NAGPUR HIGH COURT

Jainarayan

Vs

Sonaji

First Appeal No. 16-B of 1934

(Stone, C.J. and Vivian Bose, J.)

09.04.1937

JUDGMENT

Stone, C.J.

1. This case raises a question-of considerable difficulty and importance. It is concerned with the execution of a personal decree passed in a mortgage suit brought against certain fathers and their sons (forming four joint Hindu families). The mortgage suit was dismissed as against the sons, and decreed against the fathers. The purpose of the mortgage being to purchase land, the land so purchased and the fathers share in the ancestral lands were made available to satisfy the mortgage debt. The judgment, after directing a decree for sale of those properties (subject to usual time for redemption) proceeded as follows:

> Liberty for applying for 'personal decree' against defendants 1 to 4 only is given for the balance if sale is made and if there is a balance of decretal debt.

2. Defendants 1 to 4 were the adult executants, as mortgagors, of the mortgage. We are in this appeal concerned with defendants 5 to 9 (the sons of defendant 1) and defendants 10 to 13 (sons of defendant 2). The other defendants have not appealed. In order to make the position that here arises clear, it is necessary to mention a few dates. The judgment in the mortgage suit was pronounced on 29th August 1925. The preliminary decree was issued on the same day. A final decree was passed on 6th August 1926. An application for a personal decree was made on 22nd February 1929 and a personal decree issued on 6th July 1929. Meanwhile on 17th June-1926 a partition had been effected between defendant 1 and his sons, and on 2nd April 1928 between defendant 2 and his sons. Following upon the personal decree, which was directed inter alia against defendant 1 and defendant 2, there were execution proceedings wherein the decree-holders sought to take in execution certain items of property which had formed part of the property of the respective joint families on the ground that a personal decree against a father, where Hindu law applies, can be executed against the property of the sons, even though those sons have become divided, if the decree is a mere working out of a pre-partition judgment.

3. We proceed on the basis that here the personal decree (which it will be observed was granted after partition on an application made after partition) is a mere working out of the pre-partition judgment and should thus be regarded as though it were a pre-partition event. If regarded otherwise, it makes the position of the decree-holder worse. It is also to be noted that the mortgage was held not to be for any such purpose as would make it binding on the sons. The mortgage contained a personal covenant and the sons' liability is founded on the pious obligation imposed by the texts upon a Hindu son to pay his father's debts. It is regarded as of no moment whether the debt in question here is the original debt, clothed with contractual obligation through the personal covenant to repay, or the debt of record created by the judgment. In either case, it is said, one has a pre-partition debt by which the sons' shares are burdened. It is next to be observed that the sons were made co-defendants with the fathers in the mortgage suit and it was held that:

> Defendants 5 to 17 are not liable for the claim and their shares in the ancestral property are exempted. Defendants 6 to 16, however, shall bear their own costs under the circumstances of the case.

4. The preliminary decree provided inter alia as follows:

> (4) It is ordered and decreed that the defendants 6 to 17 are not liable for the claim.

5. It is obvious that such facts introduce as at once to a mass of non-congruous case-law which centres round the opinion of the Board in *Brij Narain v. Mangal Prasad*[1], Their Lord-ships there lay down the famous five propositions which summarise the authorities relating to the son's liability for the father's debts under the Mitakshara system of law. Two of those propositions have here been relied upon:

> (2) If he is the father and the reversionaries 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.
> (3) If be purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

6. Stress has also been laid on a portion of the judgment at p. 102, viz.:

> ....if looked at straight in the face, what position could he more anomalous than this? A father who is manager, borrows a like sum from A and B. To A he gives a mortgage on the family estate containing a personal covenant. To B he gives a simple acknowledgment of loan. B sues and gets a decree; on this decree, execution can follow and the estate can be taken. A, suing upon his mortgage, cannot recover.

7. It is to be noted in passing that their Lordships felt the difficulty of the position which they were constrained to leave untouched by the principle of stare decisis. It is clear that they were purporting to apply the law as established by a long series of

[1] AIR 1934 PC 50=74 IC 689=51 IA 129=46 All 95 (PC)

cases and did not hesitate to narrow their own observations in *Sahu Ram Chandra v. Bhup Singh*[2], which did not agree with the catena of authorities they were concerned with, and which included *Kandasami Goundan v. Kuppa Moopan*[3], That case we shall have to advert to later. It was cited before the Board and neither overruled nor criticised. It will be noticed, in the above quotation their Lordships are posing the case of a mortgage with personal covenant. It is naturally argued that their Lordships introduced the personal covenant in order to put a case where there is both conveyance (mortgage) and contract (covenant). It is then said that their Lordships have in effect said that in each a case, i.e., where there is a debt secured (contractually) by a covenant to repay and (really) by a transfer of a piece of property, the lender cannot recover his debt from the sons. If that be so, it follows directly that the "debt" referred to in proposition (2) at p. 104 excludes a debt secured by a mortgage and that therefore in most cases of loans to Hindus with sons a secured is in a worse position than an unsecured creditor unless of course the mortgage is binding on the family. That it is possible to hold two views about the meaning of the above decision is obvious from the history of that authority's treatment by the Allahabad High Court.

8. In *Gajadhar Pande v. Jadubir Pande*[4], (before Sulaiman J., as he then was, and Mukerji J.) the facts were: A (father) mortgaged joint ancestral property. The loan was not to pay off antecedent debt; it was not immoral. The mortgagee sued A alone on the mortgage. The subject matter was brought to sale. The sons sued for a declaration that the mortgage and auction sale were not binding on them. The result was, the action was dismissed on the ground that the debt was binding on the song and that proposition (2) applied, "debt" there including a debt secured by a mortgage. In *Jagdish Prasad v. Hoshyar Singh*[5], (Sulaiman C.J., Mukerji and Boys JJ.), Sulaiman C.J. adhered to his view that "debt" in proposition (2) includes mortgage debts, but the other two Judges held that "debt" as used in that proposition did not include a debt secured by a mortgage. In *Jahan Singh v. Hardat Singh*[6], (Sulaiman C.J. and Rachhpal Singh J.), it was held by both Judges that the second proposition inoludes debt secured by a mortgage as well as other debts. Thus the learned Chief Justice of the Allahabad High Court has throughout taken the view that proposition (2) applies to mortgage debts. Mukerji J. has taken both views, his second opinion being that it does not. Boys J. has also taken the view that it does not. Rachhpal Singh J. takes the view that it does.

9. In *Ramkisan Bholaram v. Shioram Kisanrao*[7], Pollock J. held that a mortgage to secure a debt effected neither for necessity nor to pay an antecedent debt was not binding on the sons and the estate is not bound. It is not bound by the mortgage and it is not bound by the debt. Agreeing with the majority view in *Jagdish Prasad v. Hoshyar Singh*[8], he concluded that in proposition (2) "debt" does not include debt secured by mortgage. It will be apparent on a perusal of the Allahabad decisions above cited, that most of the difficulty felt has been due to the contrasted cases put by the Board. Those cases were put to show an absurd distinction, the distinction being between

[2] AIR 1917 PC 61=39 IC 280=44 IA 126=39 All. 437 (PC)
[4] AIR 1925 All 180 : 85 Ind. Cas. 31
[3] AIR 1920 Mad 479=55 IC 320=43 Mad 421=38 MLJ 208
[5] AIR 1928 All 596 : (1929) ILR 51 All 136
[6] AIR 1935 All 247 : 1934 AWR (H.C.) 4 727 : 152 Ind. Cas. 487
[7] AIR 1936 Nag 93
[8] AIR 1928 All 596 : (1929) ILR 51 All 136

secured and unsecured debts and the result being that in one case the "estate can be taken" and in the other case the mortgagee "can-not recover". Were it not for this, there is no difficulty. Proposition (2) is dealing with debt; proposition (3) is dealing with the burdening of an estate by

a mortgage. Proposition (2) is concerned with what may be taken in execution, of a decree given in a suit brought to enforce payment of a debt. Proposition (3) is considering neither suit nor execution but when a mortgage binds the estate. It will be remembered that the Board were proceeding to crystallize an anomalous and unsatisfactory branch of law by declaring stare decisis, and that they had cited before them *Kandasami Goundan v. Kuppa Moopan, AIR 1920 Mad 479=55 IC 320=43 Mad 421=38 MLJ 208(supra)*, i.e. that was one of the "derisions" they felt constrained by and which they did not criticise.

10. In *Kandasami Goundan v. Kuppa Moopan, AIR 1920 Mad 479=55 IC 320=43 Mad 421=38 MLJ 208(Supra)* a father executed alone a mortgage. A mortgage suit was instituted against father and sons. The mortgage was held not to be binding on the sons. It was further held that the mortgagees were entitled to a conditional decree under Order 34, Rule 6, against the father personally and against the joint family property of himself and his sons (undivided) for the deficiency if the sale of the father's share disclosed a deficiency. The greatest difficulty felt in that case arose out of the Board's observation in *Sahu Ram Chandra v. Bhup Singh, AIR 1917 PC 61=39 IC 280=44 IA 126=39 All. 437 (PC)(supra)*. Against that difficulty was placed the then recent decisions in Madras (one of which was a Full Bench case), viz. *Peda Venkanna v. Sreenivasa Deekshatulu*[9], and *Arumugam Chetti v. Muthu Koundan*[10], There it was held that the pious obligation of the sons did arise during the father's lifetime and that the debt involved in a mortgage was an antecedent debt which attracted the pious obligation of the sons to pay, even though the mortgage as a transfer of an interest in joint ancestral property failed. The Full Bench view is pithily stated by Sadasiva Ayyar J. in *Arumugam Chetti v. Muthu Koundan, AIR 1919 Mad 75=62 IC 525=42 Mad 711=37 MLJ 166 (FB)(supra)* as follows:

> The uniform course of decisions.....has been to treat a really antecedent mortgage debt on the same level with a really antecedent simple debt for the purpose of supporting a subsequent alienation against the son's share.

11. As was pointed out by the learned Chief Justice (Sir John Wallis), the more restrictive language used in *Sahu Ram Chandra v. Bhup Singh, AIR 1917 PC 61=39 IC 280=44 IA 126=39 All. 437 (PC)(suupra)* might have been due to certain vigorous sentences of Sir John Stanley in *Chandra Deo Singh v. Mata Prasad*[11], Sir John Wallis observes at p. 727 as follows:

> Their Lordships, I cannot help thinking, were influenced by these forcible observations in laying down the principle in the way they did. It is however clear I think that Sir John Stanley did not intend to lay down that there was any necessity to show that the debt was not only antecedent but also not incurred on the security of the family property, because he does not lay down any such restriction in formulating the rule and because he refers with approval to the

[9] AIR 1919 Mad 1175=43 IC 225=41 Mad 136=33 MLJ 519

[10] AIR 1919 Mad 75=62 IC 525=42 Mad 711=37 MLJ 166 (FB)

[11](1909) 31 All 176=1 IC 479=6 ALJ 263 (FB)

> decision of the Full Court in *Badri Prasad v. Madan Lal*[12], In that case the mortgage in question was executed in satisfaction of a prior mortgage debt incurred by be father to the same mortgagee. It was contended that the alienation was bad because the mortgage was

> effected in discharge of the mortgagee's own prior debt, and was therefore not an antecedent debt within the meaning of the rule. Sir John Edge C.J. with whom the other Judges concurred rejected this contention and after citing a Calcutta ruling that the purchase money itself which was the consideration for a conveyance could not be said to be an antecedent debt-the point now decided by their Lordships-added; "I know of no other restriction of the term 'antecedent debt.'"

12. This criticism was approved in *Brij Narain v. Mangal Prasad*[13], (where however there is unfortunately a wrong reference, p. 730 being occupied by part of Sadasiva Ayyar J.'s judgment). It will be apparent from the above why the Board posed the case of a mortgage with personal covenant. They were taking a case where there was no antecedent debt (in the sense to be understood after *Sahu Ram Chandra v. Bhup Singh, AIR 1917 PC 61 : 39 IC 280 : 44 IA 126 : 39 All. 437 (PC(supra)* as restricted by *Brij Narain v. Mangal Prasad*[14], In such, a case where contract and conveyance synchronize, the mortgage would not by reason of antecedency alone be binding on the estate. It will be observed that their Lordships follow the illustration at p. 102 with the following observation:

> It seems to have been felt that if the debt for which a mortgage was given was in any proper sense antecedent then, it so to speak escaped the direct infringement of the principle that the father manager could not burden the estate except for necessity.

13. In other words, their Lordships are contrasting the obligation imposed by a mortgage with the obligation springing from a decree on an ordinary debt. The mortgage is not binding; the decree can be executed against the sons' shares. It does not follow that a personal decree having been given after the father's share has been exhausted against the father thereby creating & debt of record, that debt or the original debt which justifies the passing of a personal decree is excepted from the debts which the sons are under a pious obligation to pay. In our opinion, there is no logical ground for excluding a debt secured by a mortgage from the expression "debt" as used in proposition (2) of *Brij Narain v. Mangal Prasad, AIR 1934 PC 50 : 74 IC 689 : 51 IA 129 : 46 All 95 (PC)(supra)*. It directly follows that such a debt, being neither illegal nor immoral, imposes a pious obligation upon the undivided sons and a decree having been obtained against the father alone, it may be enforced by attachment and sale of the entire coparcenary property: see *Sardarilal v. Bharat National Bank Ltd*[15]., In such a case it has been held that the decree, holder can proceed in execution against the sons' share and need not proceed by a separate suit: *Pannalal v. Rama Nand*[16], and *Muni Lal v. Gian Singh*[17], Clearly on the view taken above as to the extent of proposition (2) on such a debt, the son's share can be reached in some circumstances in execution and

[12](1898) 15 All 75=1893 AWN 52 (FB)
[13] AIR 1934 PC 50=74 IC 689=51 IA 129=46 All 95 (PC) at p. 102
[14] AIR 1934 PC 50 : 74 IC 689 : 51 IA 129 : 46 All 95 (PC) at p. 103
[15] AIR 1931 Lahore 716.
[16] AIR 1936 Lah 193
[17] AIR 1931 Lah 717

the suit by the son to have his share declared absolved would fail: *Gajadhar Pande v. Jadubir Pande*[18],

14. Does it make any difference that here (a) the judgment in the mortgage suit exempts the sons' shares (b) after judgment and before execution there is partition? As to (a) we feel no difficulty.

All that the sons' shares were freed from was the burden created by the mortgage. This property is not now sought in execution because of the mortgage but because of the debt which led to a personal decree which in turn creates a debt of record. The question is: can that be pursued in execution against the sons' shares? The fact that the sons' shares have been declared not bound by the mortgage is neither here nor there. As to (b) a real difficulty discloses itself. The application for a personal decree was entitled in a manner which restricted the non-applicants to the four judgment, debtors, i.e. defendants 1 to 4. It was against them that a personal decree was sought and against them that it was given. This personal decree was doubtless sought, following upon the liberty to apply, under the provisions of Order 34, Rule 6.

15. Thus putting on one side details, this is a case where A, father of B, etc. is sued inter alia for debt; a personal decree is given against A; then A and B, etc. separate; then execution is sought to be effected. Admittedly the doctrine of lis pendens does not come into play. It is only necessary to refer to Section 52, Transfer of Property Act, to see why. The partition is thus effective to divest A of property. Whether the shares which go to the sons can by suitable procedure be made liable or not is not the question now before us. The question we have to resolve is whether it can be taken in execution of the decree obtained against A. Section 60, Civil Procedure Code, tells us what property of A can be taken. It provides as follows:

> (1) The following property is liable to attachment and sale in execution of a decree, namely lands, houses of other buildings, goods, money, banknotes, cheques, bills of exchange, hund is, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immovable, 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, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf.

16. It was argued before us that the words "belonging to the judgment-debtor, or over which.... he has a disposing power..." relate to the words "all other saleable property" and not to the words "lands, houses...." We cannot accept this argument. In our opinion the Code is restricting the decree-holder to property which either belongs to the judgment-debtor or over which the judgment-debtor has disposing power. It was urged against the view that if A dies, the decree-holder can execute against the ancestral property in the hands of the sons although obviously the property after A's death no longer belongs to A nor has A any longer a disposing power and it is said the same position should arise if A goes out of the family not by death but by separation. But the reason why the decree could be executed in the case of death is that the

[18] AIR 1925 All 180 : 85 Ind. Cas. 31

decree-holder could proceed against the sons or one of them as legal representatives under the fiction created by Section 53, Civil Procedure Code It is clear that it is one thing to say that the son cannot be proceeded against for such a debt and another thing to say that the decree against the father passed in a proceeding (the application for a personal decree) to which the son was not a party, can be enforced by execution against the son's property: see *Jagannatha Rao v. Viswesam, AIR 1924 Madras 682 : 1924-19-LW 691 : (1924) 46 MLJ 590 at pp. 629 and 632(Supra).*

17. Before we can get at the son's property (the son being now separate from his father and the son's property being separated by metes and bounds from the father's property), that property must in some way be connected with the judgment-debtor. If at the time of execution the son were not divided, we can immediately see a connexion. The property would be property over which the father has disposing power and would therefore fall within the class of property that can be attached. It would therefore be property against which attachment could issue in execution of a decree obtained against the father. But if the father has no disposing power and the decree is not against the son, it is difficult to see how it can be reached without doing violence to Section 60.

18. It is said that one must give the proper meaning be "judgment-debtor" in Section 60 and that proper meaning is found by looking at Section 2(1): "judgment-debtor means any person against whom a decree has been passed or an order capable of execution has been made". That however carries the matter no further. The personal decree here was passed against the father. It was not even sought against the son. In *Govindram v. Nathulal, AIR 1937 Nagpur 45 : 170 Ind. Cas. 72(supra)4* it was held that the holder of a decree, passed in a suit against the father alone, could not execute that decree against the son's share after partition. The facts there were different in this that there the suit was after partition; here the application for a personal decree was after partition. That makes no difference in principle. *Govindram v. Nathulal, AIR 1937 Nagpur 45 : 170 Ind. Cas. 724(supra)* agreed with the conclusion in *Bankey Lal v. Durga Prasad, AIR 1931 Allahabad 512 : (1931) ILR 53 All 868(supra).* It was observed in *Govindram v. Nathulal, AIR 1937 Nagpur 45 : 170 Ind. Cas. 724(supra).* If the father's power to dispose of his son's share is "property", how can that be attached and sold in execution of a decree obtained against the father alone after partition when he loses his disposing power and therefore his "property."

19. It is true that the matter was being looked at from the point of view of insolvency law rather than Section 60, Civil Procedure Code, but if the judgment-debtor has lost his disposing power, he has lost the only thing which under the provisions of Section 60 makes property now the property of the judgment-debtor's son open to be taken in execution of the decree. It is said that this is not the reason why the son's property can he taken. The true ground of liability is the son's pious obligation and therefore if the debt is of such a kind as to impose on the son a pious obligation to pay it, the son's property can be taken. It is also urged that the well-known principle established by *Prosunno Kumar Sanyal v. Kali Das Sanyal, (1892) 19 Cal 683 : 19 IA 166 : 6 Sar 209 (PC)(supra)*, viz. that litigants should not be driven to suits when their remedy can be obtained in execution, should be applied. As supporting the view that pious obligation founds the right in the decree-holder, ***Lalta Prasad v. Gajadhar Shakul,*** *AIR 1933 All 235 : 1933 AWR (H.C.) 2 101 : (1933) ILR 55 All 283(supra)* and *Raghunandan Pershad v. Moti Ram, AIR 1929 Oudh 406 :119 IC 419 : 6 Luck 497 : 6 OWN 689 (FB)(Supra)* are, stressed. *Lalta Prasad v. Gajadhar Shakul, AIR 1933 Allahabad 235 : 1933 AWR (H.C.) 2 101 : (1933) ILR 55 All 283(supra)* is of course distinguishable from this present case on facts. In that case father and sons were joint, they were all sued and the question was whether the sons were under a pious obligation to pay the particular debt of the father. That case is no authority for the proposition that a separated son's property can be taken in execution. On the other hand, *Raghunandan Pershad v. Moti Ram, AIR 1929 Oudh 406 : 119 IC 419 : 6 Luck 497 : 6 OWN 689 (FB)(supra)*, a Full Bench case, is a direct authority in favour of the view that after partition a son's share can be taken in execution of a decree passed against the father. Unfortunately, neither in the order of reference nor in the judgments is Section 60, Civil Procedure Code glanced at. It seems to have

been assumed that granted a son is liable, it follows that the son's property nan be taken in execution. To us however it appears equally plain that to say a son is under a pious obligation to pay certain debts is one thing; to say his property can be taken in execution is another. In our view, property can only be attached and sold in execution if it falls within the kind of property that can be attached and sold. What that is is found by looking at Section 60. When one looks at Section 60 one finds that the property in question should either belong to the judgment-debtor or he should have a disposing power over it. After partition the share that goes to the son does not belong to the father and the father has no disposing power over its. Therefore such property does not fall within Section 60. Thus it cannot be attached. It by no means follows that the son cannot be made liable. He could be made liable for his father's debts if he had become a surety; he can be made liable under the pious obligation rule. In neither of the cases put, could his liability take the form of having his property taken in execution and sold without any prior proceedings brought against him, leaving him to raise the question whether his liability as surety or under the pious obligation rule precluded him from claiming in execution.

20. Finally it is said that the son's share can be got at in execution because the partition does not completely divest the father of the property allocated to the sons, but such shares go to the sons burdened with debts to pay which the sons are under a pious obligation. This is the same point in a different guise. It was not said that the sons held the share to the extent of the debt "on his (the father's) behalf" within the meaning of Section 60. It is to be remembered that the law we are interpreting here is not the Hindu law governing a son's liability, but the codified law of procedure under which alone that liability can now be enforced. In so far as the substantive law is concerned that dealing with the actual rights and liabilities of the parties, it is of course regulated by the Hindu law, but as regards the other, the old Hindu law of procedure under which these rights could once have been enforced, no longer applies, and we are now governed in these matters by the Code of Civil Procedure. A point was taken that defendant 1 having died his sons at least were liable. This is a new point taken for the first time in reply. We decline to consider it. The appeal accordingly fails and is dismissed with costs. We are obliged to counsel for very helpful arguments and careful analysis of an intricate legal position.
Appeal dismissed.