BOMBAY HIGH COURT

Ganpatrao Vishwanathappa

Vs.

Bhimrao Sahibrao

Second Appeal No. 11 of 1945, in Appeal No. 136 of 1943

(Bavdekar and Jahagirdar, JJ.)

21.09.1948

JUDGMENT

Bavdekar, J.

1. This is an appeal from a suit filed by the appellant to recover possession of certain lands which ha had purchased in execution of a decree which he had obtained against one Sahebrao Patil, the father of the respondent. It is no longer in dispute that at the time when the appellant obtained the decree against Sahebrao, Sahebrao and his two minor sons, one of whom subsequently died, were members of a joint Hindu family. Under the view of this Court, which has differed in this regard with other High Courts in India, the whole of the joint family property including the sons' interest therein was liable to be brought to sale in execution of the decree against Sahebrao, notwithstanding any partition which may have taken place after the date of the decree. It appears that after the date of the decree the appellant brought to sale the whole of the joint family property and himself purchased it in execution, the sons, who were minors, not having appeared to contest the execution. But, in the meanwhile, the song who were minors brought a suit for partition against their lather, and as a result of this suit they obtained a decree. The suit from which the present appeal arises was brought by the plaintiff for possession of the property which he had purchased in execution of his own decree, and to this suit he made one of the minor sons a party, the other having died prior to the filing of the suit. The respondent, the other minor son, took up a contention that the debt in respect of which the joint family property was sold was contracted by Sahebrao for an illegal and immoral purpose and the decree in that suit and the auction sale in execution were not binding on his share in the properties. He also contended that the auction sale was affected by the principle of lis pendens. Upon this point the defendant failed, and the learned trial Judge came to the conclusion that the plaintiff-appellant purchased in the execution sale only the one-third interest of the father, because prior to the sale there had been effected a partition between the father on the one hand and the sons on the other by the filing of the suit. By partition, of course, the learned trial Judge meant a severance of the status of the joint family. He held that consequently the minor sons should have been made parties to the execution proceedings and inasmuch as the plaintiff-appellant had failed to do so, all that passed by the execution sale was one-third interest of the father. In doing so, he has followed the decision of a single Judge of this Court in *Surajmal Devram v. Motiram Kalu*[1], and when

[1]41 Bom LR 1177 : AIR 1940 Bom 22
the appellant went in appeal to the learned District Judge, the learned District Judge relying upon the game case dismissed the appeal.

2. The plaintiff-appellant has come in second appeal, and this matter has now referred to us because subsequent to the decision in Surajmal's case, 41 Bom LR 1177 : AIR 1940 Bombay 23 there was reported a case, again of another single Judge, in *Tammanji Govind v. Abdul Rahim*[2], It was held in that case that members who are united at the time a joint family liability is incurred were not absolved from their liability by the fact that they had become subsequently divided. Consequently, an objection by the sons that they had not been parties to the execution proceedings, and consequently the Court was not entitled to sell their interest was not maintainable.

3. Now, the proposition of Hindu law that in a joint Hindu family governed by the Mitakshara and consisting of a father and sons the whole of the joint family property is liable for the father's debts provided they are not tainted by illegality or immorality may now be taken to have been established beyond any possibility of dispute, and all the High Courts have held unanimously that where the sons and the father continue to be joint, the creditor may sue the father alone and obtain a decree against him, and he may execute the decree not only by attachment and sale of the interest of the father but also by attachment and sale of the entire interest of the father as well as the sons in the joint family property, and the sons will be bound, though they were not made parties to the suit or to the execution proceedings unless the debt was contracted by the father for an immoral or illegal purpose. The sons are entitled to intervene both before the sale and after the sale, and in case they show that either there was no debt of the father or it being assumed that there was no partition there was a debt but it was incurred for as immoral or an illegal purpose, then the sale will not bind their interest. The difference is as to what happens in case the creditor having obtained a decree against the father when the father and the sons are still joint the sons separate after the obtaining of the decree. One view has been that in such a case the creditor must bring another suit against the sons, obtain and decree against them which would be limited to the shares allotted to them on partition, and then attach and sell the shares, unless the partition was made with intent to defraud the general body of creditors, in which case the decree may be executed against the joint family property. But the other view which, as I said above, has been established now in this Court is that if there is a partition after the decree the decree may be executed notwithstanding the partition against the whole of the family property including the sons' interest therein. To an application for execution in such a case the sons are obviously props parties, and if they are made parties and after hearing their contentions as to whether their interest should or should not be sold the property is sold, than the sons will be bound by the sale. If, on the other hand, after hearing their contentions the Court comes to the view that the sons' interest was not liable to be sold in execution, then the sons' interest will not be sold. The question which has been raised in the present appeal is what happens in cage after the partition the sons are not made parties to the suit, and the creditor brings to sale nevertheless their interest, and purchases it himself. Now, in order to determine what happens in such a case it would be worthwhile to examine first why it has been held in this Court that a decree obtained before the partition against the father may nevertheless be executed against the sons after the partition, but only provided the sons fail to show that the debt was not binding upon them. The view proceeds on the ground that in the

[2]47 Bom LR 884 : AIR 1946 Bom 105

decree which was obtained by the father the sons are represented by the father there having been no partition when the decree was obtained. It has got to be remembered that a creditor can bring to sale interest of the sons in the joint family property because a debt binding upon the father is the liability of the joint estate : *Sat Narain v. Srikishen Das*[3], he cannot bring to sale in execution of a decree for debt incurred by the father eve a before partition the separate property of the sons. The view which, therefore, has prevailed in this Court is that to the extent that the father can represent the interest of the sons the decree obtained when the father and the sons were separate would be taken to have been obtained against them and that means to the extent of the whole of the property of the erstwhile joint family consisting of the father and sons : *Chanmahappa v. Vannaji*[4],

4. It appears to us that if that is the case, then it most follow logically that a decree obtained against the father alone cannot be executed against the sons' interests after partition without making the sons parties to the execution proceedings. It is true that the decree can be executed against their interest; but the question is whether the decree can be executed a against their interest without making them parties, and the proposition of law which we regard as very well established is that in case a creditor wants to bring to sale the interest of a particular person, that person must be represented in the execution proceedings. That proposition will be found laid down by their Lordships of the Privy Council in the case of *Khairajmal v. Daim*[5], It was not a case of a joint Hindu family; nor was it concerned with the case of a decree which had been obtained against the father when the sons were not represented; but what happened in that case was that the lands in that suit were held by the plaintiffs under leases granted by Government for terms of seven years, and renewed from time to time. To a suit brought in 1897 for redemption of the lands which had been mortgaged is 1878 by usufructuary mortgages, the defence was that the defendants were not mortgagees of the property but had purchased it all sales in execution of decrees in 1880-81 which could not be set aside, an that the suit wag barred by lapse of time. It appeared, however, that to the proceedings as a result of which the execution sales took place certain persons who had interest in the property were not made parties. Their interest was not represented are all in those proceedings. It was held that the Court had no jurisdiction to sell the property of persona who were not parties to the proceedings or properly represented on the record. As against such parsons the decrees or sales under them were void without any proceedings to set than aside. Now, when a father and the sons are joint, the father is entitled to represent the sons, so far as the joint family property is concerned. It can be said, therefore, that when the family consisting of father an sons is joint, the son's interest will pass notwithstanding the fact that they were not in their individual capacity made parties cither to the suit or to the execution proceedings. That is, of course, provided the sons are not in a position to show after the sale that there was no debt, or the, if there was a debt, it was incurred by the father for an illegal or an immoral purpose; but the capacity of a manager to represent the family only ensures up to the date of the partition. We find no authority whatsoever for the proposition that the manager of a Hindu family can represent the family or can represent the several erstwhile coparceners after the date of a partition in that family, and it seems to us that it make no difference that the manager is the father and the other coparceners are only his sons. After partition the father cannot represent the interest of the sons any more than a manager who is not a father can represent the interest of the other

[3]63 IA 384 : (AIR 1936 PC 277)
[4]45 Bom LR 457 AIR 1943 Bom 241
[5]32 Cal 296 (32 IA 23 PC)

co-parceners. Consequently, in the execution proceedings as a result of which the plaintiff-appellant brought to sale the sons' interest, the sons were not properly represented. It is true that the view has sometimes been taken that the reason why the property of a Hindu son who is under a pious obligation to pay the debt of his father can be brought to sale by a creditor in execution of a decree against the father alone is the fact that the father is entitled under the Hindu law to sell for payment of his own debts which are binding upon his sons not only his own interest bat also the interest of the sons in the joint family property, and under Section 60, Civil Procedure Code when a decree has been obtained against the father alone, the sons' interest is not indeed the interest of the judgment-debtor, but it is property over which the father, the Judgment-debtor, has a disposing power which he may exercise for his own benefit; but even where that is the view upon which the sale of the interest of a son in execution of a decree against a father is justified, the father would obviously have no power to exercise for his own benefit that power after partition. For example, in *Firm Govindram Dwarkadas, Bombay v. Nathulal*[6], it was pointed out that the creditor's power to bring to sale the property owned by the judgment-debtor or in which he has disposing interest is co-extensive with the power of the judgment-debtor to dispose of his property or property over which he has disposing power. It must follow that when the property ceases to be the property of the judgment-debtor or the judgment-debtor loses his disposing power over it, the creditor's power also cornea to an end and the decree obtained by him becomes incapable of being executed against; it. It is true that the case of Firm *Govindram Dwarkadas, Bombay v. Nathulal*[7], was concerned with the right of the creditor to execute a decree obtained by him against a Hindu father in a suit to which a son was not male a party and which had been filed after there was a partition effected between the son and the father. But that does not affect in any manner the question of principle and that is upto what time the creditor who is entitled to execute a decree obtained against a father can execute it against his sons, and it was pointed out in that case that the father's power to sell the interest of the son must be lost by a partition. It was held that it does not follow there from that the son's pious obligation to pay the debts incurred by the father before partition also came to an end but that was an entirely different matter.

5. It is true that Sen, J. seems to have been inclined to take a somewhat different view in the case of *Tammanji Govind v. Abdul Rahim*[8], That was a case of a mortgage decree which had been obtained by a mortgagee creditor of the father. The decree was payable by instalments, and while some of the amounts due upon the decree still remained un-recovered from the debtor, one of the sons filed a suit against the father, his brother and his mother, the decree-holder and other creditors of the father for partition and a declaration that Govind's debts and his liabilities under the decree were not binding on his share in the joint family property. The partition suit resulted in a decree which gave a declaration that the award decree was binding on the father as well as on the sons. After the date of the decree in this partition suit there was filed by the mortgagee creditor an application for execution against the father only praying that the amount due be recovered by sale of the mortgaged property. A sale was ordered and papers were sent to the Collector, but after the date of the order for the sale and before the property was sold the father died. The sons were brought on the record as the heirs, and they contended that the

[6] ILR (1938) Nag 10 : AIR 1937 Nag 45

[7](ILR (1938) Nag 10 : AIR 1937 Nag 45)

[8](47 Bom LR 884 : AIR 1946 Bom 105)

mortgagee being aware of the decree in the partition suit and the sons not having been made parties to the darkhast filed after the date of the decree he could not proceed against them or their

separate shares in the family property. Reliance was placed in support of this proposition upon the decision of the Madras High Court in the case of *Venkatanarayana v. Somaraju*[9], The creditor relied in support of his contention that he is entitled to bring to sale the sons' interest also on the decision of Lokur, J. which I have referred to above in *Surajmal Deoram v. Motiram Kalu*[10], Sen, J. purporting to follow the case of the Madras High Court held that the members who were united at the time a joint family liability wag incurred were not absolved from their liability by the fact that they became subsequently divided. A creditor is entitled to have recourse to every item of the joint family property so long as it is in the hands of the persons who are under the law liable for his debt. When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division. In doing so he followed, as I have said above, the view of the Madras High Court in the case of *Venkatanarayana v. Somaraju*[11], Now, it appears to us with respect that the case before Sen, J. did not present any very formidable difficulty. The case was a case upon mortgage deed; the mortgage decree was obtained at a time when the father and the sons were joint. It is well established again that both a mortgage decree as well as a money decree which had been obtained against the father when he was joint with his sons can be executed not only against the father's interests in the property but also in the sons' interest in the property in execution of the decree after partition that is, I mean, in so far as Bombay is concerned. The eons did not dispute this proposition of the law. Their only contention was that to the darkhast which was filed after the decree in the partition suit the decree-holder has made only the father as a party, and the eons, as a matter of fact, had not been made parties. It appears to us that the contention of the sons could have been met merely by making the sons parties to the suit. No question of limitation appears to have been raised, inasmuch as if there is a partition after a suit there does not seem to be any period of limitation prescribed for making the sons parties. If there was any objection taken on the ground that the sons ought to have been made parties to the darkhast because after the decree the father was not a person who was entitled to represent the estate and any application to make the sons parties after the objection was taken would be of no avail as on that date a fresh application would be barred, then the objection should have been treated as an objection of limitation. It could easily have been met under the explanation to Article 182. But so far as the question which was raised, namely, that the sons interest could not be sold was concerned, it could be dealt with by a simple answer that the decree having been obtained when the father and sons were still joint, the sons' interest was liable to be sold in execution after the partition provided the sons were made parties to the suit.

6. I shall now come to the case of *Venkatanarayana v. Somaraju*[12], In that case A and his sons B and C were members of an undivided Hindu family. A, for and on behalf of the joint family, purchased certain property which was then subject to a mortgage. Subsequent to the said purchase, the mortgagee brought a suit to enforce the mortgage and impleaded A as the purchaser of the

[9] ILR (1937) Mad 880 : AIR 1937 Mad 610 (FB))
[10] 41 Bom LR 1177 : AIR 1940 Bom 22
[11] ILR (1937) Mad 880 : (AIR 1937 Mad 610 (FB))
[12] ILR (1937) Mad 880 : (AIR 1937 Mad 610 (FB))

equity of redemption. A represented the joint family in that suit. There was a decree for sale and, in execution of the decree, the mortgagee purchased the property, and on the foot of that purchase filed a suit against A, B and C to recover possession of the property and mesne profits. On the plea raised by B and C that they ceased to have any interest in the property by virtue of a partition effected in the joint family in and by which the property fell to the share of At they were exonerated from the suit. At the said partition A obtained the said property for himself and on

behalf of another son, D (a minor), with whom he continued to remain joint. The trial Court dismissed the suit, but the High Court, on appeal, pronounced judgment on 3rd May 1933, decreeing possession to the plaintiff and directing the ascertainment of mesne profits. A decree for mesne profits was ultimately passed on 3rd April 1935. Two months later A and in February 1936 an application was filed to recover the amount by sale of the other properties in D's hands. D resisted the suit on the ground that, during the pendency of the above, mentioned appeal in the High Court, there was a partition between him and his father A, in and by which the suit property fell to the share of his father, and by reason of the said partition the properties which fell to his share could not be rendered liable in execution on the basis of a decree obtained against his father alone. It was held by the Full Bench that the properties of the joint family in D's hands could be proceeded against in execution.

7. Now, the partition during the pendency of the High Court appeal put an end to the joint family and with effect from the date of the partition father A ceased to have authority to represent his son D. The decree for mesne profits was admittedly passed after the partition. It was of no use to the decree holder to contend that the decree by its own force created a debt against his son D which be was bound to pay, because the decree was after the partition, and the debt was, therefore, a post-partition debt.

8. One of the learned Judges seemed to rely in support of his decision upon Sections 50 and 53, Civil Procedure Code; but the other two Judges held that the father could sue and be sued for possession as the representative of himself and his sons, and the decree for mesne profits which was obtained was consequently a decree against the father as the manager of the joint family-property consisting of himself and his son in Venkatasubba Rao, J. dealt with the question of partition brought about pending an appeal in this manner (p. 894) :

> "Lastly, the question remains, does the fact that subsequent to the suit there was a partition make any difference ? 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. As Mayne observes :
> 'All the members of the family, and therefore all their property, divided or undivided, will be liable for debts which have been contracted on behalf of the family by one who was authorized to contract them. Mayne's Hindu law, Edn. 9, Section 333.

In this case the partition was, as already stated, entered into prior to the decree [though long after the commencement of the suit] but that circumstance, as I have held above, makes no difference." It would be seen from this that the question as to whether a partition made any difference or not was answered by Venkatasubba Rao, J. by reference to the passage in Mayne quoted, which, however has merely a reference to the question as to whether if family property is liable for a debt incurred by the family while joint, the liability is affected by a partition. It has no reference to the question whether even if the property is liable it is necessary to obtain after

partition another decree against the persons who were not either eo nomine or otherwise parties to the decree obtained by the creditor. That was one of the grounds upon which in *Kameswaramma v. Venkata Subba Row*[13], the view has been taken that the creditor must bring another suit against the sons, obtain a decree against them and then attach and sell the property which has gone to their shares, the other ground being that owing to the partition at the date of the attachment the father has no power to Bell the interest of the son.

9. On the other hand, Venkataramana Rao, J. while pointing out that the suit having been properly constituted, any severance of status among the several members of the family would not divest the representative character of the manager therein till the other members choose to disaffirm it, was inclined to put it on the ground that it would not lie in the mouth of the son, inasmuch as he was aware of the pending litigation and yet did not make an application to come on the record, to deny the representative character of his father.

10. In my view, the question as to whether a decree obtained against the father alone after the partition could be executed against the sons cannot be answered by reference to the liability of the joint family property whether before or after the partition for all debts binding upon the family. A. decree could be executed against the separated property of the sons only in case the sons were parties whether eo nomine or otherwise to the decree. They could not be said to be parties to the decree if the father did not continue to represent them until the end of the suit. If prior to that there was a partition, the father could not represent them when the decree was passed. With respect, I do not think that there could be an estoppel against the sons in such a case on the ground that he did not apply to be made a party because there was no duty on him under the law to so apply.

11. On the other hand, when there is the devolution of the interest of a defendant or respondent the duty of adding the person upon whom the interest devolves is laid by the Civil Procedure Code on the plaintiff or the appellant.

12. The learned advocate, who appears for the plaintiff-appellant has raised, however, another contention before us, and that is that even if the interest of the sons could not be sold after a partition without making the sons parties to the execution proceedings, in this case there was no severance of status when the minors filed their suit for partition. He contends that a severance of status between the minor sons and the father could not be affected merely by a partition suit filed on behalf of the minors. It is open in such a suit to a Court to refuse to allow the sons to separate from their father. As a matter of fact, the Court has got to consider in such a case whether it is in the interests of the minors that there should be a separation between them and their father. The learned advocate

[13]38 Mad 1120 : AIR 1914 Mad 328

contends that consequently a separation took place between the father and the sons only when ultimately the Court consented in the year 3937 in passing the decree in the minor's suit that the partition should be effected, and in that case, he contends that the sale which in this case took place in 1935 was binding upon the sons because they must be treated as joint with their father at the time of the sale. We find, however, that so far as this aspect of the case is concerned, we are bound by two decisions of this Court, both of division benches. The first decision will be found in *Ramsing v. Fakira*[14], which was followed subsequently in *Rammanagouda v. Shankargouda*[15], The reason of the rule was placed in the earlier case on the ground of the minor being capable

through his nest friend of making up his mind whether there should be a severance of his interest or not when instituting the suit provided that the discretion exercised by the next friend on his behalf was approved by the Court. With respect we are in agreement with the reasoning of the case, which in any case is binding upon us. Mr. Chitale contends, however, that even so, even if it could be said that the partition related back to the date when the minors filed the suit against their father, we should hold that the sale was nevertheless binding upon the minors, because the creditor could not possibly be expected to know what the Court would do. The Court might come to the conclusion that the partition was in the interest of the minors; the Court may come to the conclusion that the partition was not in the interest of the minore; and he says there was no reason why then it should be taken that he was bound to make the minors parties. Now, the argument that the creditor could not possibly know what the Court was likely to do may perhaps be accepted; but it does not follow there from that the sale would be binding upon the interest of the minors. Whether the sale would be binding of not would depend upon the question as to whether the minors' interest was represented in the proceedings as a result of which the execution sale took place. It is not in dispute that if it is held that the severance in status dates back to the filing of the suit, assuming foe example there is a death subsequently, whether of the minor sons or of the father, notwithstanding the fact that such a death took place before the decree, the property would pass by inheritance as if the joint family had come to an end at the date of the partition. This shows that the legal consequence of a separation, even though such a separation is recognised only after the decree is passed, follow upon the footing that the separation had taken place at the date when a suit was filed on behalf of the minors, and in our view, therefore, the legal consequences of a separation must be taken to affect the sale which has taken place without making the sons parties to the execution proceedings. That consequence obviously would be that what would pass as a result of the execution sale would be the interests of the only person having an interest in the property who was properly represented before the Court.

13. It is contended, however, that even if we are not prepared to say that the interests of the sons also passed as a result of the execution sale, inasmuch as the partition in the present case took place after the property was attached by the plaintiff in execution of his decree, the partition was affected by Section 64, Civil Procedure Code, and it was void as against the claims arising under the attachment. How Section 64, Civil Procedure Code, says that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment. The partition in this case was effected as a

[14]41 Bom LR 195 : AIR 1939 Bom 169

[15]46 Bom LR 1021 : AIR 1944 Bom 67

result of a suit which had been filed by the minors against their father. One possible answer, therefore, to Section 64, Civil Procedure Code, is that the partition in this case did not amount to a private transfer. Mr. Chitale says that the partition in this case took place not as a result of the decree of the Court, though under the decree the family properties were divided between the father and the sons; but the partition took place when the minor sons filed a suit after having made up their mind outside the Court to separate. He says that the suit was a judicial proceeding; but the filing of the plaint was not an act which could take away the character of a private transfer from the partition effected by the filing. Now, in our view, it is not necessary to go into this question for the purpose of the present appeal, because what comes in the way of Mr. Chitale's contention that his client obtained by the execution sale the whole interest in the property, that is,

the interest of the father and the sons, is not the partition effected by the decree but is the severance of the status which was effected by the filing of the plaint which wag subsequently approved by the Court. It is not the contention of the respondent defendant that the property which had come to his share in the partition could not be proceeded against by the creditor because the property had gone to his share as a result of the partition. Such an argument can not obviously avail the respondent-defendant anything, because even after a partition the property in the hands of the son is under the view which has prevailed in this Court liable to be brought to sale in execution of the decree obtained against the father alone. It makes no difference, therefore, that there has been a partition in the present case; we are prepared to say that the partition is void under Section 64. But that does not mean that the severance of status which was effected is of no effect. In order to enable Mr. Chitale's client to succeed, he must show that be has purchased as a result of the sale the whole interest. Holding that the partition does not make the least difference, and the property which had gone to the share of the father as well as the property which had gone to the share of the son was liable to be sold notwithstanding the partition will not help Mr. Chitale at all. It must be shown further that what Mr. Chitale's client purchased as a result of the sale was the whole interest in the property, and unless we are prepared to hold that the severance of the status was of no effect, it is not possible to say that Mr. Chitale's client purchased the whole property in execution of his own decree.

14. Mr. Chitale is, therefore, forced to contend that, as a matter of fact, what is void is not merely the partition by metes and bounds, which was effected as a result of the decree in the partition suit, but the partition which was void was the act as a result of which the joint family was severed and the father and the sons became separate in estate. Now, a view has sometimes been taken that if the father and the sons who are members of a joint Hindu family fraudulently effect a partition, the creditors who are entitled to recover from their joint family property the debts due to them are entitled to avoid the transfer ; but even then it does not mean that the creditors are able to say that there has been no severance of the status of the joint Hindu family; it is the choice of the members of the family whether they should remain joint or whether they should separate. If they want to separate, they are not entitled to make a partition of the property in such a manner as to defraud the creditors of the joint family. At a partition provision must be made for the payment of the debts which are due to the joint family, and the partition will be avoided by the creditors as fraudulent if it is shown that no provision is made for debts due to the joint family and the partition was effected in order to defraud the creditors. But as was pointed out by the Madras High Court in *K.S.B.M. Firm v. Subbiah*[16], even when the

[16] ILR (1945) Mad 138 : AIR 1944 Mad 381

creditors can avoid a partition under Section 53, Transfer of Property Act, and proceed against what would be the proper share in the family properties of the father (it being the Madras view that a decree obtained by the father alone cannot be executed against the son's interest after partition), the creditors cannot nevertheless proceed against the son's shares in execution, as the division of status brought about by the partition will stand, notwithstanding the avoidance of the partition as a fraudulent transfer, With respect we are in agreement with the view that even when a partition is brought about in order to defraud a creditor provided only that there is an intention to separate, the severance of the status which has been brought about by the partition will stand. It may be a different case when, as a matter of fact, there is no intention to separate. That means that the partition may not only be a fraudulent transaction; but it may be a colourable or a sham transaction no one having the slightest interest to separate from anybody else. But where the intention to separate is clear whatever the motive with which the separation was effected,

whether the intention was to defraud the creditors or merely to make it more difficult for the creditors to obtain the fruit of their decree in execution, the division of the status which it is within the will of the members of the joint Hindu family to bring about must be given full effect, and as long as that is so, what will pass in the execution sale to which the sons were not made parties when the sales took place after the partition is the interest of the father alone.

15. It is true that in India a creditor's difficulties, as has been well observed, start with the obtaining of the decree, and it is open to a father and sons, as it is open to other members of a joint Hindu family, to effect a separation between themselves without the knowledge of the creditors. It is not necessary that a partition whether between the father and the sons or between the branches of a joint Hindu family should be effected by a document. The partition could be effected without any document being brought into being, and it is obvious that the creditor would have no means of knowing of such a partition in case there is no document and nothing to be registered. To hold, therefore, that a creditor cannot proceed against the sons' interest after partition is making his path to that extent more difficult. But we cannot help deciding so because of the principle that an execution sale cannot be taken to have been effective to transfer the interests of a party when the sale did not take place after proper representation of his interest. It has been well pointed out before now that a creditor is alter all not without a remedy. The law merely permits him to sue a father alone for the debt incurred by him. It similarly permits him in execution of a decree brought against the father when the father was joint with the sons to bring to sale without adding as parties the sons the interest of the father as well as the sons. But if the creditor is apprehensive of a partition after the filing of the execution proceedings, it is open to him where the debt is binding upon the sons, to make parties not only the father but the sons. If he does not do as, he takes a risk, and when we remember that after all what is being enforced against the sons is a pious obligation to pay their father's debts, we see no reason why we should encourage the use of the doctrine further than is absolutely necessary.

16. The view, therefore, which has been taken by Lokur, J., in *Surajmal Deoram v. Motiram Kalu*[17], namely, that in case a creditor wishes to proceed against the interest of the son after partition in execution he must make the son a party, is the correct view to take.

[17]41 Bom LR 1177 : AIR 1940 Bom 22

17. There remains to be considered one argument under Section 62, Transfer of Property Act. The attachment in this case was effected when the father and the sons were joint, and Mr. Chitale contends that the partition having taken place after the date of the attachment, under Section 52, Transfer of Property Act, is affected by the doctrine of lis pendens. Now, Section 52, Transfer of Property Act, will have application only in case it could be said that in the proceedings during the pendency of which the partition took place there was involved a right to immovable property directly and specifically which was dealt with by the partition. Now, it is true that the partition in this case dealt with family property and the creditors sought to bring to sale the family property; but we are not concerned here with a claim petition or an objection taken on behalf of the sons to the sale of the property. The only proceeding which was before the Court was proceeding for execution of the decree obtained against the father, and in our opinion, that is not a proceeding in which any right to the immovable property of the family was directly and specifically involved. The property which was to be sold was the family property; but the subject-matter of the proceeding was the recovery of the monies which were due to the judgment-debtor. Section 52, Transfer of Property Act, had, therefore, no application.

18. The appeal must, therefore, be dismissed. No order as to costs.

Jahagirdar, J.

19. I agree. The only question for consideration in this case is what is the interest that the plaintiff purchased in the auction sale in execution of a decree against the father of the defendant. On 27th July 1935 the plaintiff had obtained a money decree against the father of the present defendant in Suit No. 398 of 1932, and he filed Darkast No. 1227 of 1934 to execute the decree by attachment and sale of the joint family property. In March 1934 the property was attached. But pending the execution proceedings, the two minor sons of the defendant in Suit No. 398 of 1932 filed a suit for partition against their father. Ultimately, a decree was obtained by the sons, and the sons in execution obtained possession of their shares in the land from the plaintiff's tenant. The plaintiff thereupon filed the present suit out of which this second appeal arises for a declaration that he baa purchased the entire property belonging to the father and his two sons and not the interest of the father alone. The sons contended that pending the execution proceedings there was a partition in the family, and that they were not brought on record in the execution proceedings, and as they were not made parties, the properties allotted to their share could not be sold in execution of the decree. This contention was accepted, and it was held that the plaintiff purchased only one-third share in the property which belonged to the defendant and his father. That decree was confirmed in appeal by the District Judge, Jalgaon. He followed the ruling in *Surajmal Deoram v. Motiram Kalu*[18], In that case Lokur, J., had laid down six propositions, and proposition No. 5 is relevant for the purposes of this case :

> "Proposition No. 5 : If such a decree is to be executed after the son has separated from his father, the eon mast 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."

[18]41 Bom LR 1177 : AIR 1940 Bom 22

20. In second appeal it is contended that this ruling of Lokur, J., has not been followed in *Tammanji Govind v. Abdul Rahim*[19], by Sen, J., so far as proposition No. 5 is concerned, and therefore it is urged that this point requires to be reconsidered. Now, in *Brij Narain v. Mangla, Prasad*[20], their Lordships of the Privy Council reviewed the entire law relating to the sons' liability to pay the father's debt and laid down five propositions. The second proposition has a material bearing on the question before us, and it is this :

> "If he (the managing member) is the father and the other members are the sons he 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 that debt."

Now, this pious obligation of the sons to pay the father's debts lasts so long as the liability of the father subsists. If the liability lasts until the father's liability subsists, then it stands to reason to hold that the liability cannot be put an end to by division of the property between the father and the sons. It is, therefore, clear that even after the partition the share that baa been allotted to the sons in the joint family property continues to be liable for the payment of the debt of the father. In this case the sons' share in what was the joint family property before 1934 was also liable to be sold in execution of a decree obtained against the father when the family was joint. But in this particular case what has happened is that at the time when the property was ordered to be sold the father no longer represented the entire joint family, there having been a partition between him

and his sons. It is true that at the time when the darkhast was filed the father represented the entire family and the property belonging to the joint family was attached. But after the darkhast was filed, there was severance in law between the father and the sons and the father ceased to represent the joint family property. So, if it was the intention of the decree-holder to bring to sale the sons' interest also in the joint family property, it was clearly his duty to make the sons parties to the darkhast. It has been held in *Khiarajmal v. Daim*[21],

> "That the Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such, persons the decrees or sales under them were void without any proceedings to set them aside."

The interest, therefore, that passed to the auction-purchaser in the sale was one-third only as the sons were not made parties to the execution proceedings. If the sons had been made parties to the execution proceedings, there is no doubt that the entire interest in the joint family property would have passed to the decree-holder in the sale that was held in 1935.

21. The facts in *Tammanji Govind v. Abdul Rahim*[22], were somewhat different. There the father had executed a mortgage of the joint family property, and the decree-holder had obtained a mortgage decree against the father. After the date of the decree and before execution was taken out, there was a partition between the father and sons. But he filed a darkhast against the father alone to execute the decree by the sale of the mortgaged property and an order for sale of the mortgaged property was also passed. After the order was passed, but before the sale was

[19]47 Bom LR 884 : AIR 1946 Bom 105
[20]51 IA 129 : (AIR 1924 PC 50)
[21]32 Cal 296 : (32 IA 23 (PC))
[22]47 Bom LR 884 : AIR 1946 Bom 105

held the father died and his sons were brought on record. There, the sons contended that they were on record merely as the legal representatives of their deceased father and not in their individual right as sons, and contended that the only property that could be sold was the share of the father and not that of the sons. That contention was not accepted and the entire property including sons' interest was ordered to be sold. But the sons were on record before the sale was held, though as heirs of their deceased father. There would have been no difficulty whatsoever to bring the sons on record in their own individual right as sons and not merely as the heirs of the father; but whatever it is, when it was held that the interest of the sons also could be sold, the sons were on record. The facts, in that case, therefore, were entirely different from the facts in the case in *Surajmal Deorao v. Motiram Kalu*[23], but all the same there are some observations of Sen, J. which are against proposition No. 5 in Surajmal's case, 41 Bom LR 1177 : AIR 1940 Bombay 22. The learned Judge observes that (p. 339) :

> "If it be held that the decree-holder could not sell the property of the sons without making them parties, it would necessitate the decree-holder's impleading in execution all coparceners of a joint Hindu family against whose karta he had obtained a decree which is binding on such co-parceners for they may plead a partition of which he may not even be share. Why he should not proceed against the judgment-debtor on the record, especially when, as in this cage, the decree enables him to bring the property mortgaged to sale, is somewhat difficult to understand, for a technical objection like the one that has been pressed amounts, in a case like the present, virtually to a repudiation of the other

> coparceners' liability so far as the darkanst in question is concerned."

Therein, it appears that it was not present before, his Lordship's mind that the father ceased to represent the sons the moment there was a separation between the father and the sons. It is not disputed that even after the separation, the son's share in the joint family property would be liable; but if the son's share is to be made liable, the sons must be brought on the record in the execution proceedings before their shares are ordered to be sold. The difficulty that was mentioned by San, J. is met by the observations of Varadachariar, J. in *Thirumalamuthu v. Subramania*[24], There his Lordship has observed (p. 460) :

> "The law provides ways in which the creditor can avoid any injurious consequences arising there from, namely by impleading the sons is the action that he may bring against the father, because it is now well established..in nearly all the Courts that a partition will not defeat the rights of the creditor, though it may have some bearing on the procedure to be followed by him for the realization of the debt."

So it would be always safe for the creditor to make all the members of the co-parcenary parties to both the suit and the execution proceedings, so that he may not be met with a situation that a decree obtained against the manager or the father will not avail him against the interest of the sons or other members of the co-parcenary on account of the partition between the members of the joint family of which he may not be aware. We,

[23]41 Bom LR 1177 : AIR 1940 Bom 22

[24] AIR 1937 Mad 458 : (170 IC 914)

therefore, prefer to follow the view adopted by Lokur, J. in Surajmal's case, 41 Bom LR

22. The appeal, therefore, fails.

Appeal dismissed.