with this result can only arise out of the negligent breach of a duty due from the one party to the other; but I cannot find, in the facts stated for our consideration, anything to justify us in attributing this to the present plaintiff.

For these reasons the question formulated in the case must be answered in the negative, and there will be a decree in the plaintiff's favour in the terms set forth in the 9th paragraph of the case.

CANDY J., concurred.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

MOTIBAI AND ANOTHER (PLAINTIFFS), *v.* MOTIBAI AND OTHERS (DEFENDANTS).*

1900.
June 21.

Parsi Marriage and Divorce Act (XV of 1865)—Alimony—Charge on husband's immoveable property—Widow—Distributive share.

By an order of the Parsi Matrimonial Court the deceased was directed to execute a proper instrument charging his immoveable property with the payment of Rs. 70 per mensem by way of permanent alimony to his wife during her life. The instrument was executed accordingly. On his death his widow was held entitled, in addition to the Rs. 70 per mensem charged on her deceased husband's immoveable property, to a distributive share in his estate.

In chambers.

This was an originating summons.

* Suit No. 17 of 1900.