

was to be calculated from the date of the loan. The facts in *Motoji Batnaji v. Shekh Husen* (1) and *Pava Nagaji v. Govind Ramji* (2) are not very clear in the report. It may be that the heavy and unconscionable increase of debt which the stipulated rate of interest would cause, induced the Court to regard it as a penalty. At any rate I do not think these decisions preclude us from considering the question of equity by the light of the more recent cases.

The case of *Seton v. Slade* (3) is at variance with the view I am disposed to take. But the language used in that judgment is general: and, on the other hand, the language used by their Lordships of the Judicial Committee of the Privy Council in *Balkishen Das v. Run Bahadur Singh* (4), although the case before them related to a decree and not a contract, is also somewhat general, and we may, therefore, be guided by it to a certain extent. Their Lordships treat a stipulation increasing the interest from 6 to 12 per cent. as not a penalty, nor an unreasonable substitution under the circumstances. I am, therefore, of opinion that in the present case the Courts below were wrong in treating the higher rate of interest as a penalty.

Decree varied.

14 B. 206.

[206] APPELLATE CIVIL.

Before Mr. Justice Scott and Mr. Justice Jardine.

DINKAR BALLAL CHAKRADEV (*Original Plaintiff*), Appellant v.
HARI SHRIDHAR APTE (*Original Defendant*), Respondent.*

[20th August, 1889.]

Res judicata—Sale of two plots of land by one sale-deed—Validity of deed questioned in dispute as to one of the plots—Order in execution proceedings that deed was valid—Subsequent dispute as to second plot included in deed—Question of validity of deed again raised—Orders in execution proceedings, how far final—Civil Procedure Code (*Act XIV of 1882*). s. 13 and 283.

The plaintiff purchased two distinct plots of land (A and B) from one Gopal by a deed of sale dated 30th December, 1875. In 1884, in execution of a decree against Gopal, plot A was attached and sold as his property, and purchased by the defendant. The plaintiff did not intervene, and at that time took no steps to establish his alleged right to this land. In 1885 the defendant obtained another decree against Gopal, and in execution attached plot B. The plaintiff intervened, and claimed the property attached as his own under the sale-deed of 30th December, 1875. The defendant disputed the sale, but the Court found in favour of the validity of sale-deed, and allowed the plaintiff's claim. The defendant did not file a suit to set aside this order. The plaintiff then filed a suit to establish his title to plot A, relying on his sale-deed of the 30th December, 1875. The defendant again disputed the sale, pleading that it was a colourable and fictitious transaction.

Held, that the order in the execution proceedings did not operate as *res judicata*, and did not stop the defendant from contesting the validity of the sale-deed in the present suit.

Per JARDINE, J.—If the decision as to the validity of the deed had been a final decision in a suit as distinguished from an execution proceeding, it would have created an estoppel by *res judicata*. Between the parties the orders to which s. 283 of the Civil Procedure Code refers, are subject to the result of a suit, if

* Second Appeal No. 715 of 1887.

(1) 6 B.H.C.R. A.C.J. 8.

(2) 10 B.H.C.R. 382.

(3) 7 Ves. Jun. 265.

(4) 10 C. 305; 10 I. A. 162.

1889
JULY 8.
—
APPEL-
LATE
CIVIL.
14 B. 206.

1889
AUG. 20.
—
APPEL-
LATE
CIVIL.
—
14 B. 206.

any, conclusive; but this conclusiveness exists only as regards the particular property in dispute.

[R., 25 B. 202 (207); 9 C.L.J. 597=12 C.W.N. 739=4 Ind. Cas. 81=6 M.L.T. 363; 11 O.C. 220.]

SECOND appeal from the decree of H. Batty, Acting District Judge of Thana, in appeal No. 7 of 1887 of the District File.

The property in dispute consisted of land (plot A) bearing two survey numbers, 8 and 9, situate in the village of Sadore. The plaintiff alleged that by a sale-deed dated 30th December, 1875, he had purchased it together with other land (plot B) from one Gopal Bapuji, to whom it originally belonged. In 1884 [207] however, the defendant, having obtained a decree against Gopal attached plot A as belonging to him, sold it in execution, and bought it himself.

In 1885 the defendant, having obtained another decree against Gopal, attached plot B as belonging to him. Thereupon the plaintiff intervened, and made an application, (No. 48 of 1885), for removal of the attachment, alleging that he had purchased the land from Gopal under the above-mentioned sale-deed. The defendant contested the sale, but the Court found that it was a real and valid transaction, and allowed the plaintiff's claim to plot B. The defendant did not bring a suit to set aside this order.

Shortly after this proceeding the plaintiff filed the present suit to establish his title to, and recover possession of the land bearing the survey Nos. 8 and 9 (plot A), alleging that he had purchased it along with the other piece of land (plot B) from Gopal under the sale-deed of the 30th December, 1875.

The defendant pleaded that the sale was a colourable and fraudulent transaction intended to defeat Gopal's creditors, and that the plaintiff had no title to the property in dispute.

The Subordinate Judge found that the sale was a sham, and rejected the plaintiff's claim.

This decision was confirmed on appeal by the District Judge. As to the relevancy and effect of the decision in the execution proceeding (No. 48 of 1885), the District Judge made the following remarks:—

"On the second issue the appellant complains of the rejection of application No. 48 of 1885, which he admits referred to *other land* than that in suit, and which was made after the sale to defendant. It is said that in that application plaintiff's sale was held proved. But defendant may not have thought it worth while to litigate further as to the other land, and is not bound by his neglect as to other land. I think the Subordinate Judge was not bound to accept that decision as relevant in this case."

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

[208] *Branson* (with him *Goverdhanram M. Tripti*); for appellant:—The sale-deed on which we rely was held proved in the former execution proceeding (No. 48 of 1885). The decision in that proceeding operates as *res judicata*. The defendant is, therefore, estopped from contesting the sale in the present suit. He did not bring a regular suit to set aside the decision in the summary proceeding. That decision is, therefore, final and conclusive under s. 233 of the Code of Civil Procedure (XIV of 1882). No doubt the execution proceeding related to other land than that in suit, but that is immaterial. The *bona fides* or otherwise of the sale-deed in question was a matter directly and substantially in issue in that proceeding.

That matter was heard and decided by the Court. Its decision, not being reversed, is final and conclusive—*Pahlwan Singh v. Risal Singh* (1); *Rama Rao v. Suriya Rao* (2); *Ananta Balacharya v. Damodhar Makund* (3); *Srimati Kamini Debi v. Asutosh Mookerjee* (4).

Manekshah Jehangirshah, for respondent:—The cases cited do not apply. The decision in application No. 48 of 1885 was one in a summary proceeding, and it is conclusive only as regards the property which was the subject-matter of that proceeding. Section 283 of the Code of Civil Procedure (XIV of 1882) is clear on the point. The order under ss. 280, 281, or 282 refers only to the property attached. It does not affect any other property. To give to such an order the binding effect of a decision in a regular suit, would be to extend the principle of *res judicata* too far.

1889
AUG. 20.
—
APPEL-
LATE
CIVIL.
—
14 B. 208.

JUDGMENT.

SCOTT, J.—In this case the plaintiff claimed certain land under a deed of sale of 30th December, 1875, and both the lower Courts held the deed colourable, and rejected the claim. A point of law was raised in second appeal as follows. In an execution proceeding in another suit (application No. 48 of 1885) a piece of land was attached by the present defendant, and the present plaintiff intervened as claimant of the land under the deed of sale relied upon to prove title to the land now in dispute. [209] The plaintiff claimed that piece of land by virtue of the deed of sale now relied upon. His claim was allowed, and no suit was brought within a year to dispute his right. The order, therefore, in favour of his right to the piece of land then in litigation was conclusive—Civil Procedure Code, s. 283. It was argued that as the validity of the deed of sale was thus put in question in a previous proceeding between the same parties, it cannot be questioned now (s. 13, Civil Procedure Code). But I do not think the case comes under s. 13. "The matter directly and substantially in issue" now is the right to one piece of land. "The matter directly and substantially in issue" in the previous proceeding was the right to another and totally distinct piece of land. No doubt the evidence used by the plaintiff in both cases in the same, *viz.*, the deed of sale. But the title to the entire property was not in question. The land formerly in dispute may have been so small as not to justify further litigation. The land now in dispute is considerable in extent and value. The question of title to the one may not have been worth the fighting. Does acquiescence in the decision regarding the one preclude any question as regards the other? Both the spirit and the letter of the section or against such an estoppel. The title to the entire property was not in question. Still less the title to the property now in dispute. Thus the matter now in dispute was not in question in the former proceeding. As it was not then in controversy, the defendant is not estopped from raising the question now. (See Expl. 1 to s. 13.) Moreover, the previous proceeding was not an independent suit, but a proceeding in execution; and although a decision in such a proceeding is binding in subsequent proceedings in the same suit, it is a matter of doubt whether they affect claims in independent suits. It is not, however, necessary to examine that question, as I hold there was not the same subject-matter in dispute in the present and the previous proceeding in the sense required by s. 13.

1889

AUG. 20.

APPEL-

LATE

CIVIL.

14 B. 206.

I think the decree should be confirmed with costs:

JARDINE, J. —I concur. I will deal *seriatim* with the objections taken by Mr. Branson, as counsel for the plaintiff-appellant, to the findings of the lower Court of appeal.

[210] It is admitted by the District Judge that the *onus* of proving want of consideration lay on defendant. I am of opinion that the District Judge was right in holding, on the strength of *Moti Kahanji v. Dipchand Virchand* (1) and *Makund v. Bahori Lal* (2), that the irregularity in procedure in the original Court did not prejudice plaintiff on the merits. So this objection fails.

The remaining objections depend on the rule of *res judicata*. It is contended that the lower Courts erred in rejecting as evidence the record of application No. 48 of 1885, in which execution proceeding the Subordinate Judge determined between the present parties that the deed of sale whereon plaintiff relies now, was not proved to be without consideration. The subject-matter then in litigation was a different piece of land which the present deed of sale purported to convey to plaintiff along with the piece of land now in litigation. I am of opinion that the validity of that deed was a matter directly and substantially in issue between the present parties in the execution proceeding 48 of 1885, and that the question was heard and decided by the Subordinate Judge in that proceeding. His decision has not been reversed. If that decision had been a final decision in a suit as distinguished from this execution proceeding, it would, in my opinion, have created estoppel by *res judicata*, according to the following authorities cited by Mr. Branson—the fact that the present suit relates to a different piece of land not being a circumstance taking the decision out of that rule—*Pahlwan Singh v. Risal Singh* (3), *Rama Rao v. Suriya Rao* (4), *Ananta Balasharya v. Damodhar Makund* (5) being directly in point, and *Srimati Kamini Debi v. Ashutosh Mookerjee* (6) showing the principle. To these I would add the Privy Council decision in *Pittapur Raja v. Buchi Sitayya* (7), where the subject is discussed fully.

Mr. Manekshah for the respondent-defendant meets the objection of *res judicata* with the argument that this rule does not [211] apply, inasmuch as the decision in application 48 of 1885 was a mere order in a summary proceeding to which s. 283 of the Code of Civil Procedure applies. That section is as follows:—

“The party against whom an order under ss. 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.” Mr. Manekshah admits that the order passed in the execution proceeding is conclusive, but conclusive only as to the property then in litigation.

The effect of orders in execution on later proceedings between the same parties has been considered by the different Courts, and the cases are collected in Mr. O’Kinealey’s Code of Civil Procedure under s. 13, in Broughton’s Notes, p. 153, and in Field’s Evidence Act under s. 40, p. 295. Those that have been cited by Mr. Branson relate to the effect of the decision in execution proceedings as *res judicata* in later litigation about the same decree, and, therefore, about the

(1) 5 B.H.C.R. A.C.J. 81. (2) 3 A. 824. (3) 4 A. 55. (4) 1 M. 84.
(5) 13 B. 25. (6) 15 I. A. 159. (7) 12 I. A. 16=8 M. 219.

property dealt with in the decree, viz., *Mungul Pershad Dichit v. Grija Kant Lahiri* (1), *Manjunath Badrabhat v. Venkatesh Govind Shanbhog* (2), *Bandey Karim v. Romesh Chunder Bundopadhya* (3). In the last quoted case, Field, J., observes: "We do not, on the present occasion, propose to go into this broad, general, and probably difficult question, whether the principle of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure applies in all its generality to proceedings after decree."

In this state of the authorities, it is desirable to consider the purpose and object of the jurisdiction of the Courts in matters of execution of decrees as well as the object of the rule of *res judicata*, for which there are two grounds—the one public policy, that there should be an end of litigation, and the other, that the suitor should not be vexed twice, for the same cause—*per* Lord Blackburn in *Lockyer v. Ferryman* (4). It is a condition, however, of the previous judgment that it has been passed by a competent Court, and their Lordships of the Privy Council in [212] *Abedoonissa Khatoon v. Ameeroonissa Khatoon* (5) apply the test whether it was passed in a competent proceeding. That seems to me to be the question in this case; and the decision of their Lordships, although not cited to us, seems to me more analogous to the question than any I have been able to find. Following their reasoning, I would notice that the powers of the Court in execution are, under s. 244, concerned with questions relating to the execution, discharge or satisfaction of the decree: that to application No. 48 of 1885 no provision for appeal existed; that the only property about which the order is passed, is the property attached in execution. Thus the determination of the validity of the deed was only important with regard to that property; and any inference to be drawn from the finding as to the ownership of other property not then in suit and perhaps not in dispute was merely incidental. See *Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer* (6). I do not think the provisions about claims to attached property were intended to apply to dealing with the titles to other lands not in suit. If the effect of *res judicata* were to be given to the orders incidentally affecting such titles, the confusion so arising might do more harm than good, and defeat both the reasons for the rule. Between the parties the orders to which s. 283 refers, are, subject to the result of a suit, if any, conclusive. But this conclusiveness exists only as regards the particular property in dispute, as appears from s. 283 and the language used in the Limitation Act XV of 1877, sch. II, art. 11. The limitation for suits to set aside such orders is only one year. It cannot have been the intention of the Legislature, which excludes all other property from the operation of this article, to prevent the title to it being litigated at all in future, merely because the title to it has been incidentally or rather inferentially dealt with, because it happened to be included in a document which was the foundation to the title of the property in dispute. For, as s. 283 does not allow the remedy by suit to be brought within one year except as regards the property in dispute in the execution of decree, the rule of *res judicata*, if applied to the other property, [213] would prevent any suit being brought about it at all. But it would be absurd to allow by express words fresh litigation about the property formally adjudicated in the execution matter, and by a jural rule to prohibit any direct trial of the right to the other property about which there has been

1889
AUG. 20.
—
APPEL-
LATE
CIVIL.
—
14 B. 206.

(1) 8 I. A. 123—8 C. 51.

(2) 6 B. 54.

(3) 9 C. 65 (67).

(4) L. R. 2 Ap. Ca. 530.

(5) 4 I. A. 66.

(6) 12 I. A. 23 (38) = 11 C 30.

1889
 AUG. 20.
 —
 APPEL-
 DATE
 CIVIL.
 —
 14 B. 206.

no formal litigation, perhaps no dispute. This consideration is still more important, as in many cases, before formal suit is brought and the other property valued, it is impossible to know whether the Court executing the decree is competent to adjudicate on the other property. For, as determined by the Judicial Committee of the Privy Council in interpreting the meaning of "competent Court" for the purposes of *res judicata* under s. 13 of the Civil Procedure Code, it is essential to take notice of the pecuniary limit of jurisdiction, there being in India a great number of Courts, of various grades with different pecuniary limits of jurisdiction—*Misir Raghobardial v. Rajah Sheo Baksh Singh* (1) *Rajah Eun Bahadoor Singh v. Mussumut Lachoo Koer* (2).

For these reasons, I am of opinion that the proceedings in the execution case were not relevant as evidence of an estoppel by *res judicata*, and that the decree ought to be confirmed with costs.

Decree confirmed.

14 B. 213.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

THE SECRETARY OF STATE FOR INDIA (*Original Defendant*),
Appellant v. MATHURABHAI AND OTHERS (Original Plaintiffs),
*Respondents.** [20th August, 1889.]

Construction—Act when applicable to Crown—Limitation Act XV of 1877, s. 26—Easement—Profit a prendre—Right to pasturage claimed by a village against Government—Prescription—Limitation—Custom.

The rule of construction according to which the Crown is not affected by a Statute, unless specially named in it, applies to India.

[214] *Semble*—The provisions of s. 26 of the Limitation Act XV of 1877 do not apply to the Crown. The mere mention of the Crown in an Act has not the effect of making all its provisions applicable to the Crown, and s. 26 does not relate to the limitation of suits, but to an entirely different matter, *viz.*, the creation of rights by the enjoyment of them, which is a branch of the substantive law. The section is clearly in prejudice of the Crown's rights, and the other provisions of the Act do not afford sufficient evidence of an intention that this section should apply to the Crown.

The rule of English law, that a claim to a *profit a prendre* cannot be acquired by the inhabitants of a village either by custom or prescription, does not apply to a right of pasturage claimed by a village in the Presidency of Bombay as against the Government. The right of free pasturage has always been recognized as a right belonging to certain villages, and must have been acquired by custom or prescription.

The plaintiffs, who were the inhabitants of the village of Dani Limbda, sued for themselves and the other inhabitants to establish their right to graze their cattle on the banks and the dry part of the village tank Chandola and for a perpetual injunction restraining the defendant from interfering with such right. The defendant contended (*inter alia*) that the tank was *kharabo* or waste land, that it had never been set apart under the Land Revenue Code, s. 38, for grazing purposes, and that the plaintiffs could not acquire, as against the Government, a right of grazing by prescription. The Court of first instance held the defendant not excluded from the operation of s. 26 of the Limitation Act XV of 1877, but

* Second Appeal No. 696 of 1887.

(1) 9 I. A. 197.

(2) 12 I. A. 23.