APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

ABDUL ALLI ABDUL HUSEIN AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MIAKHAN ABDUL HUSEIN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1911. *February* 21.

Civil Procedure Code (Act XIV of 1882), sections 13, 44 (b)—Suit by a Mahomedan to recover a portion of a house—Prior suits with respect to other portions—Res judicata—*Gift—No estoppel by judgment in suit commenced after the gift—Privity in estate—Misjoinder of causes of action—Costs.*

A prior donee of property cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the gift.

A Mahomedan plaintiff having first claimed the property in suit as the heir of his father on the ground that his mother had no title to the property which she purported to dispose of by way of gift to the plaintiff's daughter, cannot in the same suit contend that his daughter had obtained a good title to the property from his mother and he was entitled to the property as the daughter's father.

Mercantile Investment and General Trust Company v. *River Plate Trust, Loan, and Agency Company*(1), *The Natal Land, &c., Company* v. *Good*(2) and *Naiz-Ullah Khan* v. *Nazir Begam*(3), followed.

SECOND appeal from the decision of W. Baker, District Judge of Surat, confirming the decree passed by J. E. Modi, First Class Subordinate Judge.

Suit to recover possession of a portion of a house.

The house in dispute originally belonged to one Abdul Husen Kamrudin, who, on the 15th April 1879, sold it to his wife Mariamboo but continued himself in possession. Abdul Husen died on the 19th October 1884 leaving him surviving his widow Mariamboo, two sons, Esuf Alli and Abdul Alli and one daughter,

* Second Appeal No. 864 of 1908.

(1) [1894] 1 Ch. 578 at p. 595. (2) (1868) L. R. 2 P. C. 121 at p. 132.

(3) (1892) 15 All. 108.

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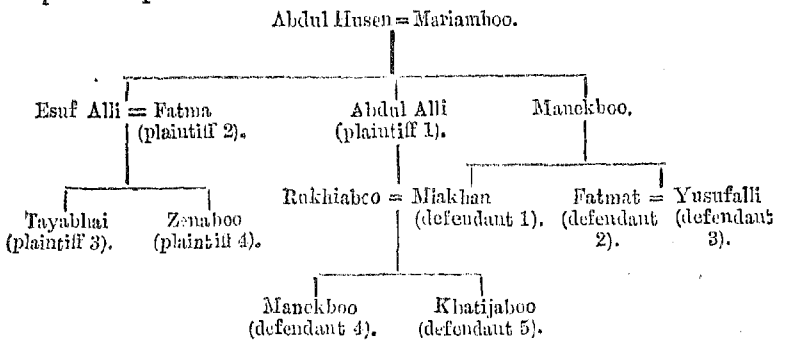
Manekboo. The following genealogical tree explains the relationship of the parties :—



On the 29th August 1898 Mariamboo sold the ground floor of the house to Miakhan, the son of her daughter Manekboo. But that portion being in Abdul Alli's possession, Miakhan brought a suit, No. 358 of 1900, against Abdul Alli to recover possession, but the Court dismissed the suit holding that the sale-deeds in favour of Mariamboo and Miakhan were sham transactions without consideration.

In the meanwhile on the 3rd June 1899 Mariamboo executed a deed of gift to her son's daughter Rukhiaboo of the front portion of the second story of the house.

Mariamboo herself brought a suit, No. 222 of 1900, against her son Abdul Alli to recover possession of the ground floor and part of the first story of the house which were in his possession, but that suit also failed, the Court having held that the sale-deed passed to her by her husband was a sham transaction. She also filed another suit, No. 223 of 1900, against her son Esuf Alli with respect to portions of the first and second stories but that suit also failed for the same reason.

In 1903 the plaintiffs, that is, Abdul Alli and the heirs of Esuf Alli brought the present suit against the heirs of Rukhiaboo, the donee under Mariamboo, to recover possession of the front portion of the second story of the house, the subject of the gift.

Defendants answered *inter alia* that the sale by Abdul Husen to Mariamboo was not fraudulent and void and that by her purchase she had become full owner of the house.

The Subordinate Judge found that the conveyance in favour of Mariamboo was a good and valid transaction, that Mariamboo had become full owner and the gift by her to Rukhiaboo was not invalid and that the decisions in suits Nos. 222 and 223 of 1900 were not binding on Rukhiaboo as the gift to her was prior in date and she was not a party to those suits. He, therefore, dismissed the suit observing :—

The reported dicta of high judicial authorities are to the same effect. In Hukumchand's Civil Procedure Code at page 160 it is said, "It is well understood though not usually stated in express terms in words upon the subject that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. . . . Dr. Bijelow says the ground of privity is property and not personal relation. To make a man a privy to an action he must have acquired an interest in the subject-matter of the action either by inheritance, succession or purchase, from a party, subsequently to the action. . . . Romer, J., held the same recently in Mercantile Insurance, etc., *vs.* River Plate Co. (1894 English Weekly Notes 9), observing that a purchaser could not be estopped being privy in estate by judgment in an action commenced after the purchase."

This rule has been followed in India too in the cases in Dooma *v.* Joonarain, 12 W. R. 362 ; and Bonomalee *v.* Koylash Chunder, 4 Cal. 692 ; and Krishnaji *v.* Sitaram, I. L. R. 5 Bom. 496 ; and Sita Ram *v.* Amir Begam, I. L. R. 8 All. 324; and Naiz-Ullah Khan *v.* Nazir Begam, 15 All. 108 ; and Chidden Singh *v.* Durga, 22 All. 382. In Sitaram *v.* Amir Begam, the Court said that section 13 of the Civil Procedure Code must be read as if after the words "under whom they or any of them claim" the words "by title arising subsequently to the commencement of the former suit" had been inserted. The case of Naiz-Ullah Khan *v.* Nazir Begam deserves notice, as there the assignee got his interest under a transfer during the pendency of the suit ; yet the judgment in that suit was held not to be binding on him.

On appeal by the plaintiffs the District Judge confirmed the decree.

The plaintiffs preferred a second appeal.

Modi with *N. K. Mehta* for the appellants (plaintiffs).

Ratanlal Ranchoddas for the respondents (defendants).

SCOTT, C. J. :—This suit relates to a portion of a house alleged to have been given away by one Mariam, the widow of Abdul Husen Kamrudin, to her grand-daughter Rukhiaboo, the daughter of Abdul Alli, the first plaintiff, and the wife of the first defendant Miakhan.

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The deed of gift in favour of Rukhiaboo was dated the 3rd of June 1899.

In the year 1900, Mariam found herself involved in three suits in all of which an issue was raised and decided against her as to whether she had any title to the house in question, which had originally belonged to her husband Abdul Husen Kamrudin. The decision against Mariam in those suits is now relied upon as evidence against Miakhan, the husband of Rukhiaboo, although not only were the causes of action in those suits concerned with a different portion of the house to that which was the subject of the gift in favour of Rukhiaboo, but the suits themselves were instituted a year subsequent to that deed of gift.

Without considering the question how far a judgment in a suit relating to one portion of a house can be *res judicata* against the owners of another portion of the house, we hold that the judgments in the suits of 1900 are not admissible in evidence against Rukhiaboo on the ground stated by Mr. Justice Romer in *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan, and Agency Company*(1): that "A prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase". To the same effect are the judgment of the Privy Council in *The Natal Land, &c., Company* v. *Good*(2), and the judgment of the Allahabad High Court in *Naiz-Ullah Khan* v. *Nazir Begam*(3).

Then it is contended by the appellants that at all events the lower Court in deciding the suit should have considered Abdul Alli's claim as one of the heirs of Rukhiaboo.

Now the claim that was first put forward in this suit was put forward jointly by Abdul Alli with the children of his brother Esuf Alli claiming as the heirs of Abdul Husen Kamrudin on the ground that their mother Mariamboo had no title to the property which she purported to dispose of by way of gift to Rukhiaboo. They therefore claimed under a title derived from

(1) [1894] 1 Ch. 578 at p. 595. (2) (1868) L. R. 2 P. C. 121 at p. 132.
(3) (1892) 15 All. 108.

Abdul Husen Kamrudin as his heirs and claimed in respect of his estate. That was a clear and definite cause of action.

Abdul Alli, the appellant, now complains that he was not allowed to put forward in the same suit a case placed upon an entirely different cause of action, namely, that he was the father of Rukhiaboo, deceased, who obtained a good title to the property in dispute from Mariamboo. That cause of action relates to the estate of Rukhiaboo and is put forward by Abdul Alli claiming by derivative title as one of her heirs, and we think, it is clear that the joinder of two such causes of action in respect of two different estates is prohibited by section 44 (*b*) of the Civil Procedure Code of 1882, which was in force at the date of the institution of this suit.

The appellant's Counsel suggests that it might possibly be held, if a subsequent suit were instituted by Abdul Alli claiming as the heir of Rukhiaboo, that the matter is *res judicata* as it might and ought to have been put forward as a ground of attack in this suit. It is difficult to see how it can be put forward as *res judicata* since *ex hypothesi* the subsequent suit would be between the same parties between whom the Court has decided in this judgment that the claim ought not to be and might not be put forward.

The only remaining question is the question of costs. The learned Subordinate Judge states correctly that the defendants filed written statements which are identical in their contentions. They are all members of the same family the only difference of interest being that some claim as heirs of Rukhiaboo and others claim as tenants. The Subordinate Judge, however, allowed the tenants one set of costs and the heirs another. When the matter went to the lower appellate Court the learned District Judge, although his judgment states that he confirmed the decree of the lower Court and dismissed the appeal with costs, appears to have allowed the decree to be drawn up awarding three separate sets of costs to the defendants.

As all the questions in the case are before us in this appeal we are competent to deal with the question of costs; and we are of opinion that the defendants are not entitled to more than one set

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of costs. We therefore vary the decrees of the lower Courts in the matter of costs by allowing only one set to the defendants in each Court. In other respects the decree is affirmed.

The costs of this appeal must be borne by the appellants.

Decree partially varied.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911. *February* 23.

EBRAHIM HAJI YAKUB (ORIGINAL DEFENDANT 5), APPELLANT, *v.* CHUNILAL LALCHAND KABRE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation Act (XV of 1877), section 19—Contract Act (IX of 1872), sections 208 and 209—Suit to recover money—Acknowledgment by defendant's Gumasta *(agent) after his death—Death of the defendant not known to plaintiff—Limitation.*

Plaintiffs' firm had dealings with one Haji Usman from the 5th January 1901 till the 25th October 1903. Haji Usman's business was managed by a *Gumasta* (agent). Haji Usman died in or about March 1903, and the plaintiffs had no knowledge of his death. On the 2nd June 1903 the *Gumasta* wrote to the plaintiffs a post-card stating, "you mention that there are moneys due; as to that I admit whatever may be found on proper accounts to be owing by me; you need not entertain any anxiety." On the 30th May 1906 the plaintiffs brought a suit against the managers of Haji Usman's estate to recover a certain sum of money on an account stated.

The defendants pleaded the bar of limitation on the ground that there was no acknowledgment of the debt by a competent person.

Held, that the suit was not time-barred. The *Gumasta's* letter of the 2n June 1903 was an acknowledgment within the meaning of section 19 of the Limitation Act (XV of 1877).

The case fell within the provisions of sections 208 and 209 of the Contract Act (IX of 1872). The termination of the *Gumasta's* authority, if it did terminate, did not take place before the 2nd June 1903 as the plaintiffs did not

* Second Appeal No. 374 of 1909.