BOMBAY HIGH COURT

Surajmal Deoram Bhavsar

Vs

Motiram Kalu Wani

(Lokur, J.)

12.06.1939

JUDGMENT

Lokur, J.

1. This appeal raises an interesting question of Hindu Law as to how far a Hindu son is bound by the attachment and sale of his separated share in the family property in execution of a decree passed before his birth against his father for a debt not tainted with immorality or illegality, he being not made a party to the darkhast though it was filed after the partition between him and his father. The facts are simple. The defendant obtained a money decree against the plaintiff's father and another in original Suit No. 795 of 1923 on June 27, 1925. Thereafter the plaintiff was born, and he separated from his father in 1932. At the partition the property in suit was allotted to his share. In execution of the said decree in darkhast No. 778 of 1933 the property in suit was attached and sold by auction. The defendant himself purchased it at the auction on January 20, 1934, and obtained the sale certificate on June 5, 1934. The plaintiff was not a party to the execution proceedings. He filed this suit for a declaration that the defendant acquired no interest in the property in suit by his auction purchase, on the ground that the debt for which the decree was passed was immoral and illegal and not binding on him, that by reason of the property having gone to his share at the partition between himself and his father in 1932, it could not be attached and sold in execution of the decree against his father alone, and that the sale of his property behind his back was void. In the course of the trial, the plaintiff gave a purshis stating that he did not want to press his contention that the debt was illegal and immoral and therefore not binding on him, but he challenged the validity of the auction-sale on the other two grounds. The trial Court left open the question whether the alleged partition of 1932 was genuine and bona fide. Assuming that it was so, the trial Court, in a brief and enigmatic judgment, relied upon the ruling in *Annabhat Shankar-bhat v. Shivappa Dundappa*[1] and dismissed the plaintiff's suit on the ground that as the decree was obtained by the defendant before partition, the plaintiff was bound by the attachment and sale of the property allotted to his share. The lower appellate Court,

however, considered various rulings bearing on the point and came to the conclusion that although the proper course of the decree-holder was to file a separate suit against the soft after he was separated from his father, yet the only objection which the son could urge against the validity of the decree was that the debt for which the decree was passed was illegal or immoral and was not binding on him, and, as the plaintiff had given up that contention by a purshis, there was no reason to set aside the sale. The learned District Judge observed :If the property were not allowed to be sold, then the creditor would have been compelled to file a suit. But the property having been sold, the son has brought the suit. This makes practically no difference. The son has the opportunity to prove that the debt was an immoral or illegal one. He having given up that contention, the sale must stand.

2. On this ground the decree of the trial Court was upheld and the appeal was dismissed with costs.

3. Under the Mitakshara law a Hindu son is under a pious obligation to pay his father's debt which is not immoral or illegal, and which was incurred before his birth or when he was still joint with his father. The five rules laid down by the Privy Council in *Brij Narain v. Mangla Prasad* [2] have authoritatively settled that in a joint Hindu family governed by the Mitakshara, and consisting of a father and his sons, the whole of the joint family property is liable for the father's debts, which are not illegal or immoral, whether they are secured or unsecured, whether they were incurred by the father for his own sake or for the benefit of the family, whether the sons are minors or adults, and whether the father is living or dead. This doctrine of the son's pious obligation to pay off his father's debts, though he may not have derived any benefit from them, and though they were not incurred for any family necessity, is seemingly so unjust that in *Subramania Ayyar v. Sabapathy Aiyar*[3] Coutts-Trotter C.J. condemned it as " an illogical relic of antiquity unsuited to any but a primitive and patriarchal society." With profound respect I may point out that this doctrine does not owe its origin solely to the religious and moral obligation of the son to save his father's soul from the sin of indebtedness. In that case the pious duty would be unlimited, irrespective of any assets, and would arise only when the father died and his soul was in jeopardy. Moreover, this pious obligation on the son would not confer a right upon the father's creditor to compel him to discharge it. The obligation is, in fact, the natural consequence of the right which the Mitakshara confers upon a Hindu son to acquire by birth an interest in the ancestral family property, and thereby curtail the value of his father's credit. Judicial decisions have all along taken this as the real basis of the son's pious obligation, and have accordingly held it to arise even during his father's lifetime, but to be limited to the extent of the assets received by the son. In *Nanomi Babuasin v. Modhun Mohun*[4] Lord Hobhouse referred to this right and this obligation and observed (p. 35) :There is no question that considerable difficulty has been found in giving full effect to each of! two principles of the Mitakshara law, one being that a son takes a

present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father.

4. His Lordship further says (p. 35):Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality.

5. In these circumstances, the judicial decisions have endeavoured to take an equitable view in each case and to enforce the son's pious obligation in such a manner as not to work a hardship either on the son or on the father's creditor as far as possible; and I respectfully agree with the remark of Coutts-Trotter C.J. that we should apply the doctrine of the son's pious obligation " within the limits made binding upon us by the decisions and should refuse to go a step further," Subramania Ayyar v. Sabapathy Aiyar.

6. It is out of such an equitable consideration that a son is not required to pay off as a pious duty the debts contracted by his father after his separation from him by partition. The partition, however, does not affect his liability for debts incurred by his father before the partition. So long as the father and the son are joint, the son's interest in the joint family property may be attached and sold in execution of a decree obtained against the father alone, if the debt was not immoral or illegal and the son was, therefore, under a pious obligation to pay it. Such a sale is binding on the son, though he was not a party to the suit or to the execution proceedings, if the sale took place when he was still joint with his father *Suraj Bunsi Koer v. Sheo Persad Singh*[5] *Nanomi Babuasin v. Modhun Mohun*[6] *and Dattatraya Vishnu v. Vishnu Narayan*[7] It is also well settled in this province that even after partition, a separated son is liable for his father's pre-partition debts which are not illegal or immoral *Annabhat Shankarbhat v. Shivappa Dundappa*[8] There is, however, some uncertainty regarding the procedure to be adopted by the creditor to enforce that liability. If he files a suit against both the father and the son and obtains a decree against them, then there is no difficulty. He can execute the decree against both and have their shares attached and sold for the satisfaction of his decree. But if the son is not a party to the creditor's suit, different considerations arise according as the partition takes place before the institution of the suit, or during the pendency of the suit, or after the decree is passed against the father. It is obvious that if the creditor files his suit after the partition between the father and the son, he must implead the son also as a party to the suit if he wants to proceed against; his share, since the father ceases to represent the son after the partition. On the same reasoning, if a partition takes place during the pendency of the suit, the father will not represent the son after the partition, and the son ought to be implead-ed if the decree is to be executed against his separated share. If the

son is not a party to the decree, nor represented by his father at the date of the decree, as he would not be after the partition, the decree would not be binding on him, though he might be liable for the debt. In Venkatanarayana v. Somaraju (1937) Mad. 880 F.B. a full bench of the Madras High Court seems to have taken the view that if a suit is filed before partition, the father continues to represent the son till the decree, in spite of a partition during the pendency of the suit, and the decree passed against the father is binding on the son. This point does not arise in the present case and need not be considered further.

7. If a suit is filed against the father alone and a decree is passed against him before partition, or as in the present case, even before the son is born, the entire family property is, prima facie, liable for the satisfaction of the decree. It is, however, open to the son to contend that he is not bound by the decree on the ground that the debt for which it was passed was immoral or illegal and that he was not under any pious obligation to pay it. He may do so either in execution proceedings or in a separate suit. If the decree is executed and the property is sold before the son is separated from him, the father evidently represents the son in the execution proceedings also and the sale is binding on the son, unless he gets it set aside by proving that he was not bound by the decree for the aforesaid reason. But different considerations arise if the son becomes separated after the decree is passed against the father, and the decree is sought to be executed against the son's share after the father has ceased to represent the son. In Annabhat v. Shivappa, relied upon by the trial Court, the son was also a party to the suit filed for the recovery of the father's trade debts. The son separated from the father after the institution of the suit, and it was held that the son was liable for the debt in spite of the partition. The decree was passed against both the father and the son, Thus, all that the case lays down is that the son cannot escape liability for his father's debt by resorting to the device of a partition. There is a divergence of the opinion among the different High Courts as to the procedure to be followed by a creditor if he has obtained a decree against the father alone, and the son has separated from the father after the decree. I am not aware of any ruling of the Privy Council or of this High Court directly dealing with this question, so that I am at liberty to consider it from a broad point of view based on general recognized principles. Before doing so, I shall refer to the views of the different High Courts.

8. At one time the Madras High Court denied altogether the separated son's liability for his father's pre-partition debts. In *Krishnasami Konan v. Rama-sami Ayyar*[9] a creditor who had taken a promissory note from the father alone in 1890 for a debt which was neither illegal nor immoral filed a suit in 1893 and obtained a decree against him alone. There was a bona fide partition between him and his son in 1891, and it was held that the house which had fallen to the share of the son could not be attached and sold in execution of the decree against his father. Subramania Ayyar and Davies, JJ. observed that (p. 521) "... property taken by the son in partition cannot be

seized on account of such unsecured personal debt of the father, even though the debt had been incurred before the partition." This proposition is too wide and is opposed to the principle laid down in Annabhat's case. It was rightly distinguished in *Ramdchandra Padayachi V. Kondayya Chetti*[10] on the ground that the suit had been brought against the father alone after the partition. Ramachandras case and the case of *Jagannatha Rao V. Visvesam*[11] distinctly lay down that where a bona fide partition between a Hindu father and his son omitted to provide for an unsecured debt incurred by the father, not being for an illegal or immoral purpose, the creditor can sue the son also and recover the debt from the joint family properties allotted to the son's share at the partition.

9. The ruling of the full bench in Subramania Ayyar v. Sabapathy Aiyar is to the same effect. It accords with the decision in Annabhat's case, and lays down that a decree obtained against a Hindu father and his sons after partition, in respect of a personal debt contracted by the father before partition, may be executed against the sons, even during the lifetime of their father, to the extent of the joint family property allotted to them at the partition. But the decision dealt only with a case where the sons also were parties to the decree.

10. In *Kameswaramma v. Venkata Subba Row*[12] the father had stood surety in certain execution proceedings and had become liable for the amount when the decree under which the execution had proceeded was reversed. His family land was attached and his son objected that as it had fallen to his share at a subsequent partition, it was no longer liable for his father's debt. It was held that though the son was liable for his father's surety debt incurred before the partition, after the partition the property of his share could not be attached and sold in execution of a decree to which he was not a party. The ratio decidendi was that after the partition the father himself had no right to sell the property of his son's share, and the judgment-creditor could not claim any higher right. The point, however, did not directly arise in that case, since there was no decree even against the father; but the decree against another was sought to be executed under Section 145 of the Civil Procedure Code, as the father had stood surety for the judgment-debtor. Yet in Bapiraju v. Sreeramulu , Walsh J., sitting singly, relied upon that case and held that where there has been a partition subsequent to a decree obtained against the father only, the property which has fallen to the sons in the partition cannot be attached in execution of that decree. He observed (p. 663):It is quite one thing to say that in a suit in which the sons have been impleaded, the property which has fallen to them in partition may be attached for a prepartition debt of the father which is binding on them, and another thing to say that where they have not been so impleaded in the suit the property which has fallen to them in partition can be proceeded against.

11. In *Thirumalamuthu v. Subrammia*[13] Varadachariar J. (sitting alone) took the same view, and went even a step further, holding that the same result would follow even if the partition, though

genuine, was fraudulent and intended to defeat the decree-holder.

12. The trend of these decisions of the Madras High Court is that though the son may be liable for his father's pre-partition debt, a decree for that debt passed against the father alone before partition cannot, after the partition, be executed against the property allotted to the son's share. But the authority of these decisions has now been considerably shaken by the doubt expressed by Venkatasubba Rao and Venkataramana Rao JJ., about the correctness of this view, in the full bench case of *Venkatanarayana v. Somaraju*[14] In that case the son having separated from the father after the decree, his separated share was held liable to attachment and sale in execution of that decree, though it was passed against the father alone, on the ground that the debt had been incurred for the benefit of the family, that the father, as the manager of the family, represented in the suit all the coparceners including his son, and that the decree was, therefore, binding on all of them. A preliminary decree for mesne profits had been passed when the son was joint with the father, but before the decree was made final he was separated from him. Yet the decree was held binding on him and was allowed to be executed against his separated share in the joint family property. Venkatasubba Rao J. observed (p. 894):

The reason for holding that the members not joined should be held liable is, that they are substantially parties to the suit through the manager, in other words, they are sufficiently represented, though not eo nomine parties on the record. It follows from this that the decree can be executed not only against the parties whose names appear but also against those who must be deemed to be constructive parties. In this view it is immaterial whether the family continues to remain joint or became divided.

13. This principle applies a fortiori when the manager against whom the decree is obtained happens to be the father, and the coparcener not im-pleaded happens to be his son under a pious obligation to satisfy that decretal debt.

14. The liability of the sons which has arisen under a decree passed before the partition between the father and the sons and the corresponding right of the creditor to recover his decretal amount out of the entire property cannot be affected by a partition which the father and the sons may choose to effect and to which the creditor is not a party. This was the view taken by a full bench consisting of five Judges of the Allahabad High Court in *Bankey Lal v. Durga Prasad*[15] In that case the father and the sons separated during the pendency of insolvency proceedings against the father. The father was adjudicated an insolvent and it was held that the partition did not affect the receiver's right to sell the property allotted to the sons for the satisfaction of the insolvent's debts which they were under a pious obligation to pay.

15. The final decision in the case of *Raghunandm v. Moti Ram*[16] is rather misleading. One

Shambhu Dat, the managing member of a joint Hindu family consisting of himself and his three sons borrowed Rs. 700 from Moti Ram in 1922. He and his sons separated in August, 1926. It is not clear when Moti Ram filed his suit, but he obtained a decree for his money against Shambhu Dat alone in December, 1926, that is to say, after the partition. In execution of the decree, Moti Ram sought to attach certain cattle which had been allotted to the share of one of the sons, on whose obstruction the attachment was raised. Moti Ram filed a suit for a declaration that the animals were liable to be attached and sold in spite of the partition. The appeal first came before Pullan J., who referred to a full bench the question of the sons' liability after the partition. The full bench, while holding that the sons were liable after partition for a pre-partition debt of their father, did not deal with the point which arises in the present case, namely whether the creditor is entitled to proceed against the sons' separated share in execution of a decree obtained against the father alone. When the case went back to Pullan J., however, he assumed that the full bench had intended to decide that question also in the affirmative. He, therefore, held that the animals were liable to be attached and sold. With all respect, the assumption made by Pullan J. is not warranted, since; there is no discussion of this question in the judgments of the learned Judges of the full bench. The full bench merely decided that the sons were liable for the pre-partition debts of the father, and not that they were bound by the decree obtained against the father alone after the partition.

16. The same question arose in *Atul Krishna Roy v. Lola Nandanji* [17]and was referred to a full bench. It was held that a decree for pre-partition debts passed against the father alone after he separated from his sons cannot be executed against the separate share of the sons, though the sons be liable for those debts.

17. In *fawahar Singh v. Parduman Singh*[18] the separated share of the son was held liable for the decree obtained against the father alone before the partition, the debt being neither immoral nor illegal.

18. This question was considered by the Nagpur High Court in two recent cases, and was decided against the creditor who had obtained a decree against the father alone. In Firm Govindram Dwarkadas, *Bombay v. Nathulal*[19] the learned Judges observed (pp. 18-19) :Partition severs the sons' interest from that of the father and with it the father's saleable interest in the sons' share also comes to an end. When a creditor of the father obtains a decree against him alone while he is joint with his sons he is entitled to execute that decree against the sons' interest as well, for the reason that under Section 60 of the Civil Procedure Code all saleable property ' belonging to the judgment-debtor or over which or the profits of which he has a disposing power which he may exercise for his own benefit' is liable to be attached and sold in execution of a decree against him. That Section presupposes that the judgment-debtor is capable of exercising his disposing power

on the date of the attachment... It is clear therefore that the creditor's right to proceed against the sons' share in execution of a decree obtained against the father alone must cease when the father's authority to sell the sons' share is terminated as a consequence of the partition.

19. In that case, however, the decree was passed against the father after his sons had separated from him. But in the more recent case of *Jainarayan Mulchand v. Sonaji*[20] the same principle was applied, even though the decree against the father was passed before his sons separated from him, and it was held that under Section 60(1) of the Civil Procedure Code, the son's share could not be attached in execution of the decree, as the father, who was the only judgment-debtor, had ceased to have any interest in or disposing power over it.

20. With all deference, I prefer to take a different view. It is well settled that a decree for the father's debt which is not immoral or illegal, passed against the father alone, is binding on his undivided son, and the entire joint family property is liable for its satisfaction. As observed by Lord Thankerton in *Sat Narain v. Das*[21] the father's liability is a liability of the joint estate, so that when a money decree is passed against the father alone, the entire joint estate, including his undivided son's share, is liable to satisfy it. If so, can that liability be affected by a mere alteration in the mode of the enjoyment of that property behind the back of the decree-holder? The son cannot be allowed to say at his sweet will, " My share was liable under the decree yesterday ; but to-day I have chosen to enjoy that share separately, and therefore, it is no longer liable." Of course, if the decree was passed after he separated from his father, it is not binding on him, as his father did not represent him in the suit. What Venkatasubba Rao J. said in the full bench case of Venkatanarayana v. Somaraju, about a decree against the manager of a joint Hindu family, applies a fortiori to a decree against a father in a joint family consisting of himself and his sons. Ordinarily, a decree cannot be executed against the property of one who was not a party to the suit or who was not represented in the suit. But in the case of a joint Hindu family, the manager represents all the coparceners and, therefore, a decree passed against him in respect of a debt incurred for the benefit of the joint family is binding on all the coparceners. The difference when the coparceners are the sons of the manager was referred to in *Suraj Bunsi Koer v. Sheo Prasad Singh*[22]. Their Lordships observed (p. 100) :the rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu Law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate.

21. This is emphasized in the first two propositions laid down by Lord Dune-din in Brij Narain's

case. The second proposition takes it for granted that in a joint family the father is ipso facto the manager of the undivided share of his sons. The fact that a decree for the father's debt (which is not illegal or immoral) passed against the father is binding on the sons, if passed when they were joint, but is not binding on them if passed after their separation, although in both the cases the entire property is liable for it in spite of the partition (as held in Annabhat's case), shows that in the former case the father represented his undivided sons, while in the latter, he could not represent his separated sons. On this point I respectfully agree with the following observation of Niamat-ullah J. in *Kishm Sarup v. Brijraj Singh*[23]

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.

22. The principle behind this reason is to be found in the observations of the Privy Council in *Sat Narain V. Behari Lal*[24]*(p. 30)* :When the decree which was executed was made in a suit to which the sona were not parties and the property sold was the joint property of the father and the son, the sale was good on the principle of Hindu Law that it is the pious duty of a Hindu son to pay his father's debts unless it is shown that the debt in respect of which the decree was made was contracted by the father to the knowledge of the lender for the purposes of immorality.

23. In some cases, e.g., *Krisknasami Konan v. Ramasami Ayyar*[25] the reason given is the father's power to dispose of the entire joint family property including his son's share for the satisfaction of his debts which are not immoral or illegal.

24. These three reasons are correlative and go hand in hand. The father can represent his undivided son, because he has the power to dispose of the son's share also for his own debt, and he has such power because the son is under a pious obligation to pay that debt. But if that debt is tainted with illegality or immorality, there is no obligation on the son, and hence the father has no power to dispose of the son's share for the payment of that debt, and hence in a suit filed by the creditor to recover it, the father cannot be deemed to represent his son, so that the decree against the father alone will not be binding on the son. In this connection the remarks of Niamat-ullah J. in *Kishan Sarup v. Brijraj Singh* [26]If the sons establish in a suit of their own that the debt, for which a decree was obtained against 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.

25. Thus there are two conditions to be fulfilled before a decree passed against the father alone for his personal debt can be binding on his sons, namely, that the debt should not have been incurred for illegal or immoral purposes, and that the father and the sons should be joint in estate at the date of the decree. In such a case the sons are deemed to be constructively parties to the suit through their father, though not eo nomine parties on the record. They can escape from their liability under the decree only by proving, either in a separate suit or in execution proceedings, that the debt for which the decree was passed was not binding on them. Till then the decree is binding on them to the extent of their share in the joint family property, though there is no charge on that share. The decree which is thus binding on the sons does not lose its character by a subsequent partition between the father and the sons. It will be meaningless to drive the decree-holder to file a separate suit against the sons, merely because they have changed the mode of enjoying the property which was till then liable under the decree. If the decree was binding on the sons at the date it was passed, Section 60(1) of the Civil Procedure Code does not alter the position after the partition. That Section tells us what property can be attached and sold in execution of the decree, but the words " belonging to the; judgment-debtor, or over which, or the profits of which, he has a disposing power ", should not be construed too narrowly. According to Section 2(10) of the Code, "judgment-debtor" means " any person against whom a decree has been passed or an order capable of execution has been made." If at the date of the decree against the father, the sons were bound by it and were therefore parties to it through their father, they must be deemed to be constructively " judgment-debtors." Hence, even after partition, their shares, though separately held by them, are liable to be attached and sold under Section 60(1). In this connection, the following pertinent remarks appear in Mayne's Treatise on Hindu Law and Usage (10th edn., 1938, p. 440) :All that the sons can claim is that not being parties to the suit, they ought not to be barred from trying the nature of the debt in execution proceedings. Subject to it, the decree against the father before partition makes it a liability of the joint estate enforceable in execution against all who were constructively parties to the suit and decree. On the view that the, decree is to be treated as one against the sons also, it will continue to be one against them, notwithstanding the subsequent partition and there may be no difficulty created by Section 60(1) of the Civil Procedure Code.

26. I entirely agree with this view ; and it makes no difference if the son was not even bom when the decree was passed. The father then represented the whole family, and the decree would be binding on all his sons, including those who subsequently came into the family, whether by birth or by adoption.

27. So far I accept the arguments advanced by Mr. Desai on behalf of the respondent. But the matter does not rest there. It is true that the appellant has given up the main ground on which such a decree is to be impeached, namely, that the debt for which it was passed was illegal or

immoral; but he has impeached the validity of the auction sale on the ground that he was not a party to the execution proceedings and that the sale was held behind his back. This objection must, I think, be upheld. If the father was still joint with the son when the sale took place, he would have represented him in the execution proceedings also, and the son could not then challenge its validity except on the ground that the debt itself was not binding on him. But after the partition, the father could not represent his separated son, and though the son was constructively a judgment-debtor, he should have been joined as a party to the execution proceedings, if his separated share was to be attached and sold. As the decree was more than a year old, a notice to the judgment-debtor under Order XXI, Rule 22, of the Civil Procedure Code, was necessary. If there are more than one judgment-debtors, a notice must be given to that judgment-debtor whose property is sought to be seized in execution. Since the decision of the Privy Council in *Raghunath Das v. Sundar Das Khetri*[27] it is well established that in the absence of a notice under Order XXI, Rule 22, the sale in execution is altogether void, and not merely voidable *Raja-gopala Ayyar v. Ramanujachariar*[28] This view was held by this Court even before the ruling of the Privy Council *Parasram v. Balmukund* [29] It is quite possible that at the partition the son may be kept in ignorance of the decree against his father, and before his separated share is seized and sold, he must be given an opportunity of saving it by paying off the decretal amount. The decree-holder's omission to join him in the darkhast deprived him of that opportunity, and he is not bound by the sale thus held behind his back.

28. The conclusion to which I am led by all this discussion may be thus summarized :

(1) Under the Mitakshara law, a Hindu son is under a pious obligation to pay his father's debt (not immoral or illegal) incurred when they were joint, and this obligation continues even after a partition between them, but is limited to the extent of his share in the joint family property.

(2) The son is not liable for a debt contracted by the father after partition.

(3) A decree against the father alone, passed when he was joint with the son, is binding on the son even after partition, though it is open to him to impeach it, either in! execution proceedings or in a separate suit, on the ground that the debt for which the decree was passed was incurred for immoral or illegal purposes.

(4) So long as the father and the son are joint, such decree may be executed against the father alone and the entire joint family property including the son's share may be attached and sold for the satisfaction of the decree, subject to the son's right to oppose the attachment and sale or have them set aside on the aforesaid ground.

(5) If such decree is to be executed after the son has separated from his father, the son must be

made a party to the execution proceedings, if his separated share is to be proceeded against. Otherwise its sale will not be binding on the son.

(6) A decree passed after partition against the father alone for his pre-partition debts (though not immoral or illegal) is not binding on the separated son. After partition, a decree must be obtained against the son, if his separated share is to be held liable.

29. The result is that if the appellant was really separated from his father after the decree, then the sale of his property held in execution proceedings to which he was not a party and of which no notice was given to him is void and not binding on him. But the trial Court has not decided the question whether the alleged partition is proved. Mr. Desai for the respondent pointed out that as no arrangement was made for the payment of legitimate debts, the alleged partition is only colourable and intended to defeat the creditors. This question has not been fully considered by the trial Court, though some such opinion has been expressed by it in para. 12 of the judgment. The case must, therefore, be sent back to the trial Court.

30. The question that next arises is whether the remand should be under Rule 23 or Rule 25 of Order XLI of the Civil Procedure Code. If the suit is held to have been disposed of on a preliminary point, then the remand can be under Rule 23 of Order XLI. The contention of the plaintiff was that the sale of his property was not binding on him as there was a partition between him and his father, and the property had been allotted to his share before the execution of the decree against his father was taken out. The learned Subordinate Judge did not go into these questions and dismissed the suit after hearing arguments on a point of law only. He effectively cut short the trial by misreading a ruling of this Court, and holding that, even if both these questions of fact were decided in favour of the plaintiff, he had no cause of action in view of that ruling. The learned Subordinate Judge deliberately shut out the evidence about the partition and observed in his judgment that if his view of the point of law be found to be wrong, the parties must be allowed to adduce evidence. The suit is in fact dismissed on the ground that on the plaintiff's own showing there is no case for the defendant to answer in view of the ruling in Annabhat's case. As observed by Schwabe C.J. in *Raman Nayar v. Krisknan Nantbudripad* [30] the only meaning that can properly be given to the words " preliminary point" in Order XLI. Rule 23, is " any point the decision of which avoids the necessity for the full hearing of the suit." In *Jeshankar v. Bai Divali* [31]where a case was wrongly decided owing to a misunderstanding of Sections 107 and 108 of the Indian Evidence Act, it was held that the case could be properly regarded as a wrong disposal on a preliminary point, and the suit was remanded to the original Court to be tried afresh. Where a suit is decided only on the strength of a finding on a point of law, and the questions of fact have not been tried or decided by reason of that finding, the suit can be deemed to have been disposed of on a preliminary point, and if that finding be set aside in

appeal, it is open to the appellate Court to remand the suit under Order XLI, Rule 23, of the Civil Procedure Code.

31. I, therefore, set aside the decrees of the lower Courts, and remand the suit to the trial Court for disposal according to law in the light of this judgment. Both the parties will be at liberty to adduce their evidence. The respondent shall pay the appellant his costs in this Court and in the lower appellate Court, and bear his own.

Cases Referred.

1(1928) I.L.R. 52 Bom. 376 : S.C. 30 Bom. L.R. 539
2(1923) L.R. 51 I.A. 129 : S.C. 26 Bom. L.R. 500
3(1927) I.L.R. 51 Mad. 361 F.B
4(1885) I.L.R. 13 Cal. 21 P.C
5(1879) I.L.R. 5 Cal. 148 P.C
6(1885) I.L.R. 13 Cal. 21 P.C
7(1911) I.L.R. 36 Bom. 68 : S.C. 13 Bom. L.R. 1161
(1908) I.L.R. 32 Bom. 572 : S.C. 10 Bom. L.R. 752.8(1928) I.L.R. 52 Bom. 376 : S.C. 30 Bom. L.R. 539
9(1899) I.L.R. 22 Mad. 519
10(1901) I.L.R. 24 Mad. 555
11(1924) I.L.R. 47 Mad. 621
12(1914) I.L.R. 38 Mad. 1120
13(1937) A.I.R. Mad. 458
14(1937) Mad. 880 F.B
15(1931) I.L.R. 53 All. 868 F.B
16(1929) A.I.R. Outh 406 F.B
17(1935) I.L.R. 14 Pat. 732 F.B
18(1932) I.L.R. 14 Lah. 399
19(1938) Nag. 10
20(1938) Nag. 136
21(1936) L.R. 63 I.A. 384 : S.C. 38 Bom. L.R. 1129
22(1879) L.R. 6 I.A. 88
23(1929) I.L.R. 51 All. 932 (p. 954)
24(1924) L.R. 52 I.A. 22 : S.C. 27 Bom. L.R. 135 and 140
25(1899) I.L.R. 22 Mad. 519
26(1929) I.L.R. 51 All. 932 are quite apposite (p. 954)
27(1914) I.L.R. 42 Cal. 72 : S.C. 16 Bom. L.R. 814
28(1923) I.L.R. 47 Mad. 288 F.B
29(1908) I.L.R. 32 Bom. 572 : S.C. 10 Bom. L.R. 752
30(1922) I.L.R. 45 Mad. 900 F.B
31(1919) I.L.R. 22 Bom. 771