

1916.

Solicitors for the plaintiff: Messrs. *Little & Co.*ABDUL
RAZAK

v.

MAHOMED
HUSSEIN.Solicitors for the defendant: Messrs. *Captain & Vaidya.**Suit dismissed.*

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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January 21.

CHUNILAL HARILAL AND OTHERS (HEIRS OF ORIGINAL DEFENDANTS),
APPELLANTS v. BAI MANI (ORIGINAL PLAINTIFF), RESPONDENT.**Civil Procedure Code (Act V of 1908), sections 2 (11), 53—Legal representative—Surviving co-parceners in a joint Hindu family are not legal representatives of deceased co-parceners—Decree for injunction—Decree cannot be enforced against co-parceners who were not parties to the suit.*

The plaintiff obtained a decree for injunction against two defendants, who were members of a joint Hindu family, with three other co-parceners. After the death of both defendants, the plaintiff sought to execute the decree against the three surviving co-parceners:—

Held, dismissing the application, that the surviving co-parceners were not bound by the decree for on no construction of the term "legal representative" could members of a joint Hindu family be brought within its definition as contained in section 2 (11) of the Civil Procedure Code of 1908.

PER BEAMAN, J.:—"Section 53 (of the Civil Procedure Code) has been enacted, in my opinion, expressly to enforce one recognised rule of the Hindu law, namely, that members of a joint Hindu family may not escape the payment out of the joint family property of any debt incurred and decreed against their father before his death provided that such debt is not tainted by immorality.... The object of the section is limitative and is intended to give effect to a well-known rule of the Hindu law referable to a religious rather than legal sanction which might otherwise have been rendered nugatory by the definition of 'legal representative.'"

* Second Appeal No. 73 of 1917.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree passed by P. M. Bhat, Joint Subordinate Judge at Ahmedabad.

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On the 23rd November 1900, the plaintiff obtained a decree against two persons, Jethalal and Harilal, restraining them from offering obstruction to the plaintiff or her tenants from using a water-tank, a privy and a Khadki. The defendant Harilal had at the time three sons (the present appellants); but they were not made parties to the suit.

The plaintiff mortgaged her property. Her mortgagee was obstructed by the appellants from using the water-tank, privy and Khadki, the defendants having died in the meanwhile. The defendants and the appellants lived together as members of a joint Hindu family. The plaintiff applied in 1916 to execute the decree against the appellants. The appellants contended that they were not bound by the decree to which they were not parties.

The first Court overruled the contention and ordered execution to issue against the appellants.

This decree was, on appeal, confirmed by the District Judge, on the following grounds:—

It is true that an injunction does not run with the land. Even a mandatory injunction directing the defendant to take certain order with property in his possession cannot be enforced against a transferee. Still less therefore it would seem could an injunction other than a mandatory injunction be enforced against a transferee. But appellant here is not a transferee but a representative of judgment-debtor. The law is expressed in section 50, Civil Procedure Code, and this applies to decrees giving injunctions (I. L. R. 26 Bom. 283). An injunction decree is never fully satisfied as long as the potentiality of the commission of wrong exists. Section 50, clause 1, therefore, comes into operation and the decree can be executed against appellant. But how and to what extent? Under clause 2 of section 50 only by attachment of so much of the property of deceased judgment-debtor as has come into appellant's hands and

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not by the other means specified in Order XXI, rule 32 (1). This seems to me deducible from section 50 and to be in accordance with the case quoted above. It is true that there was a case of a mandatory injunction directing the judgment-debtor to demolish part of a structure which afterwards devolved on the representative, but the latter part of Sir Lawrence Jenkins' judgment seems of universal application.

The appellants appealed to the High Court.

I. N. Mehta, with *M. K. Thakor*, for the appellants:—The decree, which was for injunction, was obtained against our father and uncle; we, who were adult co-parceners with them, were not made parties to the suit. Our father and uncle being dead, the decree cannot be executed against us. We are in no sense their legal representatives, in the sense in which that term is defined in section 2, clause 11, of the Civil Procedure Code of 1908. We are not “a person who in law represents the estate of a deceased person,” for as members of a joint Hindu family, we took the family property by survivorship on the deaths of our father and uncle; there cannot be anything like the estate of a deceased person, of one who dies as a member of a joint Hindu family. Nor are we any person “who intermeddles with the estate of the deceased,” for the same reason. The remainder of the definition, viz., “where a party sues or is used in a representative character the person on whom the estate devolves on the death of the party so suing or sued,” does not apply to us, for our father and uncle were sued on their account and not in a representative capacity. The cases of *Sakarlal v. Bai Parvatibai*⁽¹⁾ and *Dinamoni Chaudhurani v. Elahadut Khan*⁽²⁾ are distinguishable.

N. K. Mehta, for the respondent:—The persons against whom the decree is sought to be executed are the legal representatives of the deceased judgment-debtors within the meaning of section 2, clause 11 of the

⁽¹⁾ (1901) 26 Bom. 283.

⁽²⁾ (1904) 8 C. W. N. 843.

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Civil Procedure Code, inasmuch as they are "persons who in law represent the estate of the deceased persons." Section 50 (1) of the Code is not restrictive but general. Under section 53, for the purposes of sections 50 and 52, the property in the hands of the appellants, if it is liable under Hindu law for the payment of the debt of their fathers, is to be deemed to be the property of their deceased fathers, which has come to their hands as their legal representatives. Section 53 does not restrict the application to the case of a money decree. Section 52 no doubt relates to a decree for the payment of money, but section 50 is general: see *Umed Hathising v. Goman Bhaiji*⁽¹⁾ and *Amar Chandra Kundu v. Sebak Chand Chowdhury*⁽²⁾; *Narayan Gop Habbu v. Pandurang Ganu*⁽³⁾; see also *Sakarlal v. Bai Parvatibai*⁽⁴⁾, which is a case decided under section 234 of the Civil Procedure Code of 1882 corresponding with section 50 of the present Code, and which is parallel to the present case.

BEAMAN, J.:—In my opinion the learned Judge below is wrong. Before the present Civil Procedure Code, we had no statutory definition of "legal representative" such as is now incorporated in it. That being obviously restrictive in cases arising out of the status of members of a joint Hindu family, section 53 has been enacted, in my opinion, expressly to enforce one recognised rule of the Hindu law, namely, that members of a joint Hindu family may not escape the payment out of the joint family property of any debt incurred and decreed against their father before his death provided that such debt is not tainted by immorality. The only possible ground upon which the respondent's argument could have been put, as far as I can see, is that section 53 is generally descriptive and in no sense limitative. If it

(1) (1895) 20 Bom. 385.

(2) (1907) 34 Cal. 642.

(3) (1881) 5 Bom. 685.

(4) (1901) 26 Bom. 283.

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could be read as defining every kind of property which might in any circumstances be liable for a decreed debt of a deceased Hindu father in the hands of his descendants or sons as joint family property, then doubtless the property with which we are concerned would fall within that definition. I have already explained that in my opinion the object of the section is limitative and is intended to give effect to a well-known rule of the Hindu law referable to a religious rather than legal sanction which might otherwise have been rendered nugatory by the definition of "legal representative." Upon that view it follows that on the facts before us the present decree could not be executed against the appellants.

The suit was brought by the present respondent against her kinsmen who were with the present appellants members of a joint Hindu family. They were the father and uncle, respectively, of the present appellants. The suit was for an injunction and the plaintiff must have known perfectly well the constitution of the family. If she had wished to make the present appellants liable, she ought to have impleaded them in that suit. I do not agree with the learned Judge below in his view that it was the duty of the appellants to get themselves upon the record, that they knew of the suit, and having failed to apply to be made defendants, they must be regarded as bound by the decree. I do not know indeed whether the learned Judge means to carry that portion of his reasoning quite that length, but he apparently relies upon an early case in which the same principle was affirmed and that principle in the facts of that case seems to me to have been referable exclusively to estoppel. I do not see that there is any case of estoppel here, or that the conclusion, pointed at, if not definitely stated, by the learned Judge below, is sound in law. Now, the

result of the suit was that the plaintiff obtained an injunction against the father and uncle of the present appellants. Both the father and uncle have since died. The plaintiff has mortgaged the property and is seeking execution in the interest of her mortgagee. The appellants resisted the execution on the ground that they were not parties to the suit in which the decree had been obtained; nor were they in any sense legal representatives or heirs of their deceased father and uncle within the meaning of section 50 of the present Code. In my opinion both those contentions are valid and ought to have been upheld. On no construction of the words "legal representative" can members of a joint Hindu family be brought within the definition now contained in our Statute. Neither in my opinion were they parties, by a very strained construction, to the suit in which the decree was obtained. Nor do I think that the result, I have reached, occasions any hardship or injustice. If the respondent is obliged to bring a separate suit for injunction, she has only herself to thank; and, in any event, as soon as the house was sold as it might be any day, presumably she would, if the purchaser challenged her rights, be driven to a fresh suit after every such transfer. Here, however, she might have avoided the present additional delay and expense by impleading all the members of the joint family at the time she elected to sue only two of them.

I think the Darkhast ought to have been struck off against the present appellants and no execution given her against them; and I would so order.

HEATON, J.:—I agree. The point in dispute is a very easy one to state though not so easy, possibly, to decide. A decretal injunction was obtained against two brothers, who together with the sons of one of

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them formed a Hindu joint family. On the death of the two brothers who alone out of the family were parties to the suit, the plaintiff-decree-holder sought to enforce the injunction against the sons of one of those brothers. The decree-holder justified his right to do this on the ground, the only possible ground that he could take, that the sons were the legal representatives of the persons against whom the decree was obtained. There is a definition of the expression "legal representative" in the Code of Civil Procedure. The sons here certainly do not fall within the meaning of that definition. They do not in law represent the estate of a deceased person and they are not persons on whom has devolved the estate of a person sued in a representative character. So long as they do not come within the definition of "legal representative," then of course it is futile for the decree-holder to refer to section 50 or section 52 of the Code. But it is argued that section 53 gives to the decree-holder in this case a legal right to enforce the injunction against the sons of the brother; and that might be so if section 53 were purely descriptive of the kind of property which was deemed to be property of the deceased which has come to the hands of the sons or other descendants as their legal representatives. If that section were purely descriptive and not limitative, then there would be force in the contention I am considering. But I think it is limitative as well as descriptive; for if it were purely descriptive it would run in this way:—"For the purposes of section 50 and section 52, the property of sons and other descendants which would be liable under the Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree had been passed, shall be deemed," &c. A comparison of the rendering of the section which I have suggested with the actual wording of the section will bring out

very clearly the distinction which I am here seeking to point out. The conclusion I have come to is identical with that stated by my learned brother.

We have in the course of the argument been referred to a considerable number of cases, of which *Amur Chandra Kundu v. Sebak Chand. Chowdhury*⁽¹⁾ is an instance. It is an interesting instance for this reason that it indicates quite clearly the kind of difficulty which the new provision in the Code is intended to overcome. The new provision which I have alluded to is section 53. But seeing that this new provision has been incorporated in the Code, we have to determine the law from a consideration of that provision and not, as we have been invited to do, from a consideration of the decisions which were given before the law was changed. In this Calcutta case, to which I have referred, there is a very imposing array of cases collected which no doubt illustrate the difficulties which then existed, but which in my opinion do not go any way whatever towards solving the difficulty with which we are now confronted, when we have to ascertain the meaning of that which was enacted for the first time in the year 1908.

We allow the appeal with all costs and dismiss the Darkhast with all costs.

Appeal allowed.

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⁽¹⁾ (1907) 34 Cal. 642.

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