Venkatesh Dhonddev Deshpande

Vs

Sou. Kusum Dattatraya Kulkarni and Others

Civil Appeal Nos. 2084-2065 of 1974

(V. R. Krishna Iyer, D. A. Desai JJ)

27.09.1978

JUDGMENT

DESAI, J. -

1. These two appeals by special leave arise from a suit filed by the respondent-plaintiffs for recovering possession of land bearing survey Nos. 487/11 to 487/6 situated at Shirwal Peta Khandala from the appellant defendant. During the pendency of this suit a portion of the land in dispute was acquired under the Land Acquisition Act and as both the plaintiffs and the defendant laid a claim to compensation, a reference was made under Section 30 of the Land Acquisition Act for determining the eligibility for the amount of compensation. The trial Court decreed the plaintiffs suit and First Appeal 160 of 1966 was preferred by the defendant to the High court of Bombay. Following the decision of the trial court, the reference under Section 30 of the Land Acquisition Act was answered in favour of the plaintiff-respondents and the defendant preferred First Appeal 173 of 1966 to the High Court. Both the appeals were heard together and by its judgment dated October, 10/11, 1974 a Division Bench of the High Court dismissed both the appeals with costs. Thereupon the appellant preferred the present two appeals. As both the appeals arise from a common judgment, they were heard together and are being disposed of by this common judgment.

2. Facts necessary for appreciating the point of law canvassed in these appeals lie within a narrow compass. One Dattatraya Govind Kulkarni, husband of plaintiff 1 and father of plaintiffs 2 to 6 had borrowed Tagai loan of Rs. 12,000 by making an application Exhibit 129 accompanied by prescribed form, Ext. 128 on February 7, 1949. The loan was borrowed of constructing wells in Survey Nos. 167, 170 and he offered as security the lands bearing Survey Nos. 165, 166, 167, 170, 172. In the application Ext. 129 that accompanied the prescribed from it was stated that wells have to be sunk to bring barren land under cultivation. In other words, the loan was for improvement of the land. The loan was advanced and the borrower failed to repay the loan as per the stipulations. A revenue recovery proceeding was commenced and as by the sale of the land offered as security the Government could not reimburse itself the total amount outstanding, a proclamation of sale was issued and ultimately the suit land was auctioned and it was purchased by the defendant and the sale in his favour was confirmed an he was put in possession on May 20, 1960. The plaintiffs stated that prior to the date of auction there was a partition between the father and has sons on July, 6, 1956 evidenced by Ext. 53 and at this partition the suit land with its sub-divisions came to the share of the plaintiffs and, therefore, the father had no saleable interest in the suit land and it could not have been sold, at a revenue auction for recovering the personal debt of the father. So contending, the plaintiffs brought an action for a declaration that the sale is not binding upon them and possession may be restored to them.

3. The trial Court held that the suit land was joint family property consisting of Dattatraya and his sons but as there was an effective partition prior to the revenue sale and the partition being a genuine one, the subsequent sale is not binding upon the plaintiffs to whose share the suit land was allotted at the partition and, therefore, the sale was void and the plaintiffs are entitled to be put back in possession.

4. The High Court in appeal by the present appellant examined the question of the validity of the revenue sale in the context of the provisions of the Land Improvement Loans Act, 1883 ('Loans Act' for short) and held that the auction sale of the lands at the relevant time standing in the names of the plaintiffs, the land being not one in respect of which the Tagai loan was advanced, or which was offered as security for that loan, would not be binding upon the plaintiffs as the plaintiffs were not borrowers within the meaning of Section 7(1) of the Loans Act and the plaintiffs' suit on this ground was rightly decreed. The submission on behalf of the defendant that Tagai loan was a debt and that it was incumbent on the sons of Dattatraya under the doctrine of pious obligation of the sons of a Hindu father to pay their father's debts which were not tainted with immorality or illegality, was not accepted and the High Court held that this doctrine of pious obligation cannot be extended to the debts contracted under the Loans Act as the Act applies to all citizens of India irrespective of their religion. With these findings the appeals were dismissed.

5. Mr. U. R. Lalit, learned counsel for the appellant urged that Tagai Loan was borrowed by Dattatraya, the father, for improvement of lands bearing Survey No. 167 and 170 which were joint family property and the debt represented by Tagai loan would be joint family debt incurred by the manager for the benefit of the joint family or for the benefit of the estate of the joint family and, therefore, the joint family property, irrespective of the fact whether it was offered as security for the loan or whether it benefited by the loan, would be liable for the repayment of the loan notwithstanding the fact that a partition has taken place before the suit land, which again is a joint family property, was brought to revenue auction. It was also urged that the partition is not genuine and it is a sham and bogus one and in fact there was no partition in the eye of law. It was further urged that the pious obligation of the sons of a Hindu father to pay the debt incurred by the father not tainted with illegality or immorality to the extent of the joint family property in their hands would certainly apply to a loan borrowed the Loans Act and the expression "borrower" under the Loans Act can as well include a joint Hindu family and thereby making the entire joint family property liable for repayment of the loan.

6. Mr. Bal, learned counsel for the plaintiffs-respondents contended that Tagai loan was not a joint family debt nor in borrowing the loan the father was acting as Karta but was acting in his personal capacity, nor the loan was for the benefit of the joint family estate. It was said that the Loans Act being a complete Code in itself and only recognised borrower in his individual capacity, one cannot import the concept of Karta of a joint family borrowing under the Loans Act in his representative capacity so as to make the joint family property liable for such loans.

7. The principal contention which goes to the root of the matter is whether the Tagai loan borrowed by Dattatraya, the father, was borrowed in his personal capacity for his personal use or as Karta of the joint family for the benefit of the joint family or joint family state. If the loan was borrowed by Dattatraya, the father, as Karta of the joint Hindu family for the benefit of the family, certainly it would be a joint family debt and all the joint family property would be liable for this debt. Even if there is a subsequent partition before the debt is repaid, the creditor can proceed against the joint family property in the hands of any of the coparceners because the joint family property is liable for the joint family debts. The Karta or the Manager of a joint Hindu family has implied authority to

borrow money for family purposes and such debts are binding on other coparceners and the liability of the coparceners in such a case does not cease by subsequent partition (See Para 240, Mulla's Hindu Law, 14th Edn., p. 298). Where father is the Karta of a joint Hindu family and the debts are contracted by the father in his capacity as manager and head of the family for family purposes, the sons as members of the joint family are bound to pay the debts to the extent of their interest in the coparcenery property. Further, where the sons are joint with their father and the debts have been contracted by the father for his own personal benefit, the sons are liable to pay the debts provided they were not incurred for illegal or immoral purposes. This liability arises from an obligation of religion and piety which is placed upon the sons under the Mitakshara law to discharge the father's debts, where the debts are not tainted with immorality. This liability of the sons to pay the father's debts exists whether the father be alive or dead (para 290, Mulla's Hindu Law, 14th Edn., p. 354). A further requirement is that for an effective partition of a Mitakshara joint Hindu family a provision for the joint family debts should be made. In order to determine what property is available for partition, provision must first be made for joint family debts which are payable out of the joint family property, personal debts of the father not tainted with immorality, maintenance of dependent female members and of disqualified heirs, and for the marriage expenses of unmarried daughter. This must be so because partition is of joint family property and if joint family debts are repaid before the partition only the residue would be available for partition. Therefore, if partition is effected before paying the debts, provision to pay the debts should be made so as to determine the residue available for partition.

8. Having cleared the ground in law, let us look at facts which have been found by the Courts on appreciation of evidence and which unless found to be utterly unconscionable this Court would not interfere with. The trial Court found that the suit property was joint family property and the High court has not departed therefrom. In fact, in an earlier suit filed by these very plaintiffs being Special Suit 14 of 1958 it has been in terms stated that the lads described in para 1 of the plaint Ext. 37 which include the suit land, were originally, owned by joint family of plaintiffs and Dattatraya. Therefore, on plaintiffs' own admission the suit land was joint family property of plaintiffs and Dattatraya.

9. The next important question is whether the Tagai loan was the personal debt of Dattatraya or was debt incurred by him as Karta of the joint family for the benefit of the Joint family. We would only look at uncontroverted salient features of the evidence. Prescribed form of application Ext. 128 with application Ext. 129 would show that the loan was borrowed for constructing wells for improvement in the potentiality of the lands bearing Survey Nos. 167 and 170 It was submitted that these lands, for the improvement of which the loan was borrowed, were not joint family property. There again reference may be made to the admission of the plaintiffs in plaint Ext. 37 which also includes lands bearing Survey Nos. 167 and 170 being described by the plaintiffs themselves as joint family property. The High court held that Dattatraya borrowed the loan for improvement of the land. Therefore, Dattatraya, the father, borrowed loan in his capacity as the father for improvement of joint family lands and for this purpose offered as security three other pieces of land which were joint family property. In the face of this unimpeachable evidence the statement in Ext. 128, the application for loan, that Dattatraya was the full owner of the lands therein mentioned would not convey the idea that it was his separate property. It is not necessary that Karta acting in his capacity as Karta to describe himself as Karta to affirm his representative capacity. Whether he has acted in his personal capacity or representative capacity can be gathered from all the surrounding circumstances and in this case they are eloquent, in that he mortgaged or gave a collateral security joint family property, to wit land, and it extends to whole of the interest of the family and is not confined to Karta's share, and therefore he must be deemed to have acted in the transaction on

behalf of the family (See Mulla's Hindu Law, 14th Edn., page 313, Article 251). It was, however, stated that agriculture was not the avocation of the joint family and, therefore, the father as the Karta did not have the implied authority to borrow loan so as to be binding on the joint family property. One has merely to look at the content of the application for loan. Ext. 129 made by Dattatraya to the Mamlatdar, Taluka Vichitragad, for advancing loan to him, to dispel the contention. The application recites that applicant Dattatraya, the father, had undertaken extensive work to bring barren land under cultivation to raise sufficient crops as well as to improve the quality of land and for improving the quality of agriculture he had undertaken, loans should be advanced to him. Mr. Bal, however, pointed out that Dattatraya was carrying on some business which would be evident from Ext. 23. A copy of Execution Application 87/60 filed by Bhor State Bank Ltd., against one Pandurang Krishnaji Kamble and Dattatraya Govind Kulkarni in which the occupation of Dattatraya is shown as business; and Ext. 22 being a copy of Execution Application 92/57 in which his occupation is shown as general agent, and Ext. 120 a copy of the decree in Special Civil suit 2/49 wherein the occupation of Dattatraya is shown as business and which further shows that Dattatraya had running account with one Raghunath Shridhar Phadke in which Dattatraya had withdrawn Rs. 56,800 and had credited Rs. 41,000 and after adding interest leaving a debt balance of Rs. 19,238-14-00. It was urged that if all these aspects are taken into consideration, it would appear that agriculture was not the occupation of the joint family. Now, as against this, one may also refer to Ext., 24 a copy of the BADR Execution Application 294/56 for executing an Award made under the Bombay Agricultural Debtors' Relief Act against Dattatraya which would show that Dattatraya was an agriculturist by occupation and his debts were adjusted by the Courts set up under the Bombay Agricultural Debtors' Relief Act and this could have only been done if his principal occupation was agriculture. Therefore, mere description of Dattatraya's avocation in Exts. 22, 23 and 120 is hardly determinative of the occupation Dattatraya or his family. It may be that over and above agriculture Dattatraya may or his family. It may be that over and above agriculture Dattatraya may have been carrying on some side business but if his application Ext. 129 shows that he had on his own showing 160 bighas of land most of which are admittedly shown to be joint family property, it cannot be denied that agricultural was one of the occupations of Dattatraya and he was carrying on that avocation as Karta of the joint family consisting of himself and his minor sons. Now, if agriculture was one of the occupations of the joint family and if loan was borrowed for the purpose of improving the joint family lands, the loan would ipso facto be for legal necessity and it would be joint family debt for which all the joint family property would be liable.

10. If thus the loan for the recovery of which the suit property was brought to auction was joint family debt and if the suit property was joint family property, certainly it would be liable to be sold for recovery of joint family debt.

11. The question, however, is : does the subsequent partition make any difference in respect of the liability of the joint family property for the joint family debts ? That would necessitate examination of the circumstances in which the partition was brought about though we are not inclined to examine the question whether the partition was a sham or bogus transaction or was a motivated one with a view to defeating the creditors of the joint family.

12. The partition is evidenced by a registered deed, Ex. 79 dated July 6, 1956. Partition is between father and his minor sons. There is no dispute that on that date the debt of Tagai loan was outstanding as well as there were certain other debts. In the partition deed Ex. 79 there is no express or implied provision for the repayment of joint family debts or even outstanding debts of Dattatraya, the father. There was some suggestion that the property which was allotted to Dattatraya was sufficient for discharging the debts outstanding on the date of partition. That at least is not borne out

by the partition deed nor has Dattatraya gone into the witness box to say that such was the position. Therefore, taking into consideration the recitals in the partition deed as well as the relevant evidence on record the position is clear that no provision was made at the time of partition for the joint family debts or alternatively outstanding debts incurred by the father. It is not for a moment suggested that on this account the partitions bogus and sham, an argument which was put forward before the High Court and negatived. The substance of the matter is that if at a partition amongst the members of the joint family no provision is made for joint family debts, then despite the partition and allotment of shares to different coparceners the joint family property in their hands which they acquired by partition would still the liable for the joint family debts. The Judicial Committee in Sat Narain v. Kisan Das ((1936) 63 IA 384 : AIR 1936 PC 277), pointed out that when the family estate is divided, it is necessary to take account of both the assets and the debt for which the undivided estate is liable. After affirming this ratio this court in Pannalal v. Naraini (1952 SCR 544 at 558 : AIR 1952 SC 170 : 1952 SCJ 211) observed as under :

... the right thing to do was to make provision for discharge of such liability when there was partition of the joint estate. If there is no such provision, 'the debts are to be paid severally by all the sons according to their shares of inheritance' as enjoined by Vishnu (Vishnu, Chap. 6, versa 36). In our opinion, this is the proper view to take regarding the liability of the sons under Hindu law for the pre-partition debts of the father. The sons are liable to pay these debts even after partition unless there was an arrangement for payment of these debts at the time when the partition took place. This is substantially the view taken by the Allahabad High Court in the Full Bench case referred to above and it seems to us to be perfectly in accord with the principles of equity and justice.

If thus the partition makes no provision for repayment of just debts payable out of the joint family property, the joint family property in the hand of coparceners acquired on partition as well as the pious obligation of the sons to pay the debts of the father will still remain.

13. This position of law was reaffirmed in Vriddhachalam Pillai v. Shalden Dyrian Bank Ltd., ((1964) 5 SCR 647 : AIR 1964 SC 1425). The only effect of partition is that after the disruption of joint family status by partition the father has no right to deal the property by sale or mortgage even to discharge an antecedent debt nor is the son under a legal obligation to discharge the post-partition debts of the father.

14. Assuming we re not right in holding that the debt was for the benefit of the estate of the joint family and, therefore, a joint family debt, and assuming that Mr. Bal is right in contending that it was the personal debt of the father, yet the doctrine of pious obligation of the son to pay the father's debt would still permit the creditor to bring the whole joint family property to auction for recovery of such debts. Where the sons are joint with their father and debts have been contracted by the father for his personal benefit, the sons are liable to pay the debts provided they were not incurred for an illegal or immoral purpose. This liability to pay the debt has been described as pious obligation of the son to pay the father's debt not tainted with illegality or immorality. It was once believed that the liability of the son to pay the debts contracted by the father, though for his won benefit, arises from an obligation of religion and piety which is placed upon the sons under the Mitakshara law to discharge the father's debts, where the debts are not tainted with immorality, yet in course of time this liability has passed into the realm of law.

15. In Anthonyswamy v. M. K. Chinnaswamy Koundan ((1970) 2 SCR 648 : (1969) 3 SCC 15) following the decision in Muttavan v. Zamindar of Sivagiri, ((1883) IA 128 : AIR 1906 Mad 1.) this Court held that this obligation of the son to pay the father's debt not tainted with illegality or

immorality was not religious but a legal obligation and the rule would operate not only after the father's death but even in the father's lifetime and the pertinent observation is as under :

It is evident therefore that the doctrine of pious obligation is not merely a religious doctrine but has passed into the realm of law. The doctrine is a necessary and logical corollary to the doctrine of the right of the son by birth to a share of the ancestral property and both these conceptions are correlated. The liability imposed on the son to pay the debt of his father is not a gratuitous obligation thrust on him by Hindu law but is a salutary counter balance to the principle that the son from the moment of his birth acquires along with his father an interest in joint family property.

16. It is not the case of the plaintiffs that the debt contracted by the father for which the property was sold was tainted with illegality or immorality or that it was avyavaharik in the sense opposed to good morals. Therefore, even assuming that there was a partition, the debt being antecedent debt for which no provision was made in the partition and the debt having not been shown to be tainted with illegality or immorality, the sons were liable to pay this debt to the extent the joint family property came in their hands.

17. Viewed from either angle, the property sold was liable for the discharge of the debt of Dattatraya, the father, and even if it came in the hands of the sons on partition, the debt admittedly being a pre-partition debt not shown to be tainted with illegality or immorality, could be recovered from the joint family property in the hands of the sons.

18. Mr. Bal, however, raised an interesting contention that if the joint family property which came in the hands of the sons on partition was to be sold for recovery of the debt of the father after partition a suit would have to be filed by the creditor and if the property in the hands of the son was to be made liable for discharge of the debt, the sons ought to be joined as parties to the suit because only in such an event the sons could set up the defence of the debt being tainted with illegality or immorality. Where a revenue sale takes place, it was said, the sons would have no opportunity to contest the character of the debt, and, therefore, any sale in such circumstances, of the property that has fallen to the shares of the sons at a partition, subsequent to the partition would be void as against the sons. In support of the submission reliance was placed on an observation in Pannalal's case (supra) that a decree against the father alone obtained after partition in respect of such debt cannot be executed against the property that is allotted to the sons and that a separate and independent suit must be filed against the sons before their shares can be reached. After observing that a sons is liable even after partition for the pre-partition debts of his father which are not immoral or illegal, this Court proceeded to examine the question as to how this liability is to be enforced by the creditor, either during the lifetime of the father or after his death. After taking note of a large number of decisions in which it was held that a decree against the father alone obtained after partition in respect of such debt cannot be executed against the property that is allotted to the sons on partition and a separate and independent suit must be instituted against the sons before their shares can be reached, it was held that the principle underlying these decisions is sound. This Court approved the decision in Jagnarayan v. Somaji. (AIR 1938 Nag 24 : ILR 1938 Nag 136 : 174 IC 621). It may be noted that decree for the pre-partition debt was made after partition when in the suit father after partition could not represent the sons. This very question again came up before this Court in S. M. Jakati v. S. M. Borkar. (1959 SCR 1384 : AIR 1959 SC 282 : 1959 SCJ 719.). In that case the Deputy Registrar of Co-operative Societies had made an order against Mr. Jakati for realisation of the amount and an item of property belonging to the joint family of Jakati was attached by the Collector and duly brought to sale under Section 155 of the Bombay Land Revenue Code. The sale was held on February 2, 1943 and confirmed on June 23, 1943. In the meantime, on

January 15, 1943, one of the sons of Jakati instituted a suit for partition and separate possession of his share in the joint family property and contended inter alia that the sale in favour of the first respondent was not binding on the joint family. If the order of the Deputy Registrar was to be treated as a decree the sale under Section 155 of the Bombay Land Revenue Act being execution of that decree, was after the institution of the suit for partition and therefore, it was contended that a partition after the decree but before the auction sale limited the efficacy of the sale to the share of the father even though the sale was of a whole estate including the interest of the sons, because after the partition the father no longer possessed the power to sell the shares of sons to discharge his debts. Negativing this contentions it was held as under :

But this contention ignores the doctrine of pious obligation of the sons. The right of the pre-partition creditor to seize the property of the erstwhile joint family in execution of his decree is not dependent upon the father's power to alienate the share of his sons but on the principle of pious obligation on the part of the sons to discharge the debt of the father. The pious obligation continues to exist even though the power of the father to alienate may come to an end as a result of partition. The consequence is that as between the son's right to take a vested interest jointly with their father in their ancestral estate and the remedy of the father's creditor to seize the whole of the estate for payment of his debt not contracted for immoral or illegal purpose, the latter will prevail and the sons are precluded from setting up their right and this will apply even to the divided property which, under the doctrine of pious obligation continues to be liable for the debts of the father., Therefore where the joint ancestral property including the share of the sons has passed out of the family in execution of the decree on the father's debt the remedy of the sons would be to prove in appropriate proceedings taken by them the illegal or immoral purpose of the debt and in the absence of any such proof the sale will be screened from the son's attack, because even after the partition their share remains liable.

19. The High Court with examining the ratio in Jakati's case (supra) observed that even though Ganpatrao Vishwanathappa Barjibhe v. Bhimrao Sahibrao Patil (52 Bom LR 154 : AIR 1950 Bom 278.), was referred to therein it was not specifically overruled and, therefore, the trial Court was right in relying upon it and incidentally itself relied on it. In that case it was held that in order to make share of sons liable after partition they should be brought on record. This Court referring to Ganpatrao (52 Bom LR 154 : AIR 1950 Bom 278.) observed that the decision should be confined to the facts of that case and further observed as under :

Therefore where after attachment and a proper notice of sale the whole estate including the son's share, which was attached is sold and the purchaser buys it intending it to be the whole coparcenery estate, the presence of the sons to nominee is not necessary because they still have the right to challenge the sale on showing the immoral or illegal purpose of the debt. In our opinion where the pious obligation exists and partition takes place after the decree and pending execution proceeding as in the present case, the sale of the whole estate in execution of the decree cannot be challenged except on proof by the sons of the immoral or illegal purpose of the debt and partition cannot relieve the sons of their pious obligation or their shares of their liability to be sold or be a means of reducing the efficacy of the attachment or impair the rights of the creditor.

20. The binding ratio would be one laid down in Jakati's case and it cannot be ignored by merely observing that a different approach in Ganpatrao's case holds the field for the High Court as it was not overruled in Jakati's case. It is thus crystal clear that the pious obligations of the sons continues to be effective even after partition and if the creditor in execution of a decree obtained prior to partition seizes the property in execution without making sons parties to the suit and the property is

sold at an auction and purchaser is put in possession and the property thus passes out of the family in execution of the decree on the father's debt, the remedy of the sons would be to challenge the character of the debt in an appropriate proceeding brought by them. The sale cannot be voided on the only ground that the sale of the property took place after partition and the property sold was one which was allotted to the sons on partition. Once the property is liable to be sold for recovery of debt of the father incurred prior to partition and which is not tainted with illegality or immorality partition in such a situation merely provides a different mode of enjoyment of property without affecting its liability for discharge of pre-partition debts.

21. In the present case the sons have filed the suit and in this suit issue No. 6 framed by the learned trial Judge was whether the Tagai loan of Rs. 12,000 was incurred by Dattatraya as manager of the family, for legal necessity and the family has benefited by it, and this issue was answered in the affirmative, meaning the debt is not shown to be tainted with illegality or immorality. No submission was made to us by Mr. Bal on behalf of the respondents that the debt was tainted with illegality or immorality. In such a situation unless in this suit the sons challenged the character of the debt and established to the satisfaction of the Court that the debt was tainted with illegality or immorality, they cannot obtain any relief against the purchaser who purchased the property at an auction held by the Civil Court or by the revenue authorities for recovering the debt of the father which the sons were under a pious obligation to pay. Therefore, even if the plaintiffs were not parties to the proceedings held by revenue authorities for sale of the land involved in this dispute, once the sale took place and it was confirmed and purchaser was put in possession, the sons can successfully challenge the sale by establishing the character of the debt thereby showing that they were not bound to pay it and, therefore, their share in the property cannot be sold to discharge the debt. They cannot succeed merely by showing, as is sought to be done in this case, that as the sale took place subsequent to partition and as they were not parties to the proceedings the sale is not binding on them. This clearly emerges by reading Pannalal and Jakati cases together.

22. The loan sought to be recovered was Tagai loan advanced under the Loans Act. The amount can be recovered as arrears of land revenue. Chapter XI of the Bombay Land Revenue Code provides procedure for realisation of land revenue, recovery to be made as if they are arrears of land revenue and other revenue demands. Section 150 provides that an arrear of land revenue may be recovered inter alia by sale of defaulter's immovable property under Section 155. Section 155 provides that the Collector may cause the right, title or interest of the defaulter in any immovable property other than the land on which the arrear is due to be sold. The sale is subject to sanction and confirmation.

23. The first contentions is that the Collector is authorised to cause the right, title or interest of the defaulter in any immovable property which is sought to be sold in a revenue auction and in this case as the sale was after the partition the defaulter Dattatraya had no interest in the property brought to auction and, therefore, no title passed to the auction purchaser. This submission overlooks again the pious duty of the sons to pay the father's debt as also the right of the creditor to recover debts from the joint family property in the hands of the coparceners. In Jakati's case this was the exact contention and after comparing the parallel provision in the Code of Civil Procedure, viz., "the right, title or interest of the judgment debtor", this Court held that it is a question of fact in each case as to what was sold in execution of the decree. This Court affirmed the ratio in Rai Babu Mahabir Prasad v. Rai Markunda Nath Sahai ((1889) LR 17 IA 11, 16 : ILR 17 Cal 584 (PC).), that it is a question of fact in each case as to what was sold, viz., whether the right, title or interest of the debtor or defaulter was sold or the whole of the property was put up for sale and was sold and purchased. It was concluded that where the right, title and interest of the judgment debtor are set up for sale, as to what passed to the auction purchaser is a question of fact in each case dependent upon

what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for. There is not the slightest doubt that the whole of the property was sold in the instant case and that was intended to be sold and the purchaser the whole of the property and the certificate was issued in respect of sale of the property and, therefore, it is futile to say that only the right, title and interest of Dattatraya was sold and that as he had no interest in the property sold on the date of auction sale, nothing passed to the purchaser.

24. Assuming, for a moment that if the sale takes place after the partition, to such a proceeding the sons should be a party before the liability arising out of the doctrine of pious obligation to pay the father's debt is enforced against the joint family property in the hands of the sons, evidence reveals that the sons were fully aware of the intended sale and not only they know of the intended sale but possession was taken from the by the purchaser after notice to them. Proceedings for the recovery of the amount of Tagai loan of Rs. 12,000 were commenced much prior to April 25, 1955 because the first proclamation of sale in respect of four pieces of land was issued on April 25, 1955. Ex. 79 would show that no bid was received whereupon the Kamgar Patil offered a nominal bid of Re. 1 for four pieces of land. It may here be mentioned that this sale was challenged by none other than Dattatraya and it was quashed and he had taken back the land included in the proclamation Ex. 79. Thus the recovery of the loan started prior to partition which took place on July 6, 1956. Where a loan is taken under the Loans Act and it is being recovered as arrears of land revenue, the order of the revenue authority to recover the amount would tantamount to a decree and when a proclamation of sale is issued it amounts to execution of the decree, to borrow the phraseology of the Code of Civil Procedure. It is thus clear that execution started prior to the partition. Undoubtedly the proclamation for sale of suit land was issued on January 22, 1957 as per Ex. 80 and that was subsequent to the partition but when different properties are brought to auction by different sale proclamations it is nonetheless an execution proceeding. The sale proclamation was issued under the provisions of the land revenue code. Amongst others the proclamation of sale is to be fixed on the property which is to be auctioned. After the sale was confirmed, the purchaser was required to be put in possession. The plaintiffs claimed to be in possession and yet the revenue officer on May 10, 1960 as per Ex. 82 handed over possession of the land involved in the dispute to the purchaser. It would be advantageous to point out here that the plaintiffs served notice dated February 2, 1957 which would mean that the notice was served prior to the date of the auction. The plaintiffs therein referred to the proclamation of sale for the land involved in dispute and they also referred to the attachment of the land. They also referred to the date of intended auction sale and they called upon the Collector not to proceed with the sale. The plaintiffs thereafter filed their fist suit being Special Suit No. 14/58, certified copy of the plaint of which is Ex. 37, which would show that it was filed on April 6, 1957. In this plaint they sought a declaration that the sale held on May 26, 1955 and April 6, 1957 be declared illegal. It was alleged in the plaint that Dattatraya was a drunkard and was in bad company and had borrowed the Tagai loan for his own vices and in collaboration with the concerned officers of the revenue department and the loan could never be said to be a Tagai loan. Amongst others, the State of Bombay was impleaded as party defendant. Subsequently this suit was withdrawn and the present suit was filed deleting State of Bombay as party. From this narration of facts it clearly emerges that the plaintiffs had the knowledge of the proclamation of sale and yet no attempt was made by them either to appear before the Collector who had issued the proclamation or as was now sought to be urged, offered to repay the loan. If after this specific knowledge that proceeding for recovery of Tagai loan had commenced and during its pendency the partition was brought about and yet on the subsequent sale the revenue authority sold the whole of the property and the purchaser intended to buy the whole of the property, the only way the sons can challenge this sale is by establishing the character of the debt as being tainted with illegality or immorality and

the purchaser would be entitled to defend his purchase and possession on all the contentions which would negative the plaintiffs' case including the one about the pious obligation of the sons to pay the father's debt. Therefore, there is no force in the contention that as the plaintiffs were not parties to the recovery proceedings the sale is not binding on them.

25. That brings us to the last contention which has found favour with the High Court. The contention is that a loan borrowed under the provisions of the Loans Act could always be in the individual and personal capacity of the borrower and the Loans Act being applicable to all the communities in this country, it does not admit of a person borrowing loan in his representative capacity as Karta of the joint family and, thereby making joint family property liable for the discharge of the debt. Section 5 prescribes the mode of dealing with the applications for loans and Section 6 provides for the period for repayment of loans. Then comes Section 7 which is material. It provides for the mode of recovery of the loans borrowed under the Act. Section 7 reads as under :

> 7. (1) Subject to such rules as may be under Section 10, all loans granted under this Act, all interest (if any) chargeable thereon, and costs (if any) incurred in making the same, shall, when they become due, be recoverable by the Collector in all or any of the following modes, namely -
>
> (a) from the borrower - as if they were arrears of land revenue due by him;
>
> (b) from his surety (if any) - as if they were arrears of land revenue due by him;
>
> (c) out of the land for the benefit of which the loan has been granted - as if they were arrears of land revenue due in respect of that land;
>
> (d) out of the property comprised in the collateral security (if any) - according to the procedure for the realisation of land revenue by the sale of immovable property other than the and on which that revenue is due :
>
> Provided that no proceeding in respect of any land under clause (c) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgages of, or persons having charges on, that interest, and, where the loan is granted under Section 4 with the consent of another person, the interest of that person, and of mortgagees of, or persons having charges on, that interest.
>
> (2) When any sum due on account of any such loan, interest or costs is paid to the Collector by a surety of an owner of property comprised in any collateral security, or is recovered under sub-section (1) by the Collector from a surety or out of any such property, the Collector shall, on the application of the surety or the owner of the at property (as the case may be), recover that sum on his behalf from the borrower, or out of the land for the benefit of which the loans has been granted, in manner provided by sub-section (1).
>
> (3) It shall be in the discretion of a Collector acting under this section to determine the order in which he will resort to the various modes of recovery permitted by it.

26. The loan can be recovered from the borrower as if it were an arrear of land revenue due by him or from his surety by the same procedure or out of the land for the benefit of which the loan has

been granted by following the same procedure or out of the property comprising as collateral security, if any, according to the procedure for realisation of land revenue by sale of immovable property or by the sale of immovable property other than the land on which the land revenue is due.. Now the word ' borrower' is not defined. Could it be said that a borrower for the purpose of Section 7 can be individual and no other person ? The High Court observed that the Act is applicable to all communities in India and not merely to Hindus and there are many communities which do not have the system of joint family and if the Legislature intended to include in the word 'borrower' manager of a family, it should have said so in express terms. There is nothing in the language of Section 7 which would show that the borrower must always and of necessity be an individual. Even if the Act applies to other communities which do not have the system of joint family, that by itself would not exclude the manage of a joint Hindu family from becoming a borrower under Section 7. If the construction as suggested by the High Court is accepted it would put joint Hindu family at a disadvantage in borrowing loans under the loans Act because the Karta of a joint Hindu family, if he has no separate property of his own, and if he cannot borrow the loan in his representative capacity, has no security to offer, nor could he take advantage of the beneficial provision of the Act for improving the land belonging to the joint Hindu family. We see no justification for restricting the word 'borrower' to be an individual alone. In fact the Act itself contemplates joint borrowers. Section 9 provides for joint and several liability of joint borrowers. Karta of a joint Hindu family therefore can be a borrower in his representative capacity. If the Karta of a joint Hindu family is considered eligible for becoming a borrower, would it run counter to the position of other communities in which there is no concept of a joint family and joint family properties ? In the absence of any such concept a borrower other than a Hindu can offer all the property at his disposal even if he has got sons, as security for the loan to be borrowed because in other communities governed by their personal laws the sons does not acquire interest in the ancestral properties in the hand of the father from the time of his birth. But in Hindu law there are two seemingly contrary but really complementary principles, one the principle of independent coparcenary rights in the sons which is an incident of birth, giving to the sons vested right in the coparcenery property, and the other the pious duty of the sons to discharge their father's debts not tainted with immorality or illegality, which lays open the whole estate to be seized for the payment of such debts (see Jakati's case). Now, if the sons of a Hindu father take interest in the ancestral property in the hands of the father by the incident of birth, they also incur the corresponding obligation of discharging the debts incurred by the father either for his own benefits or for the benefit of the joint family from the property in which the sons take interest by birth. Such a concept being absent in communities not governed by Hindu law in this behalf, the father would be free to encumber the property and the sons in such communities would neither get interest by birth nor the liability to pay the father's debt and would not be able to challenge the sale of property for discharge of the debt incurred by the father. Therefore, the expression 'borrower' in Section 7 need not be given a restricted meaning merely because the Act applies to all communities. Hence a father who is the Karta of the Joint family consisting of himself and his sons can become a borrower in his capacity as Karta and if the loans is for legal necessity or for the benefit of the joint family estate he would render the joint family property liable for such debt and it is for his personal benefit the joint family property even in the hands of the sons would be liable if the debt is not tainted with illegality or immorality. The High Court said that such liability which arises from the obligation of religion and piety cannot be extended to the loans borrowed under the Loans Act because there is no such obligation in other communities to which the Act applies. In reaching this conclusion the High Court overlooked the principle that this doctrine of pious obligation is not merely a religious duty but has passed into the realm of law (see Anthonysw__amy, supra). On the facts of that case this principle was applied to parties belonging to Tamil Vannian Christians. Viewed from this angle, the High Court was in error

in holding that Dharmashastras of Hindus never contemplated improvement loans being given by the Governments of the day which were usually monarchies and, therefore, a debt of the kind which is contemplated under the Loans Act could never have been under the contemplation of the writers like Brihaspati and Narada in whose texts the pious liability is imposed on the sons and others. It is not possible to subscribe to this view for the reasons hereinbefore mentioned. The decisions in Sankaran Nambudripad v. Ramaswami Ayyar ((1918) ILR 41 Mad 691 : 34 MLJ 446 : 47 IC 301), and Chinnasami Mudali v. Tirumalai Pillai ((1902) ILR 25 Mad 572.), do not touch the question herein raised and are of no assistance in the matter. 27. It, therefore, clearly transpires that Dattatraya had borrowed a loan from the Government under the Loans Act for the benefit of joint family property. It was being recovered as arrears of land revenue. The property which is the subject matter of dispute in this proceedings was joint family property. It was sold at a revenue auction and the whole of the property was sold and the whole of it was purchased by the purchaser. The debt of Tagai an for which the property was sold is not shown to be tainted with illegality or immorality or avyavaharik. Therefore, the suit property was liable to be sold at court auction for two reasons, one that the debt was joint family debt for the benefit of the joint family estate and, therefore, all segments of the joint family property were liable for the discharge of the debt, and secondly, under the doctrine of pious obligation of the sons to pay the father's debt. In the present proceedings no attempt was made to establish that the debt was tainted with illegality or immorality. Therefore, the sale is valid and the purchaser acquired a full and complete title to the property. The sale is not void.

28. Part of the property is acquired and the compensation is taken by the plaintiffs subject to the orders of the Court.

29. Accordingly both these appeals are allowed and the plaintiff's suit is dismissed but in the facts and circumstances of this case, with no order as to costs throughout.

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