1867. January 5. S. A. No 437 of 1866.

validity to documents which were the result of fraudulent collusion. The case first came on before the Chief Justice and Mr. Justice Collett, who directed an issue whether a consideration of any kind passed between the first and second defendants for either of the two mortgage bonds ; and afterwards, upon the finding of the Civil Judge that no consideration passed, the case came on again before Mr. Justice Innes and Mr. Justice Collett, who therefore dismissed the appeal and confirmed the decree of the Civil Judge.

In the present case we do not think it necessary to send any issue for trial by the Lower Appellate Court, as the Principal Sadr Amin has already found the deed set up by the fourth defendant to be wholly fictitious.

Appeal dismissed.

APPELLATE JURISDICTION (*a*)

Regular Appeal No. 76 *of* 1866.

RÁMASÁMI PADEIYÁTCHI and another...... *Appellants.*

VIRASÁMI PADEIYÁTCHI........................ *Respondent.*

The force of *res judicata* attaches not only to the bare condemnation or discharge of a defendant, but to all the objective grounds distinctly found by the Judge as the basis of his decision.

The proposition that everything acquired by a woman during coverture is the property of her husband has no foundation in Hindu Law.

1867. January 7. R. A. No. 76 of 1866.

THIS was a Regular Appeal from the decision of G. Ellis, Civil Judge of Cuddalore, in Original Suit No. 1 of 1866.

This suit was brought for ejectment and removal of an attachment, and for a declaration of right of patta to the land claimed.

The plaintiff declared that his father Lutchmana Padeiyátchi, Tándavaráya Padeiyátchi and Násika Padeiyátchi were undivided brothers. Plaintiff's father died about thirteen years before the institution of the suit, and his two uncles in 1855 and 1856 without issue. The 1st defendant before being married to Tándavaráya Padeiyátchi was the widow of one Árimuttu Padeiyátchi, whose son the 2nd defendant was.

(*a*) Present :—Holloway and Innes, J. J.

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The property, Nos. 1 and 2, in issue, was declared by the decrees in Original Suits Nos. 1340 and 1603 of 1857, on the file of the Cuddalore Munsif, to be plaintiff's ancestral property, yet was attached with Nos. 3, 4, 5 at the instance of 3rd defendant in satisfaction of the decree in No. 564 of 1863. Hence this action.

The 1st, 2nd and 4th defendants denied plaintiff's right to the property in issue and pleaded that the houses Nos. 1 and 2 were purchased in the 1st defendant's name on 13th September 1825, from the acquisition of her husband Arimuttu Padeiyátchi, and have been under her enjoyment. They further pleaded that the property Nos. 3, 4 and 5 was her self-acquisition, and that the pattas were registered in the 4th defendant's name ; further that the 1st defendant was not married to Tándavaráya Padeiyátchi, that plaintiff's father was not a member of an undivided family nor is plaintiff a legitimate son, that the property Nos. 1 and 2 has been mortgaged to the 3rd defendant, and that the suits referred to by plaintiff did not establish the rights of the respective parties.

The 3rd defendant pleaded that the property Nos. 1 and 2 had been mortgaged to him by the first and second defendants, and was answerable for his claim as established by Original Suit No. 564 of 1862.

The following issues were settled :—

1. Is the plaintiff the legitimate son of Lutchmana Padeiyátchi ?

2. Was the property in issue the salf-acquisition of Tándavaráya Padeiyátchi and was the 1st defendant his lawful wife ?

3. Has the property been and is it now in possession of plaintiff ?

4. Is the right of the defendants to the property Nos. 1 and 2 barred by the judgment in Suits Nos. 1603 and 1340 of 1857, on the file of the Cuddalore Munsif, and by the judgment in appeal from the above ?

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The judgment of the Civil Judge was as follows :—

It is quite evident that by the judgments in Suits Nos. 1340 and 1603 of 1857, and in the Appeal Suit No. 79 of 1860, the defendants are estopped from contesting the plaintiff's claim to the property Nos. 1 and 2. The plaintiff in Suit No. 1340 of 1857 sought to establish his right to this property on a bill of sale alleged to have been executed to him by the 1st and 2nd defendants—these defendants were the present 1st and 2nd defendants, and the 4th and 5th supplemental defendants were the present plaintiff and his mother. The points laid down for proof, as gathered from the record of that suit, were, as concerns the defendants 1st and 2nd and the plaintiff and his mother, that the two latter should prove their title to the house and that the other defendants had no right to it. The sale on which the plaintiff in that suit had based his claim was cancelled, the decree, confirmed in Appeal Suit No. 79 of 1860, declared that the 1st and 2nd defendants had no right to the property, and that the present plaintiff and his mother were the only rightful claimants, and that the present 1st defendant was the wife of Tándavaráya Padeiyátchi. Such being the case, the defendants now cannot contest the plaintiff's position or the fact of the marriage of the 1st defendant to Tándavaráya Padeiyátchi.

There has been no evidence brought forward which establishes the plea that plaintiff's father and his two uncles were divided, and there has been nothing proved tending to show that the plaintiff was other than the legitimate son of Lutchmana Padeiyátchi.

I have now to pronounce on the right of the plaintiff to the property Nos. 3, 4 and 5. The right is contested by the defendants on the ground that it was the 1st defendant's self-acquisition by funds derived from her husband Arimuttu Padeiyátchi and the question has again been raised as to her being the wife of Tándavaráya Padeiyátchi. On this latter point I decline to enter, being of opinion that the fact of 1st defendant being Tándavaráya Padeiyátchi's wife was determined by the decisions in the suits above mentioned—such being the case, I must look for evidence of

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the property in issue being the self-acquisition of 1st defendant prior to her becoming the wife of Tándavaráya Padeiyátchi, and of this I can find none on the record. Tándaváraya Padeiyátchi according to the plaintiff's statement died in 1851, and this is not controverted by the defendants; there is no evidence to show that the land was purchased by the 1st defendant, and the manner of acquisition was, according to the statement of 5th witness, by gift from him in 1846. Now if this witness' statement is to be relied on, the gift must have been made in the life-time of Tándavaráya Padeiyátchi, and, as such, must be considered as his property. The same witness further states that he gave ½ cawni of land to the father of the plaintiff.

The evidence of the 6th and 7th witnesses for the plaintiff explains how it came about that the 1st defendant retained possession of the land, obtaining transfer of the patta which stood in Tándavaráya Padeiyátchi's name to her own, and getting it transferred to that of the 4th defendant. If then the property Nos. 1, 2 and 3 was a gift to 1st defendant in her 2nd husband's life-time, and this I find it to have been, then it became her husband's, and as such family property, and she had no more right to dispose of it than of the property Nos. 1 and 2.

It does not seem that the plaintiff has had any enjoyment of this property, and this may be accounted for by his alleged minority at the time of Tándavaráya Padeiyátchi's death. The mortgage to the 3rd defendant is therefore pronounced to be invalid, and I find in plaintiff's favor all the issues save the 3rd, and in awarding to him the property claimed direct that all costs of this suit be borne by the defendants.

The defendants appealed.

Karnakara Menavan, for the appellants, the 2nd and 4th defendants.

Subbarayulu Chetti, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—The suit was brought on the direction of a Court, which had attached the property on account of a

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debt due by 1st and 2nd defendants to 3rd defendant. The present plaintiffs resisted that attachment, and now claim to be entitled to the property on the ground that 2nd defendant is the sole surviving member of the family to which the property originally belonged.

The suit has been conducted by all parties on the assumption that, if the property in dispute was that of the undivided family, the contention of plaintiffs is well founded : but the defendants resist that demand on the ground that the property was really that of 1st defendant, acquired from her former husband, and it is part of the defendants' case that Nagammai never was married to Tándavaráya.

There seems no reason for differing from the conclusion of the Judge that the evidence for the defendants has failed to make out the separate acquisition of the defendant Nagammai; but the question really to be determined in this appeal is, whether the view of the Civil Judge, that the material questions in the suit have really received a valid decision and have become *res judicatæ* against the defendants, is correct. It is much to be regretted that the Civil Judge has not set out distinctly the position of the parties and the object matters of the several suits, as this would have greatly facilitated the disposal of the case. It seems clear, however, from the joint answers of the defendants, that Mannada Padeiyátchi(a) claims under one of the parties in the previous suits, and that, so far as the parties are concerned, there is no objection to the binding force of the former decrees, and this confines the present question to the point, whether the same question of law was at issue in both.

Suit 1340 of 1857 was brought by a purchaser, alleging a valid sale of Nos. 1 and 2 from the present 1st and 2nd defendants. These defendants resisted the plaintiff on the ground of fraud, in that, the intention being to mortgage, the plaintiff had improperly drawn out and got executed by the defendants a deed of sale. The validity of the transaction was, against these defendants, established by the decree : and if nothing more had happened, the result would have been the passing of all property

(a) The 4th Defendant.

in Nos. 1 and 2 by virtue of that transaction to the plaintiff. In consequence however, of the resistance of the supplemental defendants, the present plaintiffs, the delivery of the property was declared impossible, and the purchase money which had been lodged in Court was returned to the plaintiff. As grounds of the decision, which was confirmed on appeal, the Court found that Tándavaráya was actually married to 1st defendant, and that this property vested in Tándavaráya because acquired by her during coverture. Now, we take it to be perfectly clear that the force of *res judicata* attaches not only to the bare condemnation or discharge of a defendant, but to all the objective grounds distinctly found by the Judge as the basis of his decision. Save, therefore, for the difficulty arising out of some dicta, certainly in their generality not sustainable, of the late Sadr Court, that relief could not be accorded as between defendants, which would perhaps have prevented the defendants from appealing. We think that there could exist no doubt that the title of the present plaintiffs, and the marriage of defendant, and the vesting in Tándaváráya, as objective grounds of that decision are *res judicatæ*; and this would determine the title to Nos. 1 and 2 in favor of the plaintiff.

In Suit 1603 of 1857 one Appasámi, to whose suit the present 2nd defendant was an admitting, and the 1st an ex-parte defendant, sued for a division on the ground that the property was the joint property of his father and the present 2nd defendant's father, the former husband of the present 1st defendant. Now it is quite clear that the suit was, as the conduct of the 1st and 2nd defendants showed, and as the 3rd defendant the purchaser then alleged, a suit brought in the interest of the 1st and 2nd defendants as well as of the plaintiffs. It was dismissed on the grounds of decision, in it expressly re-affirmed, taken in the Suit 1340 of 1857. This then was a case in which the plaintiff must have recovered, if the property was the property of the deceased husband of 1st defendant. The suit was rejected because the Court again decided that the property was that of the resisting supplemental defendants, the present plaintiffs. Looking at the mode in which this suit

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was framed and conducted, it would be trifling with the subject to affect to doubt that the question was really raised on behalf of the present defendants, as well as of the plaintiff; and we must take it that all the objective grounds of the former decision were established by that suit against them as well as against the plaintiff.

To decide otherwise would be to violate the well established rule, that a decree binds not only the actual parties but those on whose behalf it is manifestly brought. So far, therefore, as 1 and 2 are concerned, we consider the decree of the Lower Court clearly right.

As to Nos. 3, 4 and 5, the judgment would also bind as to the fact of the Marriage with Tándavaráya, but would still leave it incumbent upon the plaintiffs to prove that the parcels of land, which seem to have been long in the possession of 1st defendant, were really the property of Tándavaráya, and that the plaintiffs are now entitled to them. Except an incidental expression of one of the witnesses for plaintiff, that the patta of the lands was fraudulently transferred to plaintiff's name in 1865 only (Fasli 1275), a fact at variance both with the probabilities of the case and with the finding of the Civil Judge, who holds the acquisition to have been made during coverture, there is absolutely no evidence of the mode of acquisition, except that of one of defendants' witnesses, which is certainly not favorable to plaintiff's case.

There is the bare fact of acquisition : and, taking 1st defendant's allegations in connection with those of plaintiff, and the conduct of the suit, of an acquisition during the life-time of Tándavaráya.

The correctness of the Civil Judge's decision, therefore, depends upon the affirmance of the broad proposition—that everything acquired by a woman during coverture is the property of her husband.

We regard that proposition as unfounded in Hindu law: and the contrary of it to be unquestionably true. It seems pretty clear that the passage of Mr. Justice Strange's Manual (Sec. 146), quoted by the Munsif as the ground of his original decision, cannot, without very numerous qualifica-

tions, be regarded as the law laid down by the Smruti Chandrika. It is rather the law propounded by an objector, from whom the author dissents. Of course the point of law determined by the Munsif is not *res judicata*. No merely subjective ground of decision ever is so. It lay, in our judgment, clearly upon the plaintiffs to show the circumstances which prevented these parcels Nos. 3, 4, 5, from being in fact, as they are in appearance, the property of the 1st defendant. The mere fact of the acquisition during coverture is not enough. As to Nos. 3, 4, 5. we therefore reverse the decree of the Civil Judge. There will be no costs of this appeal.

Decree modified.

APPELLATE JURISDICTION (a)

Regular Appeal No. 80 *of* 1866.

CHITHRAYIL *alias* KUNATH AHMED KOYA......*Appellant,*

and

IRUMANOM VITTIL KANHAMATH HAJI and others.. } *Respondents.*

Though the distribution of costs is, under the Civil Procedure Code, a matter within the discretion of the Court, yet there may be circumstances which will justify an appeal upon a mere question of costs.

1867. January 21. R. A. No 80 of 1866.

THIS was a regular appeal from the decree of G. R. Sharpe, the Acting Civil Judge of Calicut, in Original Suit No. 9 of 1866.

The Advocate General for the appellant, the defendant.

Miller for the first respondent, the first plaintiff.

The facts sufficiently appear in the following.

JUDGMENT :—This was a suit by a mortgagor against the mortgagee for redemption and there has been a decree for redemption. In the course of the suit there were various questions raised. The preliminary questions as to the form of the suit and the valuation of the subject-matter were given up by the plaintiffs, who amended their plaint so as to meet the objections taken by the defendant. The

(a) Present :— Collett and Ellis, J. J.