APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

1918.
December 20.

HANMANT KASHINATH JOSHI, MINOR, BY HIS GUARDIAN LAXMAN MAHADEO KULKARNI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* GANESH ANNAJI PUJARI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Debts—Sons' liability to pay father's debts—Debts incurred for breach of civil duty as trustee, whether Avyavaharika*—Liability of sons to pay during father's life-time.*

A money decree was obtained against a Hindu father for his failure to account as a trustee and in execution the ancestral family property was attached. The sons having applied to raise the attachment on the ground that the money debt in the decree against their father was tainted with illegality and immorality and that their shares could not be made liable in execution during the life-time of their father,

Held, that the decretal debt of the father for breach of civil duty as trustee was not *Avyavaharika.*

Held further, that the shares of the sons in the ancestral property could be attached and sold during the life-time of the father for the satisfaction of his personal debt not tainted with illegality or immorality.

Sahu Ram Chandra v. *Bhup Singh*[1], discussed.

FIRST appeal against the decision of J. H. Betigiri, First Class Subordinate Judge of Satara, in Miscellaneous Application No. 51 of 1916.

Application to set aside attachment.

One Gopalbhat Apanbhat Pujari, uncle of the defendants (respondents), by his will, dated the 26th May 1904, appointed Kashinath Ramchandra Joshi, the father of the plaintiff (appellants), as a trustee to manage the property during the minority of the defendants. Gopalbhat having died in April 1906, Kashinath took possession of the property as a trustee and continued in management till 1914.

* First Appeal No. 157 of 1917.
(1) (1917) L.R. 44 I. A. 126.

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In 1914, the defendants having found that Kashinath had mismanaged the trust property, filed a suit No. 7 of 1914 in the Court of the Nyayadhish of the Sangli State for the recovery of ornaments, cash and certain other property for which Kashinath had failed to account. Kashinath contended that he had restored the property held by him as a trustee. A decree was, however, passed against Kashinath for Rs. 14,403-2-1 by the Sangli Court.

In 1916, the defendants applied for execution of the decree and attached certain ancestral family property of Kashinath situate in the jurisdiction of the Satara Court. Thereupon the plaintiffs, sons of Kashinath, applied to the First Class Subordinate Judge of Satara to raise the attachment on the ground that the money debt in the decree against their father was tainted with illegality and immorality and hence their shares in the attached property were not liable for the payment of the same.

The Subordinate Judge refused to raise the attachment. His reasons were as follows:—

"Property attached belongs to applicants and their father Kashinath against whom a decree for money has been passed by the Sangli Court. Applicants have been evidently put up by their father to contend now that the money debt in the decree against their father was tainted with illegality and immorality and hence their shares in the attached property were not liable for the payment of the same. Applicants, however, have not adduced any evidence on the point. Opponents' pleader has put in Exhibit 12 which is the judgment of the Sangli Court. It shows that there was a breach of civil duty as trustee on behalf of applicants' father and he was made liable for ornaments and monies which he was bound to account for, in the decree under execution. So there is nothing to show that the monies for which Kashinath was held liable under Exhibit 12 was tainted with immorality within the meaning of the decisions in I. L. R. 37 Mad. 458, I. L. R., 39 Cal. 862, I. L. R. 32 Bom. 348 and 17 Bom. L. R. 955."

The plaintiffs appealed to the High Court.

J. R. Gharpure, for the appellants.

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Jayakar with *V. V. Bhadkamkar*, for the respondents.

SCOTT, C. J.:—The execution proceedings in which this appeal has been preferred were instituted by decree-holders under a decree passed in the Court of the Nyayadhish of the Sangli State for Rs. 14,403-2-1 against Kashinath Ramchandra Joshi, the father of the appellants. The decree falls within the class of decrees mentioned in section 44 of the Civil Procedure Code as capable of execution in British India as if passed by a Court of British India.

The appellants applied in the Court of the First Class Subordinate Judge of Satara for the raising of an attachment which had been levied under the Sangli decree upon their ancestral family property situate in the jurisdiction of the Satara Court on the ground that the money debt in the decree against their father was tainted with illegality and immorality and therefore the sons' shares were not liable in execution.

The learned Judge held that the appellants' father had been guilty of a breach of civil duty as trustee but that there was no evidence that the monies for which the liability was imposed by the decree were due on account of immorality under the decisions in *Venugopala Naidu* v. *Ramanadhan Chetty*[1]; *Chhakauri Mahton* v. *Ganga Prasad*[2] and *Durbar Khachar* v. *Khachar Harsur*[3]. The application was on this ground rejected.

The first serious question in this appeal is whether the decretal debt is Avyavaharika. The debt is clearly not within the categories mentioned in Manu, VIII, 159,

(1) (1912) 37 Mad. 458.
(2) (1911) 39 Cal. 862.
(3) (1908) 32 Bom. 348.

or Yajnavalkya, II, 47, being neither contracted for dissipation nor for a fine, tax or duty but it is not so certain that it may not fall within the text of Usanas (see Mandlik's Mayukha p. 113) as Avyavaharika. According to the best authorities cited by Mookerjee J., *Chhakauri Mahton* v. *Ganga Prasad*(1), Vyavaharika may mean "sanctioned by law or custom", *Durbar Khachar* v. *Khachar Harsur*(2), "customary or usual" (Bohtlingk, Roth, Wilson, Monier Williams), "proper" (Mandlik), "not repugnant to good morals" (Colebrooke). Mookerjee J. sums up the result ofthe texts thus, p. 869: "If the provisions of all these texts are summarised, the result appears to be that the debts which a son is not under any obligation to pay may be grouped as follows: (i) debts due for spirituous liquor, (ii) debts due for lust, (iii) debts due for gambling, (iv) unpaid fines, (v) unpaid tolls, (vi) useless gifts or promises without consideration or made under the influence of lust or wrath, (vii) suretyship debts, (viii) commercial debts, and (ix) debts that are not *Vyavaharika*, i.e., debts that are not lawful, usual, or customary, or, if we accept the version of Colebrooke, debts for a cause repugnant to good morals. This list, it must be conceded, is comprehensive; and as the terms used are not accurately defined there is considerable room for divergence of opinion as is indicated by the extracts from the commentaries, quoted by Jagannath in his Digest. This divergence is faithfully reflected in the judicial decisions to which reference was made in the course of argument, and which I shall now proceed to examine." Mookerjee J. cites seven reported cases as to the pious obligation of the son to discharge the debt of his father when such debt consists of money misappropriated by

(1) (1911) 39 Cal. 862.

(2) (1908) 32 Bom. 348.

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the latter: *Mahabir Prasad* v. *Basdeo Singh*[1]; *Pareman Dass* v. *Bhattu Mahton*[2]; *McDowell & Co.* v. *Ragava Chetty*[3]; *Natasayyan* v. *Ponnusami*[4]; *Kanemar Venkappayya* v. *Krishna Chariya*[5]; *Gurunatham Chetty* v. *Raghavalu Chetty*[6]; *Tirumalayappa* v. *Veerabudra*[7]; and concludes that the son is only immune from liability if the money has been taken by the father and misappropriated under circumstances which rendered the taking itself a criminal offence. To the cases referred to above may be added *Venugopala Naidu* v. *Ramanadhan Chetty*[8], where the Court dealing with a case of misapplication of funds of a Devastanam for an improper litigation accepted the conclusion of Mookerjee J. as to the meaning of Avyavaharika and observed that: "The third defendant clearly owed a legally valid debt to the Devastanam even if he had really misappropriated the moneys which he had taken from the Devastanam funds (instead of having merely sanctioned their expenditure *bona fide* on inappropriate objects) and his descendants are bound to repay that debt according to the decision in *Natasayyan* v. *Ponnusami*[4], where it is observed 'upon any intelligible principle of morality, a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-discharge of which, punishment in a future state might be expected to be inflicted, if in any.'"

There is thus ample authority for the conclusion of the learned Judge in the lower Court. There was no proof that the money not accounted for, for which the appellants' father was found liable, was criminally

(1) (1884) 6 All. 234.
(2) (1897) 24 Cal. 672.
(3) (1903) 27 Mad. 71.
(4) (1892) 16 Mad. 99.
(5) (1907) 31 Mad. 161.
(6) (1908) 31 Mad. 472.
(7) (1909) 19 Mad. L. J. 759.
(8) (1912) 37 Mad. 458 at p. 460.

misappropriated and in these circumstances the liability of the sons would be the same as their liability for their father's debt in respect of any other sums had and received by him for the use of another.

On this appeal another point was raised which was not taken in the lower Court, namely, that the sons or their shares could not be made liable during the life-time of their father. It was based upon certain dicta in a recent judgment delivered by Lord Shaw in the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*[1]. In that case the suit was on a mortgage executed by the father alone not for any antecedent debt. The creditor had sued and obtained a decree against the father. The sons brought the suit. The dicta are as follows (page 131):—

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly the case founded merely upon pious obligation, and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh, who contracted the debt, is still alive, and that there are concurrent findings by both of the Courts below to the

[1] (1917) L. R. 44 I. A. 126.

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effect that the plaintiffs have failed to prove that the debt of Rs. 200,for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate."

This refers to the effect of a mortgage as collateral security for a contemporaneous debt, not to the personal covenant of the father which in execution proceedings on a decree in a suit within six years of the covenant might result in sale of the sons' interests in satisfaction during the father's life-time. This is clear from the later passage (page 135) :—

"The importance of the case being free from complications is this; that except under the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for. Accordingly, unless the mortgage validly affects the joint family estate, the appellants must fail. In the view taken by the Board the mortgage was not granted in respect of an antecedent debt, and was invalid".

As remarked by Kumaraswami Sastriyar J. in *Peda Venkanna* v. *Sreenivasa Deekshatulu*[1] the passage "indicates that their Lordships had in view the cases where a suit on the debt evidenced by a mortgage not illegal or immoral would lie against the sons even though the mortgage was not for an antecedent debt; *Surja Prasad* v. *Golab Chand*[2], and other cases. If there was no pious obligation at all during the father's life-time and the father was in the position of any other co-parcener it is difficult to see how any suit would lie against the sons except for debts incurred for necessary

[1] (1917) 41 Mad. 136 at p. 148. [2] (1900) 27 Cal. 762.

family purposes and it would be perfectly immaterial to the sons whether the debt is barred or not."

The judgment thus so far from throwing doubt on the well-established remedies of the creditor in execution impliedly recognises them.

We have the highest authority for the proposition that creditors' remedies against ancestral property are as extensive while the judment-debtor is alive as after his death. The two appeals of *Girdharee Lall* v. *Kantoo Lall* and *Muddun Thakoor* v. *Kantoo Lall*[1] arose out of a suit in which two grandsons of Kunhya Lall deceased sued *their respective fathers* and various alienees of the ancestral property to obtain possession of the lands as having been sold to pay debts of the fathers incurred through extravagance and immorality. Girdharee Lall took under a sale-deed executed by the two fathers to raise money to discharge antecedent debts. Muddun Thakoor had purchased at a sale under an execution of a decree against the two fathers. The sons failed to prove that the debts of the fathers had been incurred for immoral purposes; the Privy Council therefore held that neither sale could be set aside. It was there laid down that "ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce :—' The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt' "[2].

(1) (1874) L. R. 1 I.A. 321. (2) (1874) L. R. 1 I. A. 331.

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In *Sripat Singh* v. *Tagore*[1] the father against whom the decree was obtained was still alive at the date of the execution proceedings. Yet the Privy Council laid down without qualification that "By that (Mitakshara) law a judgment against the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution-creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

The remedies of the decree-holder against ancestral property of a Mitakshara judgment-debtor with sons are fully recognised by the Legislature in the new Civil Procedure Code which not only, as in the previous Code, includes property over which the judgment-debtor has a disposing power which he may exercise for his own benefit as liable to attachment and sale but further provides (section 53) that ancestral property in the hands of sons shall be deemed to be property of the deceased which has come to the hands of the sons. The Code does not limit the liability of the ancestral estate to cases of concluded sales.

We dismiss the appeal with costs.

SHAH, J.:—It is contended in support of the appeal, first, that the sons are not liable for the decretal debt of their father according to Hindu law, and secondly, that the liability of the sons does not arise during the lifetime of the father and that their shares in the property cannot be proceeded against so long as the father is alive.

It is common ground that the property attached is ancestral, and there is no suggestion that the sons are liable on the ground of any benefit to the estate or to the family.

(1) (1916) L. R. 44 I. A. 1.

As regards the first point, the decree and the judgment show that the defendant No. 1 acted as a trustee for the plaintiffs under the will of one Gopalbhatta. He admittedly received the property and subsequently failed to restore it to the beneficiaries. The plaintiffs sued to recover the property, which the trustee had failed to account for. The defence was that he had restored the trust property and had duly accounted for it. It was found that the defendant had not returned the ornaments which he had received and that he had otherwise failed to account for certain other property. In the result a decree was passed against him for Rs. 14,403-2-1 by the Sangli Court. The breach of trust had taken place in Kolhapur, the suit was filed in the Sangli Court and the decree is under execution in British India. It is not suggested that there was any criminal proceeding taken against the trustee at any of these places and there is nothing in the circumstances of the case to show that there was any act or omission on his part which would amount to a criminal breach of trust under the Indian Penal Code. A false plea of the restoration of property and proper accounting is not sufficient to make the retention of the property as a trustee criminal. He throughout admitted his position as a trustee and the receipt of the property. The taking of the property was perfectly lawful and proper. Under the circumstances the decretal debt must be treated in my opinion as the debt incurred by him in consequence of his having lawfully and properly received the property as a trustee and having failed afterwards to account for it. The onus of proving that there was any criminal breach of trust on the part of the father would be on the sons, who seek to establish that the debt is tainted with illegality or immorality. I do not think it can be inferred from the judgment, and certainly it cannot be assumed, that there was any criminality attaching to the debt.

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The *ratio decidendi* in *Natasayyan* v. *Ponnusami*[1], *Kanemar Venkappayya* v. *Krishna Chariya*[2], *Gurunatham Chetty* v. *Raghavalu Chetty*[3] and *Venugopala Naidu* v. *Ramanadhan Chetty*[4] would apply to such a debt and not the *ratio decidendi* in *Mahabir Prasad* v. *Basdeo Singh*[5], *Pareman Dass* v. *Bhattu Mahton*[6] and *McDowell & Co.* v. *Ragava Chetty*[7].

It is urged, however, for the appellants, that the sons are not liable for such a debt, first, as it is in the nature of a fine (दण्ड), secondly, as it is a debt incurred out of anger (क्रोध), and lastly, that it is not *vyavaharika*.

The general liability of the sons and grandsons to pay the father's debt is mentioned in Yajnavalkya's verse No. 50 and Vijnanesvara's commentary thereon; and the exceptions thereto are stated in verse No. 47 and the commentary thereon (see Gharpure's Translation of Mitakshara, Vyavahara Adhyaya, pp. 76, 77 and 73 and 74).

The other Smriti texts bearing on these exceptions have been quoted by Mr. Justice Mookerjee in *Chhakauri Mahton* v. *Ganga Prasad*[8] and I do not consider it necessary to quote them here.

The word "fine" (दण्ड) occurs in most of the Smriti texts bearing on the exceptions to the general duty of the sons and the grandsons to pay the father's debt. I do not think that the debt such as we have in the present case can possibly be held to be a fine (दण्ड).

The argument that the debt is due to anger must also be rejected. The texts of Brihaspati and Narad (Sacred Books of the East, Vol. XXXIII, pp. 329 and 45, respectively), the text of Katyayana (Colebrooke's Digest, Vol. I,

(1) (1892) 16 Mad. 99.
(2) (1907) 31 Mad. 161.
(3) (1908) 31 Mad. 472.
(4) (1912) 37 Mad. 458.
(5) (1884) 6 All. 234.
(6) (1897) 24 Cal. 672.
(7) (1903) 27 Mad. 71.
(8) (1911) 39 Cal. 862.

p. 212) and Apararka's commentary on Yajnavalkya's verse No. 47 (Anandasrama Series, Vol. 46, Part II, pp. 647, 648 in Sanskrit) have been relied upon in connection with this argument. It is needless to consider them in detail. The debt in the present case is in no sense attributable to anger.

As to the contention that it is not *vyavaharika*, the observations of Knight J. in *Durbar Khachar* v. *Khachar Harsur*(1) as to the meaning of *vyavaharika* have been relied upon. The meaning of the word is discussed also in *Chhakauri Mahton's case*(2) by Mr. Justice Mookerjee and in *Venugopala Naidu's case*(3) by Sadasiva Ayyar J. There has been some difference of opinion as to the exact meaning of the word *vyavaharika*.

Whatever may be the true meaning of the word, the debt such as we have in this case cannot be said to be *avyavaharika*. It is clear that it is quite proper for a man to accept a trust; such acceptance cannot be treated as being outside *vyavahara*. And any liability directly arising out of such acceptance, and not attributable to any act or omission amounting to a criminal breach of trust cannot be held to be *avyavaharika*.

In this view of the case it is needless to discuss the texts of Usanas and Vyasa on this point wherein the expression नव्यावहारिकम् is used to indicate generally the debts, other than fine and toll, not payable by the sons and grandsons. I may, however, refer to two general considerations, which, in my opinion, point to the propriety of interpreting the word in a restricted and precise sense as far as possible. In the first place Vijnanesvara refers to the text of Usanas in his commentary on Yajnavalkya's verse No. 47 after explaining

(1) (1908) 32 Bom. 348. (2) (1911) 39 Cal. 862.

(3) (1912) 37 Mad. 458.

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the meaning of the words used by Yajnavalkya indicating the exceptions. He refers to it for the purpose of establishing the proposition that the whole and not only a part of fine or toll is payable. He does not cite it for the purpose of explaining the meaning of any word used by Yajnavalkya nor for indicating that any exception not covered by Yajnavalkya's text and his explanation thereof is meant by Usanas. This would rather show that Vijnanesvara at least did not think that anything more than that indicated by him in explaining Yajnavalkya's verse was meant by Usanas; otherwise he would probably have proceeded to explain the meaning of the word Vyavaharikam, as is not unusual with him when he quotes an important Smriti text.

Secondly, this exemption from the liability of the sons and grandsons to pay the father's debts is an exception to the general rule stated by Yajnavalkya in verse No. 50; and Yajnavalkya's verse No. 47 has been in terms described by Vijnanesvara as laying down exceptions to the general rule. Any word of general import used to indicate an exception ought to be strictly construed according to the recognised rule of construction under the Hindu law. This rule of construction has been referred to by Chandavarkar J. in *Gangu* v. *Chandrabhagabai*[1] and in West and Buhler's Hindu Law [3rd Edition, p. 880 foot-note (*c*)].

The next point urged is that the shares of the sons in the ancestral immoveable property cannot be attached and sold during the life-time of the father for the satisfaction of his personal debt not tainted with illegality or immorality. In support of this argument the observations of their Lordships of the Privy Council in

(1) (1907) 32 Bom. 275 at p. 283.

Sahu Ram Chandra v. *Bhup Singh*[1], particularly the observations relating to the obligation of the sons and grandsons to pay the debts of their father arising after the death of the father at p. 131 of the report, and the observations of Sir John Stanley C. J. relating to the two propositions enunciated in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[2], quoted with approval at pp. 133-34 of the report, are relied upon on behalf of the appellants. It is urged for the respondents that as a corollary of the right of the father to alienate the son's interests in the ancestral estate, in which the sons would have a vested interest under the Mitakshara by birth, to satisfy his antecedent debts not tainted with illegality or immorality (using the expression generally to indicate the exceptions which the Smriti writers specify), so as to make the alienation binding upon the sons, it is recognised in several decisions that the creditor's right to bring the ancestral property to sale for the realisation of a decretal debt, which would be an antecedent debt at the date of the Court-sale, is co-extensive with the father's power to alienate the ancestral immoveable property. It is further urged that the observations in *Sahu Ram Chandra's case*[1] must be read with reference to the facts of the case and cannot be taken to have over-ruled these decisions.

The Indian decisions in which the creditor's right is held to be co-extensive with the father's power to satisfy his antecedent debts not tainted with illegality or immorality are based upon the earlier decisions of the Privy Council in *Girdharee Lall* v. *Kantoo Lall*[3], *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[2] and *Mussamut Nanomi Babuasin* v. *Modun Mohun*[4]. These Indian decisions are referred to in the recent case of *Peda Venkanna* v. *Sreenivasa Deekshatulu*[5] and I do not propose to refer to all

(1) (1917) L. R. 44 I. A. 126.
(2) (1878-79) L. R. 6 I. A. 88.
(3) (1874) L. R. 1 I. A. 321.
(4) (1885) L. R. 13 I. A. 1.
(5) (1917) 41 Mad. 136.

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of them again. I may only mention the decisions of this High Court in *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas*[1], *Chintamanrav Mehandale* v. *Kashinath*[2], *Umed Hathising* v. *Goman Bhaiji*[3] and *Govind* v. *Sakharam*[4]. On the facts these decisions would be distinguishable: but their *ratio decidendi* is in favour of the view, which the respondent contends for.

It is significant that the view taken in *Umed Hathising* v. *Goman Bhaiji*[5] as to procedure has received a legislative recognition in section 53 of the Civil Procedure Code of 1908. It is true that the section refers to the liability after the death of the father and not during his life-time.

It is also significant that in several cases the Official Assignee, in whom the insolvent debtor's estate is vested, is held to be entitled to alienate the property on behalf of the creditors exactly as the debtor would be entitled to alienate the ancestral immoveable property so as to affect his son's interest: and this power of the Official Assignee is recognised quite independently of the circumstance whether the father is alive or dead at the time: see *Fakirchand Motichand* v. *Motichand Hurruckchand*[6], *Rangayya Chetti* v. *Thanikachalla Mudali*[7] and *Nunna Setti* v. *Chidaraboyina*[8]. In *Rangayya Chetti's case*[7] the father was in fact alive. It may be said with reference to this class of cases, that the father can be held to be "immersed in difficulties" (व्यसनविप्लुत) on account of his insolvency within the meaning of Yajnavalkya's verse No. 50 and that therefore the sons and grandsons may be liable during the father's life-time. That, however, is not the ground upon which these decisions are based.

(1) (1886) 11 Bom. 37.
(2) (1889) 14 Bom. 320.
(3) (1895) 20 Bom. 385 at p. 389.
(4) (1904) 28 Bom. 383.
(5) (1895) 20 Bom. 385 at p. 389.
(6) (1883) 7 Bom. 438.
(7) (1895) 19 Mad. 74.
(8) (1902) 26 Mad. 214.

Apart from these decisions, the observations in *Mussamut Nanomi's case* [1] show that the sons could not set up their rights against their father's alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted with immorality. The father was alive in this case, and their Lordships held that the purchaser bought the entirety of the estate "which could lawfully be sold to him." This shows that the Court can sell the larger interest if the debt is not tainted with illegality or immorality, as the purchaser can acquire it only if it can be properly sold; and it can be properly sold during the life-time of the father only if the right of the decree-holder is held to be co-extensive with the father's power to deal with it for an antecedent debt not tainted with illegality or immorality.

The recent decision in *Sripat Singh* v. *Tagore* [2] also supports this view. Their Lordships observe "that by the Mitakshara a judgment against the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution-creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone". Further, after stating the effect of a certain order, their Lordships observe "that is what the order meant, and had it effected anything else the result would have been that, without any reason at all, the Judge would have deprived the execution-creditor of the undoubted right that he possessed, except upon the happening of one event, which, in the result, has never arisen, to sell the entirety of the estate". In this case the father was alive. It is true that the High Court had found the

(1) (1885) L. R. 13 I. A. 1.

(2) (1916) L. R. 44 I. A. 1.

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debt to be binding upon the joint family and that the sale had in fact taken place. But I do not see how the *ratio decidendi*, which is apparently independent of these facts, can be affected by them.

Thus there is ample authority for allowing the creditor to attach and sell the ancestral immoveable property of the debtor including the sons' interests during the life-time of the debtor, provided the debt is not tainted with illegality or immorality: and it is obvious that it is convenient to settle the question whether the debt is so tainted or not in execution proceedings if the sons intervene instead of leaving it to be determined by a separate suit and of allowing the Court-sale to take place before it is determined. It is to the advantage of all the parties concerned to have it determined, if possible, before the property is put up for sale.

The contention for the appellants based on the observations in *Sahu Ram Chandra's case*[1] can be allowed only if they are read as over-ruling the decisions above-referred to. In the first place these observations must be taken to have been made with reference to the facts of the case and the main point that was under consideration. The main point in the case related to the antecedency of the mortgage debt, the debt not having been incurred prior to or independently of the mortgage. Undoubtedly that point is decided and the conflict of decisions on that point is settled. But there was no question in that case of the remedy of a decree-holder during the life-time of the father: and the judgment cannot be read as deciding that point in the manner suggested by the appellants. Secondly, there is no express reference to the passage in the Mitakshara which shows that under certain circumstances the

(1) (1917) L. R. 44 I. A. 126.

liability may arise during the life-time of the father: nor is there any reference to the decisions bearing on the question of the creditor's remedies during the life-time of the debtor. It would not be reasonable to treat these decisions or rather their *ratio decidendi* as over-ruled or dissented from by their Lordships in the absence of any express reference to the point. Lastly, I do not see how such a reading of the observations in *Sahu's case*[1] as is suggested by the appellants would be consistent with the *ratio decidendi* in *Mussamut Nanomi's case*[2] and *Sripat Singh's case*[3].

I am, therefore, of opinion that in the absence of a definite and explicit pronouncement on the point, this Court is bound, in spite of the observations in *Sahu's case*[1], to follow the Indian decisions and the decisions of the Privy Council, to which I have referred, and to hold that the decree-holder's right to proceed against the ancestral immoveable property in execution during the debtor's life-time is co-extensive with the debtor's power to alienate it under the Mitakshara for the satisfaction of his antecedent debts not tainted with illegality or immorality.

This result is justified by the provisions of section 60 of the Code of Civil Procedure. Under this section the property, over which the debtor has a disposing power which he may exercise for his own benefit, can be attached. And the expression is capable of being read as including the shares of the sons in the ancestral immoveable property, which the father under the Mitakshara has power to sell for the satisfaction of his antecedent debts. It may be that the true view according to the strict Hindu law is that which found favour with Innes and Muttusami Ayyar JJ. against the opinion of the majority of the Full Bench in

(1) (1917) L. R. 44 I. A. 126. (2) (1885) L. R. 13 I. A. 1.
(3) (1916) L. R. 44 I. A. 1.

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Ponnappa Pillai v. *Pappuvayyangar*[1]. But since then the accepted view has been that the creditor's right is co-extensive with the father's power during his life-time.

I fully recognise that the power of the father to alienate the ancestral immoveable property for an antecedent debt is an exception to the general rule of the Mitakshara that the father cannot alienate the ancestral immoveable property vested in the sons and grandsons so as to bind their interests, and that the exception should not be extended and should be carefully guarded. It may be that in thus giving effect to the creditor's remedies the exception may have received an extension which is not quite justified by the Hindu law. But just as the exception is firmly established I think this extension of the exception must be taken to be equally established at least so far as this Court is concerned. It may be anomalous that while the sons and grandsons are allowed to establish that the debt is tainted with illegality or immorality according to Hindu law, they should not be allowed to show that according to that law their liability has not arisen at all. But it must be taken as a part of the anomaly involved in the exception itself.

I do not think that the provisions of Bombay Act VII of 1866 conflict in any way with this view as to the right of the decree-holder to execute the decree against the shares of the sons in the ancestral immoveable property during the life-time of the father.

We are not concerned at this stage with the question, whether the decree-holder should first proceed only against the father's share in the ancestral immoveable estate, and then against the interests of the sons, if

(1) (1881) 4 Mad. 1.

necessary. The point has not been argued; and I express no opinion about it.

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I, therefore, agree that the appeal should be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah; on difference between Mr. Justice Heaton and Mr. Justice Pratt.

1919. *January* 29.

AMBALAL BAPUBHAI GUJARATHI AND ANOTHER (ORIGINAL PLAINTIFFS, DECREE-HOLDERS), APPELLANTS *v.* NARAYAN TATYABA BHOSALE (ORIGINAL DEFENDANT, JUDGMENT-DEBTOR), RESPONDENT.[*]

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 14—Charge on immoveable property created by a money-decree—Execution proceedings of the decree—Charged property can be sold in execution—No separate suit for bringing the property to sale necessary.

A decree for money directed the defendant to pay a sum of money to the plaintiffs, and further declared a first charge and a lien on certain immoveable property of the defendant. In execution of the decree the plaintiffs applied to sell the property charged.

Held, by Shah J., agreeing with Heaton, J. (Pratt J. dissenting), that the plaintiffs had the right to bring the property charged to sale in execution proceedings; and that no separate suit for the sale of the property was necessary.

FIRST appeal from the decision of R. T. Kirtane, First Class Subordinate Judge at Poona.

Execution proceedings.

The decree under execution was obtained by consent on the Original Side of the Bombay High Court. It provided as follows:—

"This Court by and with such consent doth order that the defendant do pay to the plaintiffs the sum of Rs. 35,789-6-11 for debt and interest... and this Court with the like consent doth declare that the plaintiffs have a

[*] First Appeal No. 194 of 1917.