

ALLAHABAD HIGH COURT

Kishan Sarup

Vs

Brij Raj Singh

(Niamatullah, J.)

07.05.1929

JUDGMENT

Niamatullah, J.

1. I agree with the conclusions arrived at by my learned colleague. I am satisfied, for the reasons given by him, that the evidence fails to establish that the debts had been contracted for immoral purposes, as alleged by the plaintiffs-respondents. I am, however, not prepared to hold that the partition between the plaintiff-respondents and their father was effected in good faith. The circumstance that the suit for partition was brought by the minor sons, one aged seven years and the other aged nine months at that time, only four days after the appellant instituted the suit for recovery of money on foot of promissory notes, does not inspire confidence in the bona fides of the alleged partition. It is clear to my mind that the suit for partition was brought by the maternal grandfather of the plaintiff-respondents on their behalf in view of the money suit, instituted by the appellant, as it was apprehended that the family property would be proceeded against for satisfaction of the decree likely to be passed in his favour. Ordinarily a suit for partition at the instance of minors, especially against their father is not countenanced by Courts.

Such a suit cannot be brought by, or on behalf of, a minor to enforce partition, unless on the ground of malversation or some other circumstances which make it for his interest that his share should be set aside and secured for him. Otherwise he might be thrust out of the family at the very time when he is least able to protect himself. In short, it is in the discretion of the Court to grant or refuse a decree for partition at the suit of a minor plaintiff, and the Court has to consider in such cases whether a decree for partition would be for the benefit of the minor. (Mayne's Hindu Law, 9th edn., p. 688).

2. In view of our finding that the debts in question were not contracted for immoral purposes, it cannot be maintained that the separation of the sons was to their interest, unless we assume that they would be enabled thereby to escape their liability to pay their father's debts. The father, who was the only party to the partition suit, did not raise any objection to a partition between him and his infant sons, and an ex parte decree defining their rights inter se was passed. The learned

Subordinate Judge has assumed the total value of the family property left by the plaintiffs' grandfather to be Rs. 70,000, and the liabilities of defendant 2 (plaintiffs' father) to be (1) Rs. 12,500 due to the appellant and (2) What might have been due to one Sham Kunwar under a promissory note for Rs. 5,000 on which some interest must have accumulated. It is difficult to find exactly what the liabilities of the father were at the time of the partition. Assuming that there were no other liabilities, we find that the value of the entire family property brought into the hotchpot, as given in the plaint of the partition suit (p. 97), was Rs. 60,000. The liabilities of the father, referred to above, amount to nearly the value of the father's share in the entire family property, including lands, houses, household effects etc. No arrangement was made for payment of debts, and it could not have been honestly believed that the partition would not defeat or delay the father's creditors. The subsequent events clearly indicate that the so-called partition was the first maneuver towards the long drawn battle against the father's principal creditor. It is difficult to imagine that the father has been a silent spectator, and not a real litigant under cover of his infant sons. For these reasons, I am inclined to think that the partition was not made in good faith, and that it was prompted by a desire to defeat the claims of the creditors to whom the sons were under an obligation to pay so far as the extent of the family property would enable them to do so.

3. Cases in which partition has been held to be a bar to the creditors' claim, for father's debts incurred before the partition, expressly lay down that the liability of the sons is not affected by a partition, if it was made to defeat or delay the creditors. Apart, therefore, from the question of law, on which there has been some difference of opinion the appellant is entitled to succeed on the ground that the partition not having been made in good faith can be ignored by him. I do not, however, desire to rest my decision on this ground alone and would proceed to consider the more important question whether, assuming the partition to have been made in good faith, the remedy of the creditors is, in any way, impaired thereby.

4. An examination of the plaint shows that the plaintiffs questioned the right of defendant 1 to recover what was due to him under the decree obtained by him against defendant 1, the father, and further contended that, in any case, their property could not be seized in execution of a decree obtained in a suit to which they (the plaintiffs) were not parties. The latter part of their contention finds some support from certain observations made by learned Judges who otherwise confirmed the right of the creditors to proceed against the interests of the sons after a partition had been effected. I shall consider it separately from the general question of the sons' liability after partition for the father's debts incurred before it.

5. The answer to the main question, one way or the other, must be a corollary from the following well established propositions:

(a) Under Hindu law, pure and simple, a son is under a pious obligation to pay his father's debt not contracted for illegal or immoral purposes, regardless of the extent of any joint family property or property inherited by him from the father, But the British Indian Courts regard this obligation, which is of too far reaching a character, to be only a moral obligation, and the extent

to which it can be enforced in a Court of law is limited to the interest which the son acquires by birth or which he inherits from the father. *Masitullah v. Damodar Prasad*¹

(b) The sons cannot set up their rights, which are to take present vested interest, on their birth, jointly with their father in ancestral estate, against their father's alienation for antecedent debt or against his creditor's remedy for his debt, if such debt has not been contracted for an immoral purpose.... If the father's debt, not having been contracted for an immoral purpose, is such as to support his sale of the entirety of the joint estate, either he may sell the latter without suit, or the creditor may obtain a sale of it by a suit, but the joint sons, not being parties to the execution proceedings or to the sale, are not precluded from having a question as to the nature of the debt tried in a suit of their own—a right which will, however, avail them nothing, unless it can be shown that the debt was not such as to justify a sale of the joint estate. *Nanomi Babuasin v. Madun Mohan* [1886] 13 Cal. 21.

(c) There is no rule that this result is affected by the question whether the father who contracted the debt is alive or dead. *Brij Narain v. Mangal Prasad*²

(d) Where after the father's death joint family property is divided among sons, the entire family property is liable: Sections 50, 52 and 53, Civil P.C.

6. The liability of the sons being established in these terms, it follows that a creditor can proceed against the family property immediately after the liability is incurred. The liability of the sons, in this respect, arises at the same time as the father's. Their liability is co-extensive with that of the father, except that, in their case, it is limited to the interests which they have in the joint family property. It cannot be disputed that, if a creditor is so advised, he may sue the sons alone and obtain a decree for recovery of the father's debts; but in such a case he can proceed only against the interests of the sons in the joint family property. In practice such a course is hardly conceivable, as it can never be expedient for the creditor to sue the sons and leave out the father. A decree obtained against a father alone binds the sons, because they are represented by the father in such a suit. It is, therefore, clear that the liability of the sons which arises before a partition between them and their father and the corresponding right of the creditor to recover his money from them to the extent indicated cannot be affected by a partition which the father and sons may choose to make and to which the creditor is not party. This conclusion has not been accepted by some learned Judges. The opposite view has been forcibly and elaborately put by Srinivas Ayyangar, J., in his dissenting judgment in *Subramania Ayyar v. Sabapathy Aiyar*³ The reasoning on which it proceeds will appear from the following extracts from his judgment: It has never been to my knowledge suggested that the pious obligation, as it may be, of the sons was towards any person other than the father himself. Otherwise it is difficult to see what room there is for any piety. The right of the creditor, therefore, is only against the father. If it were against the sons also, the general rule should be that the sons should also be made a party to the suit itself in every case and a decree obtained and that no decree obtained merely against the father is capable as such of being executed against the interests of the sons also in the family property. It seems to me, therefore, that there can be little doubt that the pious obligation of the sons is only towards

the father, The right of the father corresponding to this obligation on the part of the sons is his admitted right to alienate the entire family property, including the sons' share for bona fide antecedent debts of his own. Being a power of sale, although only under certain circumstances, it is really in the nature of property, and that is how it comes about that in a mere execution of the decree against the father, this power of sale is enforced and made available for the satisfaction of the decree. (p. 384). To my mind Sahu Ram's case has not been overruled in its entirety by the case of Brij Narain, and it must be regarded as having been merely modified to the extent of engrafting the exceptions recognized by their Lordships of the Judicial Committee on the ground of stare decisis.... The true view would, therefore, seem to be that the pious obligation of the sons, no doubt, arises only after the father's death, but because of that obligation a power of sale has been created in the father, and because of this power of sale it is possible to proceed even during the father's lifetime against the sons' share.... As the creditor's rights and remedies have reference to, and are based on, the father's powers of alienation, it would follow that the creditor would have such right only if and so long as the father has such right.... On a partition of the family property there is a disruption of the family, and the managership of the father ceases, and with the managership being lost the power is also lost of the father to effect an alienation of the family property not only for the purposes of family necessity but also for his own antecedent debts.... If, therefore, after partition between the father and the sons, the father lost that power of sale, it must follow that the creditor cannot seek to enforce any rights based on or referable to the existence of such power. (p. 388).

In other words, it is in full accordance with the principles I have tried to indicate that in all such suits and proceedings the creditor of the father is seeking to exercise no right of his own against his sons, but is only seeking to work out a right of his own debtor the father. (p. 390).

7. The essence of this line of argument is that the direct liability of the sons to the creditors arises only after the father's death, and that the liability of the sons during the father's lifetime is somewhat different, being towards the father and not towards the creditor, who is, however, enabled to treat the father's right to sell the family property for satisfaction of his own debt as a saleable right or property which the creditor avails of for proceeding against the interest of the sons. With great respect, I would point out that the latest Privy Council case *Brij Narain v. Mangal Prasad*⁴ (at p. 103 of 46 Ali.), runs counter to the theory of the creditor's right in the above proposition. Their Lordships observed: There are, however, some observations in Sahu Ram Chandar's case which are not necessary for the judgment but which their Lordships are bound to say that they do not think can be supported. Founding upon them the learned Counsel in this case argued in the Court below that no liability of the sons based on the pious obligation to pay father's debt could be made available to the creditor while the father was still alive. Here again, if the point was open, there would be much to be said in favour of a position which seems consonant with common sense, but their Lordships are satisfied that a long train of authorities has settled the question.

8. In summarising their view their Lordships enunciated proposition No. 5 as follows:

There is no rule that this result is affected by the question whether the father... is alive or dead.

9. It is thus made clear that the liability of the sons to pay the debt of their father in his lifetime is exactly of the same nature as after his death, and no distinction is to be made in consequence of the father being alive or dead. This being so, and it being conceded that, after the father's death, the liability of the sons is directly to the creditor, indeed it cannot be otherwise, the liability of the sons in the father's lifetime cannot be different and must be taken to be towards the creditor. It is almost a truism that, if a creditor is entitled to recover his debt from the sons to the extent of their interest in the family property, the sons are liable to him directly to that extent. It follows as a necessary corollary that the sons' liability to the creditor is not affected by partition after the father's death. There is no conceivable reason why a partition in the father's lifetime should make any difference. It seems to me that there is a close analogy between the liability of the heirs of a debtor, not being a Hindu, to pay the debt of the deceased to the extent of the assets in their hands and the liability of a Hindu son to pay his father's debt, with this difference that, in the first case, the liability arises on the death of the ancestor and on receipt of the assets, while in the second it arises in the lifetime of the father, the sons having acquired an interest by birth. The reason in both cases is the same, namely obtaining an interest in property through the ancestor or the father, as the case may be. The liability once incurred cannot be shaken off in either case by subjecting the property to a division among the heirs or sons.

10. The view stated above does not imply that the debt is a charge on the family property any more than it is so on the assets of a deceased debtor not being a Hindu. If transferred by the father or by the sons after the partition, it cannot be followed in the hands of transferees just as the property sold by the heir of a debtor, not being a Hindu, cannot be followed by his creditor not having charge or lien on any property. The share of the sons being determined on partition, the extent of their liability is ascertained and the creditor can hold them liable to that extent just as in case of the heirs of a deceased debtor, not being a Hindu, their liability extends to the property inherited by them. In either case, there is no charge on the property received on partition or inherited, as the case may be, and if the separated sons or the heirs have validly transferred it, the creditor cannot seize the property in the hands of the transferees but can hold the sons or the heirs liable to the extent of the property originally received on partition or by inheritance. To this extent the liability is personal.

11. The reason why the interests of a son in the joint family property can be sold in execution of a decree obtained against the father alone is not that the father has a right to sell the family property for satisfaction of his own antecedent debts, which right is treated by the creditor as the property of the father, but the decree is binding on the sons as they are deemed to be represented by the father and, therefore, themselves parties to the decree. Their Lordships of the Privy Council held in *Sheo Shankar Ram v. Jaddo Kunwar*⁵ that: there seems to be no doubt upon Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of joint Hindu families so effectively represent

all other members of the family that the family as a whole is bound.

12. If the sons establish in a suit of their own that the debt, for which a decree was obtained by the father, had been incurred for illegal or immoral purposes, the decree will not be one in respect of debts as to which the father could represent the sons. Whether the sons were represented by the father or not depends upon the subject matter of the suit, and if a decree was obtained for what turns out to be a family liability, the sons must be deemed to have been parties to the suit through the father.

13. As regards the 2nd branch of the question, namely, whether a decree, obtained against a father after disruption of the family, can be executed against the sons, my answer is in the negative. I think the creditor must obtain a decree against the sons themselves, if he desires to proceed against that part of the family property, which has been allotted to the sons on partition, for satisfaction of the father's pre-partition debts. As already stated, the sons are represented by the father in case of a decree obtained before partition; but the same consideration cannot apply after disruption of the family, when sons are no longer represented by the father in any suit brought by the creditor, any more than they are represented in transactions relating to the property allotted to the sons. But, in the case before us, the suit for recovery of money had been instituted before the partition, and a decree was passed against the father before any decree defining the shares of the father and sons was passed, though the suit for partition was instituted before a decree in the money suit was passed. In a case where: it is in the discretion of the Court to grant or refuse a decree for partition at the suit of a minor plaintiff, the Court has to consider in such cases whether a decree for partition would be for the benefit of the minor. It would seem to follow from this that the rule laid down by the Privy Council that the filing of a plaint for partition or such other clear and unequivocal expression of an intention to become divided of itself effects a severance of status, is inapplicable to the case of a minor suing by a next friend. It being left to the discretion of a Court to say whether there should be a division of the family or not, it is obvious that discretion cannot be anticipated or coerced by the determination of another person who purports to act on behalf of a minor.... But in case of a minor the mere institution of the suit cannot effect a division in status, for until the suit proceeds to a decree it is uncertain whether the Court will or will not deem it a proper case in which to allow partition. It would seem to follow also that, where the Court decrees a partition at the suit of a minor, the partition will take effect as from the date of the decree: *Mayne's Hindu Law*, pp. 687-688, 9th Edn.

14. In this view of the matter, the plaintiff-respondents must be deemed to have separated from their father after the appellant obtained his decree, and the debt to which it related not being immoral, the plaintiff-respondents were fully represented by their father, with whom they were joint at the date of his decree, which is accordingly binding on them.

15. My learned brother has commented on the case law bearing on the question arising in this appeal, and I fully agree with his views. Of the two cases decided by this Court, namely, *Sita*

*Ram v. Beni Prasad*⁶ and *Gaya Prasad v. Murli Dhar*⁷ which take conflicting views as regards the liability of the sons to pay the father's pre-partition debts after disruption of the family, I prefer to follow the former.

16. For the reasons stated above, I concur with my learned colleague in allowing the appeal, in setting aside the decree of the Court below and in dismissing the suit of the plaintiff-respondents with costs throughout.

Mukerji, J.

17. This is an appeal by one who was defendant 1 in the suit out of which this appeal has arisen. There was a family consisting of three persons namely, Babu Ram, the father (defendant 2 in the suit) and his two sons Brijraj Singh and Raghuraj Singh, the plaintiff-respondents. The family was a joint one. The plaintiffs were respectively eight years and nine months old at the date of the institution of the suit. The father, Babu Ram, borrowed money from the appellant Lala Kishan Sarup from time to time on promissory-notes and Kishan Sarup instituted a suit for recovery of his money against the father alone on 14th November 1925. Thereupon, the two plaintiffs of the present litigation filed, against their father, a suit to which the appellant was not made a party for partition, on 18th November 1925. The decree in the appellant's suit against Babu Ram was passed on 15th December 1925. The partition suit was decreed ex parte on 13th January 1926. Having got their preliminary decree for partition the plaintiff-respondents instituted the present suit to obtain a declaration that the appellant, Kishan Sarup, was not entitled to execute his decree against the two-thirds share that have been declared, by the partition decree, to be the plaintiffs' property. They also asked for a perpetual injunction restraining Kishan Sarup from executing his decree against those shares. It does not appear that the preliminary decree for partition, which will be found printed at p. 103 of the record was ever followed by a final decree or by actual partition of the family property.

18. The basis of the claim of the respondents was that the father Babu Ram fell into bad company and squandered money on immoral purposes. The plaintiffs have got their two-thirds share separated by partition and, therefore, the father's debts are not recoverable from the plaintiffs' two-third share. It will be noticed that the plaintiffs did not say that their father's debts were, in any way, tainted with immorality. An issue, however, was framed on that point, so we have taken it for granted that there was such a pleading as that, on behalf of the plaintiffs.

19. The defence of the appellant was that the father had a good character and was frugal in his habits, that the debts were not tainted with immorality, that the partition took place after the family property had been attached before judgment and the partition was ineffective as against the realization of the plaintiff's debts, that the partition was a collusive transaction and that the entire property of the family in the hands of the father and the sons was bound to pay the plaintiff's debts.

20. The learned District Judge, who tried the suit, came to the conclusion that the debts contracted by defendant 1 with the appellant were tainted with immorality, that the partition was one effected in good faith, that it was not vitiated by the attachment before judgment and that the result of the partition was that the property in the hands of the sons could not be proceeded against by the appellant.

21. At an early stage of the suit there was a 3rd defendant but he was sent away from the suit and we are no longer concerned with him.

22. In appeal, all the findings of the learned District Judge have been challenged. The points that we have to determine, therefore are:

1. Whether the debts on foot of which the appellant obtained his decree were tainted with immortality?
2. If not, whether the fact that the plaintiffs obtained a partition decree exempts their two-third share from being taken in execution of the decree passed against their father?
3. What is the effect of the attachment before judgment on the partition?
4. Whether the partition was effected in good faith?

23. (His Lordship then discussed evidence regarding points 1 and 4 and concluding that the debts were not proved to be tainted with immortality proceeded).

24. Point No. 4.-On the question whether the partition was effected in good faith, we may take it that it was effected in good faith. If the idea was, as it must have been, that the partition would save two-thirds of the family property from payment of the just debts of the father, a partition with this object may have been really sought for. How far it will succeed in its object will be considered under issue 2. But if the well wishers of the sons believe that they can save two-thirds of the property by merely suing for partition, there would be no reason to think that a partition was not meant to be effected. In this sense, and in this sense alone, I am prepared to hold that the partition was asked for in good faith. There was no question of the father and the sons finding it inconvenient to live.

25. Point 3.-I have already mentioned that the appellant, as soon as he filed his suit on the promissory notes, obtained an order for attachment before judgment. The question is whether that attachment in any way stands in the way of the partition suit. Partition is not alienation. The result of partition is only this that what was held jointly by several members of the family came to be held in severalty by the same parties. I hold that the attachment does not affect the partition.

26. Point 2.-Now comes the most important point in the case. In view of the fact that it has been strenuously contended on behalf of the respondents that after the partition decree or even after

the filing of the suit for partition, the father's creditor cannot proceed against what is now the sons' separated share in the property, in order to realize simple debts against the father already existing and payable by the father at the date of the institution of the suit for partition, I propose to discuss the point at some length. Personally speaking, the contention of the respondents would seem to be very startling indeed. But for the fact that a contrary view has been taken sometimes. I should have thought that the point was not even open to argument.

27. The position is this. In a Mitakshara joint family consisting of the father and sons, the father may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of the debt: see *Brijnarain Singh v. Mangal Prasad*⁸

28. Their Lordships of the Privy Council have, from time to time, pointed out that this is the rule, although there are two conflicting principles recognized by the Mitakshara Law. One is that the joint family property is meant for the support of the entire family and except in the case of distress, a single member, even the father, cannot dispose of it. The second principle is that it is the pious duty of a son to pay his father's debts, not tainted with immorality. The strict rule of Mitakshara Law would make the son even personally liable to pay the father's debt where there was no family property out of which it might come. The Anglo-Indian Courts have put a restriction to this extreme tenet of law, by laying down (in the case of Bombay, there was a recourse to legislation) that the liability exists only so far as the son's share in the joint family would go and not beyond that. If we just ponder over the reason why the law-givers of old countenanced the two apparently contradictory propositions, the reason would be entirely clear. It is true that the family property is the means of the support of the family and must not be lightly handled by any one of the members of the family. On the other hand, the father of the family, in order that the family might live, must have credit in the market. Otherwise, everybody with whom the family has to deal would know that any loan granted to the family could not be recovered without perhaps the strictest proof that the loan was required for the purposes of the family. The father had to be trusted; otherwise the sons could not be brought up. Credit therefore was given to the father by making it a rule that not only the father shall pay the debt, but so shall the sons. It was believed to be a disgrace that a man should contract a debt and he should die without having made that good. The result was that even the sons and grandsons were called upon to pay the debt of the father and grandfather. The Bengal school of law have improved on this position and have made the father, even where the property is entirely ancestral, the full master of the entire property, in his lifetime.

29. The Mitakshara Law, therefore, being what it is (as quoted above from the latest Privy Council case on the point), the question arises, could the father and sons defeat the substantive right of the creditor to proceed against the family property, by merely agreeing, among themselves, that from a particular moment they would hold the property in severalty and not jointly? The remedy of the creditor to proceed against the entire family property is not a mere

matter of procedure, but it is a substantive right. It is on the faith of the joint family property that the creditor lends money, and although he does not take any charge or mortgage, he knows that he has some security at least for his money. Otherwise, he would not lend it. It would be disastrous, if one fine morning, the father and the sons were to tell the creditor that, on the previous evening, the father and sons had sat together and had agreed that from the next morning they should become separated members and that, therefore, the creditor could recover his money only from what had been given to the father as his share of the joint family property. If as is surely the case, for effecting a partition, mere volition on the part of the members of the joint family is enough, it is necessary to go into Court for the purpose. In such circumstances, there is the debt of the father which, for all practical purposes, was payable out of the property belonging to the father and the sons and there are the debtors, in the shape of the father and his sons. Simply because the debtors agree that they shall no longer be joint, the debt is gone, so far as the sons' share is concerned, which in many cases, would be many times the father's share? Can their proposition be sound?

30. It has, sometimes, been argued that a simple creditor has no charge on the family property and if he be permitted to follow the property, after partition, in the hands of the sons, the Courts will, virtually, be giving the creditor a charge on the property. This argument, in my opinion, with all respect, is entirely fallacious. The family property does not cease to be the family property simply because it has been decided to enjoy it separately by the father and the sons. Only the mode of enjoyment has been changed and not its character or its liability, if any existed. Take the case of a debtor who is not a Hindu governed by the Mitakshara Law. He is an unsecured creditor. If he chooses, the debtor may sell away his entire property, leaving nothing out of which the creditor may realize the debt. If such a debtor dies and if the creditor proceeds against his property in the hands of his son, nobody will ever suggest that the creditor had a charge against the property and he is following up that charge in the hands of the deceased person's son. The result of the doctrine of pious duty of a Mitakshara son to pay his father's debt is, for all practical purposes, the same as to make the father the absolute owner of the property so far as the payment of his personal debts, not tainted with immorality, is concerned.

31. Let us take, again, this case. A father governed by the Mitakshara Law dies while joint with his sons. After the death of the father, the sons divide the family property among themselves. Can it be argued that an unsecured creditor of the father cannot proceed against what was the joint family property in the lifetime of the father, simply because the sons have effected a partition. I suppose such an argument will not find favour with anybody. If such be the case, what difference should it make if a partition be effected in the lifetime of the father himself?

32. If a Mitakshara father contracts a debt, after separation from his sons, there is no liability in the sons to pay their father's debts. The reason is not the separation of the sons but it is this. The pious duty of the sons, to pay his father's debts, has been limited by Anglo-Hindu law to what is the joint family property of the father and the sons. It is this property to which a creditor looks for

payment when he lends money to the father. In the case of a separated father, there is no property in the hands of the father other than what is his own, unshared by anybody else. The father cannot sell his son's divided property to pay his own debt contracted after separation. In the circumstances, although the sons may be under a pious obligation to pay the father's debt, there being no property jointly held by the father and the sons, the property in the hands of the sons is not liable. The creditor, while lending the money, has looked upon the property in the hands of a separated father alone to find out how far he could give his debtor credit.

33. On principle, therefore, it must held and I do hold that what was joint family property in the hands of the father, at the date of his incurring the last one of the debts in question, may be proceeded against by the appellant, although some of the property is now in the hands of the sons, to realize the decree passed against the father.

34. As regards authority, almost all the High Courts have taken the same view as mine, though sometimes after some conflict of opinion. In Madras High Court, for a time, the view of the law was uncertain. The Full Bench case, however, of *Subramaniya Ayyar v. Sabapati Aiyar*⁹ settled the law so far as that Court was concerned. Three learned Judges as against two others held that:

a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a bona fide partition between the father and the sons,

35. The case of *Jagannath Rao v. Viswesam*¹⁰ was approved. It follows that this case overrules the earlier cases in which a contrary opinion was enunciated including the case of *Vinjamampati Peda Venkanna v. Vadlamannati Sreenivasa*¹¹

36. In Bombay the same view was accepted Is in the Madras Court: see *Annabhat v. Shivappa*¹²
One of the learned Judges

Quotes

from Mitakshara and Narad certain passages showing that separation is no cure of the liability to pay the father's debt.

37. In Calcutta the same view was taken in *Kulada Prasad v. Haripada* [1913] 40 Cal. 407(Supra). In this case there was no separation by partition but by the fact that a member of the family became a convert to Christianity. Such a conversion operates, under the law, as a separation and the question was whether the share of the member thus separated was liable for pre-existing debts of the father. It was held that it was liable.

38. In Patna *Ram Ghulam Singh v. Nand Kishore Prasad*¹³ the High Court in a very short judgment following the case in *Vinjamampati v. Vadlamannati*¹⁴ and another in *Krishnasami v. Ramasami*¹⁵ which have since been overruled by *Subramania Ayyar v. Sabapati Aiyar* A.I.R.

1928 Mad. 657(Supra), held that a creditor of a father could not proceed against the sons' shares after partition, to realize a debt which had been incurred by the father before the partition. As this does not appear to be an entirely independent decision by the learned Judges, I do not feel called upon to discuss this case. Its authority is shaken by the fact that the Madras cases on which it relied, have been overruled by the Madras High Court itself.

39. Coming to the cases in our own High Court, we find that in *Sita Ram v. Beni Prasad*¹⁶ a partition took place during the pendency of insolvency proceedings against the father of a joint Hindu family. The sons' share, in spite of the partition was held to be liable to be taken hold of by the receiver to realize the father's debts. The point at issue was stated to have been: Whether a Hindu father is entitled or not to property obtained by his sons on a division of joint ancestral property, when he desires to satisfy his debts out of the proceeds of such property?

40. It was held that he (the father) was so entitled and that, therefore, the receiver was right in seizing the sons' share, for the purpose of realization of the father's debts. In a latter case, however, a contrary view was taken: vide *Gaya Prasad v. Murlidhar*¹⁷ This case proceeds on the view that the liability of the sons existed only so long as the family remains joint and disappears when the family is divided. Ashworth, J., based his opinion on a statement of law contained in Mulla's Hindu law, in the passages quoted by the learned Judge. With all respect for the learned Judge, the statement of law quoted does not bear on the question that was before him and did not purport to consider the case of a separation at a date when simple debts of the father existed. Mulla in his book on Hindu law (Edition of 1929, Edn 6, pp. 343 and 344) discusses the law as to sons' liability to pay the father's debt which existed before the partition. He contents himself with pointing out that the Madras, Allahabad (earlier), Bombay and Calcutta cases take the view that the liability of the sons can be enforced even after partition and that the Patna Court held to the contrary on the authority of Madras cases which have since been overruled. Having held that the liability of the son to pay his father's debt continues only so long as he lives jointly with the father, the learned Judge (Ashworth, J.) proceeds to consider whether Section 53, T.P. Act would apply. Section 53, T.P. Act, had, of course, no application. The other learned Judge hearing the case with him, Kendall, J., thought that if the appellant's contention before them was allowed, it would be tantamount to holding that the personal debt of the father created a charge on the joint family property. With all respect, as I have shown above, there is no question of a charge. The learned Judge purported to follow the case in *Peda Venkanna v. Sreenivasa* [1918] 41 Mad. 136 (Supra) already mentioned and a case in *Krishnasami v. Ramaswami* [1899] 22 Mad. 519(Supra), both of which have been overruled by the Madras Court itself. The case in our High Court was decided on 17th May 1927 and the Madras, Bombay cases were published later; but the Calcutta case and the previous ruling of our own High Court in *Sita Ram v. Beni Prasad* A.I.R. 1925 All. 221(Supra) appear not to have been cited before the learned Judges. There being a conflict of opinion in this Court, we may choose which case to follow.

41. As shown above, this Court in an earlier ease, the Calcutta, the Bombay and the Madras High Courts have taken the same view as I am taking, and the Chief Court of Lucknow has taken the

same view in *Jageshar v. Mani Ram*¹⁸

42. I hold that the respondents' share, separated by the partition, is liable to be sold in execution of the appellant's decree against the respondents' father Babu Ram.

43. I would allow the appeal, set aside the decree of the Court below and dismiss the suit of the plaintiff-respondents with costs throughout.

Cases Referred.

1A.I.R. 1926 P.C. 105 (at p. 526 of 48 All)

2A.I.R. 1924 P.C. 50 at p. 104 of 46 All

3A.I.R. 1928 Mad. 657

4A.I.R. 1924 P.C. 50

5A.I.R. 1914 P.C. 136 (at p. 386 of 35 All.)

6A.I.R. 1925 All. 221

7A.I.R. 1927 All. 714

8A.I.R. 1924 P.C. 50 [at p. 104 of 46 All.]

9A.I.R. 1928 Mad. 657

10A.I.R. 1924 Mad. 682

11[1918] 41 Mad. 136

12A.I.R. 1938 Bom. 232

13A.I.R. 1925 Pat. 688

14[1918] 41 Mad. 136

15[1899] 22 Mad. 519

16A.I.R. 1925 All. 221

17A.I.R. 1927 All. 714

18A.I.R. 1927 Oudh. 180