

Branson (with him *Nagindás Tulsidás*) for the special respondent.

PER CURIAM:—We adhere to the decision in Special Appeal 200 of 1868, which is in accordance with what has been the invariable rule in this Court, viz., that when a review has been admitted, the whole case is re-opened. The case in Special Appeal 368 of 1872 was a peculiar one, in which the application was by the successful party for correction of a mere clerical error in the decree, and the judgment of this Court appears to have been carefully limited to the circumstances of that case only.

Decree confirmed with costs.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 38 of 1871.

SAKHA'RA'M RA'MCHANDRA

DIKSHIT..... *Defendant and Appellant.*

GOVIND VA'MAN DIKSHIT,

purchaser of a decree
obtained by Mádhavráv

Ganesh Deshpándé *Plaintiff and Respondent.*

Agreement—Decree—Hindu Law—Liability of sons and grandsons.

An agreement entered into before decree, between a person who subsequently became the decree-holder and the defendant, his debtor stipulating that the decree should be enforced in a particular manner, is no bar to the execution of that decree according to its terms.

The property of a Hindu which has descended upon his sons and grandsons is, while in their hands, liable to his debts.

Bombay Act VII. of 1866 does not apply to cases in which judgment had been pronounced before its enactment.

THIS was a miscellaneous special appeal from the order of R. H. Pinhey, Judge of the District of Puna, amending the order of the Subordinate Judge of that place.

The facts of the case will fully appear from the following extract from the District Judge's judgment:—

1873.

SAINAL
RANCHHOD
v.
DULLABH
DVA'RKA'.

June 26.

1873. "Mádhavráv Ganesh Deshpándé obtained a decree for Rs. 1,500 against Moreshvar Dikshit Manohar, on 25th April 1861, in the Court of the Assistant Agent.

SAKHA'RA'M
RA'MCHUND-
RA

v.
GOVIND
VA'MAN.

"Mádhavráv Ganesh Deshpándé sold this decree to Govind Váman Dikshit Manohar the plaintiff.

"Moreshvar Dikshit Manohar, who was a Sardár, died, leaving heirs.

"Mádhavráv presented an application to the First Class Subordinate Judge at Puna for the execution of the decree.

"The application was opposed on the grounds, that (1) the decree was barred by the law of limitation; (2) the property which Mádhavráv wished to attach was not liable for the personal debts of the original defendant now deceased; and (3) that Mádhavráv was bound by an agreement, made by the plaintiff with the deceased defendant to attach first all the property of the defendant's family.

"On the 17th August 1870 the First Class Subordinate Court (Madan Shrikrishna Judge) holding that the decree was not barred by the law of limitation, and that as the deceased defendant had three sons who were cosharers in the ancestral property with himself, only one-fourth of such property could be attached for the deceased defendant's debts, and that the present application was not in conformity with an agreement made by the parties to the decree, ordered the attachment of one-fourth of the deceased defendant's share of the village of Mohomedvádi, and directed each party to bear his own costs."

In appeal the District Judge raised two issues for decision, viz:—

1. Should the decree, which the plaintiff seeks to enforce, be executed in the manner prescribed in the agreement?
2. Should the shares of the sons of Moreshvar Dikshit deceased be excepted from the operation of the decree which the plaintiff seeks to enforce?

On both these issues he found in the negative, and for the decree-holder, for the reasons thus set forth in his judgment:—

1873.

“The agreement was passed before the decree which the plaintiff seeks to execute. It was pleaded by the defendant in the suit as a bar to the decree being passed. Nevertheless the Court, after considering the effect of this agreement, gave a decree for the amount claimed, without making any order for the execution of the decree according to the terms of the agreement.

SAKHA'RA'M
RA'MCHAND-
RA DIKSHIT
v.
GOVIND
VA'MAN.

“The decree was given for a debt incurred on behalf of a united family. The property, against which the plaintiff seeks to enforce the decree, is the common property of that family. The shares of the deceased defendant have never been divided, and his sons do not appear to have raised any objection, such as the Lower Court raised, as to the non-liability of the property which passed to them from their father for the amount of decree against their father. The division of the property of the deceased defendant into equal shares between the father and the sons, seems to have been the act of the Court acting *proprio motu*.”

The special appeal was heard by WEST and NA'NA'BHAI HARIDA'S, JJ.

Shántarám Náráyan, for the special appellant, raised three principal objections against the order of the District Judge, 1st, that he was in error in not considering the agreement entered into between the deceased defendant and the decree-holder in regard to the execution of the decree—this is the proper time for him to do so (Sec. 11, Act XXIII of 1861); 2ndly, that he wrongly assumed that the decree was for a debt incurred for a united family; and 3rdly, that the respondents came into possession of Mahomedvádi in their own right, and not by inheritance from the deceased Moreshvar, and they were, moreover, not liable for his debts under Bombay Act VII. of 1866.

Vishvanáth Náráyan Mandlík for the special respondent:—Sec. 11 of Act XXIII does not apply. It contemplates questions in execution of a decree. The agreement was considered when the decree was passed, and is absorbed in the decree. It cannot be maintained that grandsons have equal

1873.

SAKHA'RA'M
RA'MCHAND-
RA.

v.

GOVIND
VA'MAN.

and co-ordinate claim in the grandfather's property. No grant is put in to show that the property had any special character.

WEST, J.:—In the suit, out of which these proceedings have arisen, the plaintiff was met by an agreement, in which the plaintiff had engaged, in the event of a suit becoming necessary, to execute the decree he might obtain in it, in the first instance, against the property of the other members of the family from which the defendant, Moreshvar, had become separated. The Assistant Agent refused to give effect to this agreement in the way proposed, because it was not meant in any way to impede a suit for the amount due on the bond, though, as he says, there might be a “countersuit on the agreement, in case the plaintiff does not use his decree in the way agreed on.” In appeal against the order of the Principal Sadar Amin in execution, the District Judge held that the decree-holder was not bound by this agreement to any particular mode of execution, for the reason that it had been considered in trying the suit by the Assistant Agent, who, nevertheless, had “passed a decree for the amount claimed, without making any order for the execution of the decree according to the terms of the agreement.” Against this, it has now been urged that the agreement being, by its terms, expressly intended to come into operation on the passing of the decree, and to regulate the mode of execution, it cannot properly be deprived of this effect by the Assistant Agent having refused to embody its engagements in the decree itself. The question as to its enforcement, it is contended, is one arising in the execution of a decree, and as for this reason, a separate suit, brought upon it, for a breach of contract, will not be maintainable according to Act XXIII. of 1861, Sec. 11, justice requires that it should be enforced in the execution itself. A semblance of support to this latter argument has been drawn from the words “any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree,” but these general words, according to the familiar

rule of construction, are to be understood of matter *ejusdem generis*, with that more particularly specified in the same enactment. The only questions, that can properly arise in the execution of a decree, are (1) as to the contents of the order made, (2) as to the jurisdiction to make it, and (3) as to how far it has been carried out. There is here, as usual, no question of jurisdiction; there is no suggestion that the decree has been partly executed so as to exempt from its operation the property sought to be made available for its satisfaction. The only question then, that can remain, must be as to what are the contents of the decree, and these, it is obvious, are in no way dependent on a private agreement between the parties. If that agreement, indeed, could be set up, as limiting the execution of the Court's order, the mere circumstance that the Assistant Agent had refused to give it effect in framing the order itself might not be material, but no authority has been cited for giving to it such an effect as this. An agreement is relied on, because it confers a right. If that right in the present instance was one capable of being set up against the claim made by the plaintiff, it was capable of being adjudicated on in his suit; if it could not be thus set up, neither can it be set up against the execution of the decree, which, for its own purposes, is to be held final as to what the one party must do or forbear for the benefit of the other. It would be an absurd consequence, if a set-off, pleaded and refused recognition at the trial of a suit, could again be advanced in opposition to the execution of the decree. The agreement in this case may or may not be valid. It may or may not have imposed on the plaintiff a duty, the breach of which will form a good ground for a personal action. But it is at best an undertaking which has not yet been clothed with judicial sanction. It cannot prevent the execution of an express order of a Court. The right which a judgment-debtor might base on an actual payment of the sum awarded, would be stronger than that derived from an agreement such as the one now in question, yet the law refuses to recognize it, unless made, as the law itself prescribes, through the Court, and distinctly in obedience to its decree.

1873.

SAKHA'RA'M
RA'MCHAND-
RA
v.
GOVIND
VA'MAN.

1873.

SAKHA'RA'M
RA'MCHAND-
RA
v.
GOVIND
VA'MAN.

But the property, it is said, in the hands of the persons against whom execution is now sought, is not liable for the decree obtained against the original defendant, Moreshvar. These persons are Moreshvar's sons and grandsons; the present appellant is a grandson. The family, it is said, was divided by a partition made between Moreshvar and his sons, and the question of division, or no division, ought to have been distinctly adjudicated on in the Courts below. The reason it was not expressly adjudicated on was doubtless that it was not distinctly raised. What was relied on was evidently the argument, which, in the early part of the case, was strongly pressed in this Court also, that by the terms of the tenure, each successive generation took the property independently of the one which preceded it. This attempted application of the principles of the Statute De Donis, for regulating the devolution of the estate of a Hindu family, was so far successful as to lead the Joint Judge, when the case first came before him in appeal, to remit it to the Subordinate Judge, with a direction to ascertain whether Moreshvar had had more than a life interest in the property. The Subordinate Judge (Mr. Madan Shrikrishnáji), so far as the papers before us show, does not appear to have directly dealt with this question. Perhaps the terms of the grant, which, it is said, created the very special estate, which the appellant asserts, were no more revealed to him than they have been to us. But on the ground that the deceased Moreshvar having had three sons remained owner himself of but one-fourth of the family estate, the Subordinate Judge awarded execution against one-fourth of the property with a further limitation wrongly based on the agreement which has been already discussed. In this decision, the Subordinate Judge implicitly determined that Moreshvar and his sons had formed a united family. Probably the question of separation was not raised before him; but if it was, and was wrongly disposed of, the objection that might have been raised on that ground must be considered to have been waived by its omission from the cross appeal filed by Sakharám in the District Court. It is not sufficient that an

objection in regular appeal, pointed at an altogether different matter, may, by a special interpretation, be made to extend to some point afterwards raised in special appeal. The objection and the issue raised upon it, must be taken in the sense obviously intended. If the District Judge of Puna had misconceived the objections in this case, he would no doubt have been very promptly set right by the pleaders. They allowed him to try the appeal on the assumption that the family was united, and this is a sufficient proof that the ground of partition was not then intended to be relied on. In not examining it, therefore, the District Judge did not commit any error of law.

It must be taken, therefore, as it was in the Courts below, that Moreshtar and his sons were in the usual condition of a Hindu family, that is, undivided. It must be presumed also that he held his property according to the ordinary rules of the Hindu law. The grant, under which it was enjoyed, has not been produced before us. If it was produced before the Subordinate Judge, and wrongly dealt with, that ought to have formed a ground of regular appeal. The obligation of a man's sons and grandsons to pay his debts is, it is admitted, as integral a part of the Hindu law as any rule of succession. The exception, on the ground that the debts were contracted for disreputable purposes, is one of which few sons would avail themselves, and which was not suggested in the present case. The ancestral property has, under such circumstances, even been held by some of the earlier, though not by the more recent, decisions of the late Sadr Court, inalienable until the debts were paid (a). Such a doctrine may not be maintainable; but the property at least descends incumbered with the debts of the ancestor or accompanied by an obligation to pay them. But then it has been urged Bombay Act VII. of 1866 protects the appellant in this case and his brethren. Being joint-tenants with their father during his life, the whole property, it is argued, vested in them by sur-

(a) The property is not so hypothecated for the debts of the deceased that the heir may not convey a good title to a purchaser See (Jamiyat-rám Rámchandra v. Parbhudás) 9 Bombay H. C. Report 116 Ed.

1873.

SAKHA'RA'M
RÁMCHAND-
RÁ.v.
GOVIND
VA'MAN.

1873.

SAKHA'RA'M
RA'MCHAND-
RA
v.
GOVIND
VA'MAN.

vivorship on his death. They received nothing as his representatives, and are therefore exempted from liability by Secs. 1 and 2 of Mr. White's Act. This result, if correctly deduced from its words, would be highly unwelcome, it is certain, to the author of the law. That sons in a united family should take all the property on their father's death, and at the same time be free to repudiate all his debts, was, probably, the last thing he would have desired. We do not think that a construction so encouraging to unconscientiousness is the only one that these sections admit of; but it is not necessary to go further into that subject, because in our view the Act is altogether inapplicable to the present case. No law is, without necessity, to be so construed as to impair rights already fully acquired. The rights of creditors already acquired against sons, grandsons, and heirs, before Bombay Act VII. of 1866 became law, would thus be unaffected by its provisions, but for Sec. 3 which extends its operation to suits in which judgment shall not have already been delivered at the date of the Act. The judgment in this case, however, was pronounced several years before the Act was passed. The rights of the judgment-creditor against Moreshvar, his property, and his successors, were fully acquired, and the Act has not extinguished them. The case stands precisely as if the Act had not been passed, and the whole property is liable. Such was the decision of the District Court, and we confirm it with costs.

Decree confirmed with costs.