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On these grounds it appears to me that the trial Court's decision is right, and that the plaintiff under the arrangement made is entitled to the property which she claims. I would, therefore, reverse the decree under appeal and restore that of the Subordinate Judge of trial with costs throughout.

SHAH, J. :—I agree.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

KASHINATH KRISHNA JOSHI (ORIGINAL DEFENDANT), APPELLANT. *v.* DHONDSHET BHAVANSHET SHETYE (ORIGINAL PLAINTIFF) RESPONDENT.*

1916. *August* 14.

Res judicata—*Civil Procedure Code (Act V. of 1908), section 11—Sale of Khoti lands on the basis that they are alienable—Subsequent suit between the parties on the allegation that the lands were inalienable—Khoti Settlement Act (Bombay Act I of 1880), section 9.*†

Certain Khoti lands were sold in execution proceedings between the parties on the footing that they were alienable, and purchased by the defendant.

* Second Appeal No. 1118 of 1915.

†9. The rights of Khots, Dharekaris and quasi-dharekaris shall be heritable and transferable.

Occupancy-tenants' rights shall be heritable, but shall not be otherwise transferable without the consent of the Khot, unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy, independently of the consent of the Khots, at some time within the period of thirty years next previous to the commencement of the revenue year 1865-66, or, unless, in the case of an occupancy-right conferred by the Khot under section 11, the Khot grants such right of transfer of the same :

Provided that an occupancy-tenant may without the consent of the Khot grant a lease for a term not exceeding one year.

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The plaintiff then filed a suit to recover possession of the lands on the allegation that the lands being occupancy lands their sale was invalid under section 9 of the Khoti Settlement Act, 1880 :—

Held, that the plaintiff's allegation was barred by *res judicata*, inasmuch as the sale in execution decided inferentially as between the plaintiff and the defendant that the lands sold were not occupancy lands.

SECOND appeal from the decision of M. B. Tyabji, District Judge of Ratnagiri, confirming the decree passed by R. Baindur, Second Class Subordinate Judge at Chiplun.

Suit to recover possession of lands.

The defendant, a Khot, obtained a decree against the plaintiff, in execution of which he had certain Khoti lands sold at a Court sale and purchased them himself. Later, the defendant was put into possession of the lands.

The plaintiff next sued to recover possession of the lands on the allegation that the lands being occupancy lands, the sale thereof was void under section 9 of the Khoti Settlement Act (Bom. Act I of 1880).

Both lower Courts held that the lands were Khoti Kulargi (occupancy tenure) and that their sale was illegal and void. The plaintiff's suit was, therefore, decreed.

The defendant appealed to the High Court.

V. B. Virkar, for the appellant :—The question whether the property is not saleable is concluded as *res judicata*: *Umed* v. *Jas Ram*;[1] *Chhaganlal* v. *Bai Harkha*.[2]

P. B. Shingne, for the respondent :—There was no obligation to take the objection that the property could not be sold in the execution proceedings. None of the provisions of Order XXI of the Civil Procedure

(1) (1907) 29 All. 612.

(2) (1909) 33 Bom. 479.

Code can apply to the present case : see *Raghunath Mukund* v. *Sarosh K. R. Kama*;[1] *Sundar Singh* v. *Ghasi*;[2] *Krishnabhupati Devu* v. *Vikrama Devu*[3]; *Balvant Santaram* v. *Babaji*;[4] *Venkapa* v. *Chenbasapa*;[5] *Anantharazu* v. *Narayanarazu*.[6] The sale is void and no bar of *res judicata* can apply to defeat a statutory provision : *Dattatraya Ramchandra* v. *Nilu Bachaji*;[7] *Shridhar Balkrishna* v. *Babaji Mula*.[8]

BEAMAN, J. :—We have had a very full and interesting argument upon the two points raised in this appeal, viz., whether the plaintiff's contention, which succeeded in the Courts below, is not *res judicata* against him, and whether his prayer to have the sale of 1912 set aside is not time-barred.

We are of opinion that this is not a case of an alleged *res judicata* against a Statute, and we are therefore not called upon to examine certain cases which have been cited to us and which on a first view may appear to be in conflict. What we think clearly was *res judicata* here was the question of fact raised again by the plaintiff in this suit and decided in his favour, viz., whether or not the lands sold at the Court sale of 1912 were occupancy lands within the prohibition of section 9 of the Khoti Settlement Act. That was a point which the plaintiff, if he meant to rely upon it at all, was bound to take, we think, at the time the Court proposed to sell the land in suit. It is not as though it was then admitted that the lands to be sold were occupancy lands. Had that been so, no Court could have been found to sell them in the face of the direct prohibition of the Legislature. When, therefore, we find the Court selling these lands without any

(1) (1898) 23 Bom. 266.
(2) (1896) 18 All. 410.
(3) (1894) 18 Mad. 13 at p 17.
(4) (1884) 8 Bom. 602.
(5) (1879) 4 Bom. 21.
(6) (1911) 36 Mad. 383.
(7) (1898) P. J. 378.
(8) (1914) 38 Bom. 709

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challenge by, or protest on behalf of, the judgment-debtor, we take it that they must have been sold on the basis of the judgment-debtor having a saleable interest in them. *Omnia præsumuntur rite esse acta.* Inferentially, then, the sale of 1912 decided as between the plaintiff and the defendant, that is to say, the judgment-debtor and judgment-creditor, that the lands sold were not occupancy lands. Here the plaintiff has brought the suit to have it established that they were, and he was allowed to raise that question of fact and the whole case has turned upon the answer to it. It is precisely that part of the plaintiff's present suit which, in our opinion, was *res judicata* within the language and spirit of section 11 of the Civil Procedure Code.

Much has been said here upon the applicability of certain rules in Order XXI to the case of a judgment-debtor. Mr. Shingne argued that part of the respondent's case with very great thoroughness and ability, and for my part I am very clearly of opinion that none of those rules were ever intended to apply to the judgment-debtor himself.

It is not upon that ground that we think the plea of *res judicata* is here established so much as upon general principle and having regard to what is in controversy, what was and is to be inquired into and what has in fact been finally determined in this case by the executing Court between the executing creditor and judgment-debtor. The present suit is really a continuation of that execution proceeding or at any rate has been treated as such in both the lower Courts. The parties are, therefore, the same and what has resulted is that a question of fact, which, as we have shown, was decided, if not explicitly yet by necessary implication, between them in 1910, has been allowed to be re-opened and investigated and adjudicated upon, a second time.

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That being so, we have little hesitation in coming to the conclusion that the appellant's contention upon this point is sound and must prevail. It becomes, therefore, unnecessary to go into the second equally interesting point of limitation upon which the appellant has relied.

We think that the appeal must be allowed and the plaintiff's suit dismissed with all costs on him throughout.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Ag. *Chief Justice and Mr. Justice Shah.*

RAMCHANDRA DHONDO KULKARNI (ORIGINAL PLAINTIFF), APPELLANT *v.* MALKAPA BIN NARSAPA DEVARE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1916.

August 18.

Civil Procedure Code (Act V of 1908), section 11—Prior suit to set aside alienation made by minor's mother—Mortgage created by alienee before suit —Mortgagee not made party to the suit—Partial representation by mortgagor —Subsequent suit by mortgagee to support alienation—Privity between parties—Subsequent suit not barred by res judicata*—Meaning of words "claiming under."*

The property in suit originally belonged to one Devare. In 1883, during the minority of Devare, his mother sold it to the Bhojes from whom one Bavachi received it in exchange for another parcel of land. In 1891, by a simple mortgage Bavachi mortgaged the property to the plaintiff. In 1898 a suit was brought by Devare against his mother, Bavachi, and the Bhojes in order to set aside the sale by his mother to the Bhojes. That suit was successful and the result was that the sale to Bhojes was set aside. In 1901, the plaintiff obtained a decree on his mortgage against Bavachi. The property was put to sale and was purchased by the plaintiff with permission. But

* Second Appeal No. 472 of 1914.