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A CRITICAL NOTE.

SURAJMAL DEORAM BHAVSAR *v.* MOTI RAM KALU WANI, I.L.R. (1939) Bom. 658.

The enforcement of the liability of a Hindu father governed by the Mitakshara Law under a decree obtained against him against the shares of his sons presents a number of difficulties and it is not strange that the authorities are not uniform on the point,—though it is one of frequent occurrence and the subject of numerous decisions. The difficulty arises not so much under the substantive law as under the procedure to be adopted. Under the Hindu Law, it is now well settled by the decisions that the creditor, provided that the debt is not illegal or immoral, can proceed against the separated interest of the sons of a Hindu father governed by the Mitakshara Law, if it was contracted by him when he was joint with them although they may be his personal debts, even though the sons may have been separated from their father at time of their enforcement. All the previous authorities on this point will be found collected and discussed in *Subramanya Aiyar* v. *Sabapathy Aiyar*[1] and *Annabhat Shankarbhat* v. *Shivappa Dundappa*[2]. The question presents no difficulty if in such a case the sons are also made parties to the suit along with their father because then they will have to put forward all their defences and their divided shares in the joint family properties will be liable to be attached and sold in execution of the decree if one is passed against them in the suit.

Complex questions arise only when the sons are not made parties to the suit against the father on his personal debts. In such cases if the father and the sons continue to be joint at the date of the decree and the execution proceedings, the sons' interest in the properties can be proceeded against in execution as they are properties over which the father who is the judgment-debtor has a disposing power for his own benefit at the time of execution within the meaning of S. 60 of the Civil Procedure Code. *(Nunna Setti*

1. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
2. (1928) I.L.R. 52 Bom. 376.

v. *Chidaraboyina*[1] and *Jagabhai Lalubhai* v. *Bhukandas Jagivandas*[2].)

If, however, after the decree but before execution the father and sons separate, difficulties arise in enforcing the liability against the sons' separated properties. It has been held that on foot of the decree against the father as a judgment-debtor a suit can be instituted against the sons to which they can put forward defences not only that the original debt was illegal or immoral but as held recently that it did not exist at all in fact. (*Periaswami Mudaliar* v. *Seetharama Chettiar*[3] and *Lakshmadu* v. *Ramudu*[4]. *See also* Mayne's Hindu Law, 10th Edition, page 431 footnote.) When, however, the decree is sought to be executed against the sons' divided properties, the first question that arises is whether it is property over which the father has still a disposing power under S. 60 of the Civil Procedure Code. It is clear that the father cannot privately sell the sons' divided properties after the partition for his personal debts. Then the Courts cannot attach and sell those properties by virtue of the father's disposing power. Consequently, the properties cannot be sold in execution of the decree obtained against the father alone when he was joint. This is the view held in *Jainarayan Mulchand* v. *Sonaji*[5], *Thirumalamuthu Adaviar* v. *Subramania Adaviar*[6], *Kuppan Chettiar* v. *Masa Goundan*[7]. *Subramanya Aiyar* v. *Sabapathi Aiyar*[8]. The contrary view has been held in *Kishan Sarup* v. *Brijraj Singh*[9], *Venkatanarayana Rao* v. *Venkatasomaraju*[10], *Jawaharsingh* v. *Parduman Singh*[11], *Nand Kishore* v. *Madan Lal*[12], and also the case now under review. This view has been variously based on the fact that the father in such a suit represents the sons also and on the ground that the partition without making some provision for the binding debts is fraudulent and can be ignored. So far as the first ground is concerned it is difficult to see how in a suit against the father on his personal debt he can be said to represent the sons as well and they are as much parties to the suit as the father himself as observed in *Venkatanarayana Rao* v. *Venkatasomaraju*[10]. In the first place, the causes of action against the father and the sons are distinct.

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1. (1902) I L.R. 26 Mad. 214, at p 222 and 223.
2. (1886) I.L.R. 11 Bom. 37 at 41.
3. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).
4. (1939) 50 L.W. 472.
5. I.L.R. (1938) Nag. 136: A.I.R. 1938 Nag. 24.
6. (1937) 1 M L.J. 243.
7. (1937) 1 M.L.J. 249: I.L.R. (1937) Mad. 1004.
8. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
9. (1929) I.L.R. 51 All. 932.
10. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).
11. (1932) I.L.R. 14 Lah. 399. 12. A.I.R. 1936 Lah. 64.

The father is sued on his contract with his creditor and not on any principle of pious liability while the son is liable on his pious liability to pay his father's debts and not on the contract. Again if the sons are also treated in law as parties to such a suit, it is difficult to see how they can in execution set up the plea of illegality or immorality of the debt which has ripened into a decree against themselves as parties. It is also difficult to reconcile this position with the son's right to question the existence of the original debt merged in the decree in a later suit as pointed out in *Lakshmadu* v. *Ramudu*[1]. If they should be treated as having been parties to the suit against their father, no separate suit can be brought against them on the judgment as observed in *Periaswami Mudaliar* v. *Seetharama Chettiar*[2], but there can only be execution of the decree against them. *Cf.* S. 47 of the Civil Procedure Code. Reliance has been placed for the view that the sons must be deemed to be parties to the suit against the father on the observations of their Lordships of the Privy Council in *Lingangowda* v. *Basangowda*[3]. That was the case of a manager suing for the properties of the joint family and there can be distinctness of the cause of action for the manager and the other members in such a case and their Lordships applied explanation 6 to S. 11 of the Civil Procedure Code. They do not therefore seem to help the present case.

The other basis adopted in *Bankey Lal* v. *Durga Prasad*[4], that the partition is not *bona fide* because it did not provide for the binding debts and can therefore be ignored in execution has been criticised adversely in *Atul Krishna Roy* v. *Lala Nandanji*[5], *Thirumalamuthu Adaviar* v. *Subramania Adaviar*[6] and *Kuppan Chettiar* v. *Masa Goundan*[7]. It must also be observed that the point raised in *Bankey Lal* v. *Durga Prasad*[4] has been differently answered by the Full Bench of the Madras High Court in In re *Balusami Aiyar*[8].

Cases also arise frequently where the father and sons separate when the suit is pending against the father alone and a decree is afterwards passed against the father. The question is whether such a decree is executable against the sons' shares obtained in the partition. One view to take in such cases is that the father's right to represent his sons when joint ceased on the partition and the suit

1. (1939) 50 L.W. 472.
2. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).
3. (1927) I.L.R. 51 Bom. 450.
4. (1931) I.L.R. 53 All. 868.
5. (1935) I.L.R. 14 Pat. 732: A.I.R. 1935 Pat. 275 (F.B.).
6. (1937) 1 M.L.J. 243.
7. (1937) 1 M.L.J. 249: I.L.R. (1937) Mad. 1004.
8. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B.).

thereafter must be taken to be against him alone and the decree cannot therefore be executed against the sons' shares. This is the view taken in *Kishan Sarup* v. *Brijraj Singh*[1] and *Atul Krishna Roy* v. *Lala Nandanji*[2] and also by Mr. Ananthakrishna Aiyar, J., in *Subramanya Aiyar* v. *Sabapathy Aiyar*[3]. *See also* Mayne's Hindu Law, 10th Edition, page 438. In this respect the case may be likened to a suit against a trustee or executor or karnavan of a Malabar tarwad who has been removed since the institution of the suit and can no longer represent the estate. The other view that has been taken is that as the father was sued in his representative capacity and this implies that the sons are also parties to the suit though not *eo nomine* on the record and that by any subsequent partition between the father and sons, the latter cannot cease to be parties to the suit and that consequently the decree would be executable against the sons' separated shares as well. This view found favour with the learned judges in *Venkatanarayana Rao* v. *Venkatasomaraju*[4].

The learned judge in the case under review has adopted another view that though the decree is binding on the sons, if their shares have to be proceeded against in execution, they should be added as parties in the execution. With all respect, it is difficult to see that if they are already taken to be parties to the suit, though not *eo nomine*, notwithstanding the partition between the father and the sons, they will not cease to be parties in the execution or have to be brought on record once more in execution.

On the Civil Procedure Code, as it stands it must be admitted that all these anomalies will be avoided if the view put forward in *Jainarayan Mulchand* v. *Sonaji*[5], *Thirumalamuthu Adaviar* v. *Subramanya Adaviar*[6] and *Kuppan Chettiar* v. *Masa Goundan*[7] is adopted. But this view places unnecessary restrictions in the way of the creditor working out his rightful claims against the sons' shares and this has led the judges in finding ways and means to prevent the debtors circumventing their creditors' just rights by effecting a partition and delaying the creditors, if not also depriving them of their rights under the substantive law. The more satisfactory method will be to amend the Civil Procedure Code suitably to meet such cases and not make the procedure uncertain by the conflicting judicial decisions.

1. (1929) I.L.R. 51 All. 932.
2. (1935) I.L.R. 14 Pat. 732: A.I.R. 1935 Pat. 275 (F.B.).
3. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
4. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).
5. I.L.R. (1938) Nag. 136: A.I.R. 1938 Nag. 24.
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