document is silent on the question as to what happened to the assets and liabilities of the firm that was constituted under the deed of 1939. To all intents and purposes the firm as reconstituted was not a different unit but it remained the same unit in spite of the change in its constitution.

The result is that we see no substantial grounds for disturbing the opinion given by the High Court on the question submitted to it. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

Agent for the appellant: *G. H. Rajadhyaksha.*

Agent for the respondents: *P. K. Chatterjee.*

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SIDHESHWAR MUKHERJEE
v.
BHUBNESHWAR PRASAD NARAIN SINGH AND OTHERS.

[MEHR CHAND MAHAJAN, MUKHERJEA and JAGANNADHADAS JJ.]

Hindu law—Debts—Pious obligation of sons—Decree against junior member for debts which are not immoral or illegal—Sale of his interest in execution—Rights of purchaser—Interest of sons of junior member, whether passes to purchaser—Rule in Nanomi Babuasin's *case—Purchaser's right to possession or share of profits.*

A person who has obtained a decree against a member of a joint Hindu family for a debt due to him is entitled to attach and sell the interest of his debtor in the joint family property, and, if the debt was not immoral or illegal, the interest of the judgment-debtor's sons also in the joint family property would pass to the purchaser by such sale even though the judgment-debtor was not the *karta* of the family and the family did not consist of the father and the sons only when the decree was obtained against the father and the properties were sold. It is not necessary that the sons should be made parties to the suit or the execution proceedings.

Lalta Prashad v. *Gazadhar* (I.L.R. 55 All. 28), *Chhoteylal* v. *Ganpat* (I.L.R. 57 All. 176) and *Virayya* v. *Parthasarathi* (I.L.R. 57 Mad. 190) approved.

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The rule laid down by the Privy Council in *Nanomi Babuasin's case* is not restricted in its application to cases where the father was the head of the family and in that capacity could represent his sons in the suit or execution proceedings, for, subject to the right of the sons to assert and prove that the debt contracted by their father was not such as would be binding on them under the Hindu law, the father, even if he was not the *karta* could represent his sons as effectively in the sale or execution proceedings as he could do if he was the *karta* himself.

A person who has purchased the interest of a member of a joint Hindu family in execution of a decree against him is not entitled to institute a suit against the other coparceners for recovery of a share of the income of the joint family properties from the date of his purchase. He can work out his rights only by a suit for partition and his right to possession would commence only from the period when a specific allotment is made in his favour.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 53 to 55 of 1951.

Appeals from the Judgment and Decree dated the 8th September, 1948, of the High Court of Judicature at Patna (Mahohar Lall and Mahabir Prasad JJ.) in C.A. Nos. 219 of 1946, and 40 and 39 of 1945, arising out of the Judgment and Decree dated the 29th January, 1946, and 16th September, 1944, of the Court of the Subordinate Judge, Motihari, in Original Suits Nos. 108, 109 and 110 of 1943.

C. K. Daphtary, Solicitor-General for India (*Rameshwar Nath,* with him) for the appellant.

Ratan Lal Chowla (*K. N. Aggarwal,* with him) for respondents Nos. 1 and 2.

H. J. Umrigar for respondents Nos. 3 and 4.

1953. October 5. The Judgment of the Court was delivered by MUKHERJEA J.

Civil Appeal No. 53 of 1951.

This appeal is on behalf of the plaintiff and is directed against a judgment and decree of a Division Bench of the Patna High Court, dated the 8th of September, 1948, modifying those of the Additional Subordinate

Judge, Motihari, passed in Partition Suit No. 108/6 of 1943/46. There were two money suits between the same parties which were tried along with the suit for partition and both of them were decreed by the trial judge, but dismissed by the High Court on appeal. Civil Appeals Nos. 54 and 55 of this court arise out of these appeals and we will deal with them separately.

So far as the main appeal is concerned, the material facts are uncontroverted and the dispute centres round one short point, which relates to the extent of share in the disputed properties to which the plaintiff can be said to have acquired a legal title. The plaintiff averred that he was entitled to a 4 annas share in the schedule lands and this claim was allowed by the trial judge. The High Court held, on the other hand, that the plaintiff's title extended only to 1 anna 4 pies share in the disputed properties, and with regard to this share alone he could claim partition. It is the propriety of this decision that has been challenged before us in this appeal.

To appreciate the contentions that have been raised by the parties before us, it may be convenient to narrate a few material facts. The properties in suit, which are comprised in Tauzi No. 703 of the Champaran Collectorate, belonged admittedly to the defendants first party and their ancestors. Defendant No. 1, Bhubneshwar Prasad, who is the main defendant in the present litigation, borrowed a sum of money from one Panchanan Banerjee on the basis of a promissory note some time before 1932. Panchanan instituted a suit in the Court of the Subordinate Judge at Motihari against Bhubneshwar for recovery of this loan and having obtained a decree, put the decree in execution in Execution Case No. 16 of 1932 of the Court of the Subordinate Judge at Motihari. In course of these proceedings, the right, title and interest of the judgment-debtor in the properties in suit, which was described as amounting to 4 annas share in the same, was put up to sale and purchased by the decreeholder himself on 7th of September, 1932. The purchaser got delivery of possession on January 25, 1935. It is

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admitted that at the time of the sale, Bhubneshwar along with his grand-father Bishun Prakash, his father Lachmi Prasad and his two sons who are defendants 2 and 3 in the suit, constituted an undivided Hindu family, of which apparently his grand-father was the karta; and it is not disputed that if a partition had taken place at that time, Bhubneshwar Prasad along with his sons would have got 4 annas share in the joint ancestral property. Panchanan sold the interest purchased by him at the execution sale to the plaintiff by a conveyance dated the 1st of February, 1935, and it is on the strength of this conveyance that the plaintiff instituted the present suit claiming specific allotment of a 4 annas share in the suit properties. Bhubneshwar and his three sons, to wit, defendants 2, 3 and 4, are the main defendants in the suit and it is not disputed that at the present moment they own the remaining 12 annas share in the suit properties. The defendants 5, 6 and 7 were impleaded as parties defendants on the allegation that they held different portions of the joint properties as *zarpeshgidars* under the 12 annas proprietors.

The suit was contested primarily by defendant No. 1 and the substantial contention put forward by him was that as the money suit was instituted by Panchanan against him alone and his sons were not made parties either to the suit or the execution proceeding, his own undivided interest in the joint family properties and not that of his sons passed by the sale. Consequently, the execution creditor could not by his purchase acquire more than 1 anna 4 pies share in the suit properties and to this share alone the plaintiff could legitimately lay a claim. This contention was repelled by the Subordinate Judge who took the view that as the debt contracted by Bhubneshwar was not for immoral purposes, it was open to his creditor to realise his dues not merely from the father's undivided coparcenary interest in the ancestral property but from the entire interest of the father and the sons in the same. The execution proceedings showed that the creditor intended to attach and sell the interest of the sons as well and unless,

therefore, the sons succeeded in showing that the debts were such which they were not obliged to pay under the rules of Hindu law, the fact that they were not made parties to the proceedings was altogether immaterial. The result was that the trial judge allowed the plaintiff's claim in its entirety and passed a preliminary decree declaring the plaintiff's one-fourth share in the schedule properties. The defendant No. 1 thereupon took an appeal to the High Court. The learned Judges of the High Court, who heard the appeal, were of the opinion that the decision of the trial court would have been unassailable if the defendant No. 1 was the head of a joint family consisting of himself and his sons. In such cases he could have represented the interests of his sons and the entire interest could have been sold in the execution sale. But as in this case the plaintiff himself was a junior member of the family, he had neither any right of disposition over the interests of his sons, nor could he represent them in any suit or proceeding. What the purchaser acquired by the execution sale was not any interest in a specified portion of the joint property, but the right of the judgment-debtor to have his share defined and allotted by partition, and in this claim for general partition the question of the pious obligation of the sons to pay their father's debts would not at all arise. It was held, therefore, that the plaintiff was legally entitled to 1 anna 4 pies share in the joint properties which the father himself could claim on partition at the date of the sale. The sole point for our consideration is, whether the view taken by the learned Judges is right?

For a proper determination of this point, it would be necessary to consider first of all whether the sons of defendant No. 1 were legally liable to pay the decretal debt due by their father and could this liability be enforced by attachment and sale of their undivided coparcenary interest in the joint family property along with that of their father? If the liability did not exist, no other question would arise; but if it did exist, a question of procedure would still have to be considered as to whether the sons' interest in the coparcenary

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could be attached and sold without making the sons parties to the suit and the execution proceedings.

So far as the first point is concerned, the question whether the sons of defendant No. 1 were liable in law to discharge the decretal debt due by their father could be answered only with reference to the doctrine of Mitakshara law which imposes a duty upon the descendants of a person to pay the debts of their ancestor provided they are not tainted with immorality. This doctrine, as is well known, has its origin in the conception of Smriti writers who regard non-payment of debt as a positive sin, the evil consequences of which follow the undischarged debtor even in the after-world. It is for the purpose of rescuing the father from his torments in the next world that an obligation is imposed upon the sons to pay their father's debts. The doctrine, as formulated in the original texts, has indeed been modified in some respects by judicial decisions. Under the law, as it now stands, the obligation of the sons is not a personal obligation existing irrespective of the receipt of any assets; it is a liability confined to the assets received by him in his share of the joint family property or to his interest in the same. The obligation exists whether the sons are major or minor or whether the father is alive or dead. If the debts have been contracted by the father and they are not immoral or irreligious, the interest of the sons in the coparcenary property can always be made liable for such debts.

We do not find any warrant for the view that to saddle the sons with this pious obligation to pay the debts of their father, it is necessary that the father should be the manager or *karta* of the joint family, or that the family must be composed of the father and his sons only and no other male member. No such limitation is deducible either from the original texts or the principles which have been engrafted upon the doctrine by judicial decisions. Where a debt is incurred for necessity or benefit of the family, the manager, whether he be the father or not, has the undoubted power to alienate any portion of the coparcenary property for the satisfaction of such debts, irrespective of the fact as to who actually contracted the debts. The

authority of the manager is based upon the principle of agency or implied authority which has been formulated in a text quoted by Mitakshara. "Even a single individual," thus runs the text, "may make a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family and especially for religious purposes"(1). Such family debt, however, stands on quite a different footing from a personal debt contracted by the father which does not benefit the family. The liability of his sons to pay such debt does not rest on the principle indicated above, according to which the junior members of a family are made to pay the family debts. It is a special liability created on purely religious grounds and can be enforced only against the sons of the father and no other coparcener. The liability, therefore, has its basis entirely on the relationship between the father and the son. There is no authority to show that it is in any way dependent upon the constitution of the family either at the time when the debt was contracted or when the obligation is sought to be enforced. On the other hand, the subject of debts has been dealt with by the author of Mitakshara quite separately and it has apparently no connection with the provisions made by the author relating to inheritance and constitution of the family.

The learned Judges of the High Court laid great stress on the fact that the defendant No. 1 in the present case was a junior member and not the *karta* of the family and consequently had no rights of disposal over his own interest or the interest of his sons in the joint property. The idea seems to be that if the father was incompetent to alienate the coparcenary rights of his sons for satisfaction of his own debts, the creditor of the father could not claim to occupy a better position. This way of approach does not seem to us to be correct. It cannot be laid down as a proposition of law that the creditor's power of proceeding against the son's share in the joint estate for recovery of the debt due by the father is co-extensive with the father's power of disposal over such interest. As has

(1) Mitak. 1. L. 28.

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been observed by this court in the case of *Pannalal and Another* v. *Mst. Naraini*(1) "the father's power of alienating the family property for payment of his just debts may be one of the consequences of the pious obligation which the Hindu law imposed upon the sons; or it may be one of the means of enforcing it, but it is certainly not the measure of the entire obligation." If the creditor's rights are deemed to be based exclusively upon the father's power of disposition over the son's interest, such rights must necessarily come to an end as soon as the father dies, or there is a partition between him and his sons. It is settled law that even after partition the sons could be made liable for the pre-partition debts of the father if there was no proper arrangement for the payment of such debts at the time when the partition was effected, although the father could have no longer any right of alienation in regard to the separated shares of the sons.

It is true that under the Mitakshara law, as it is administered in the State of Bihar, no coparcener can alienate, even for valuable consideration, his undivided interest in the joint property without the consent of his coparceners; but although a coparcener is incompetent to alienate voluntarily his undivided coparcenary interest, it is open to the creditor, who has obtained a decree against him personally, to attach and put up to sale his undivided interest, and after purchase to have the interest separated by a suit for partition. A personal decree obtained against the sons could certainly be executed against them by attachment and sale of their undivided interest. The position, in our opinion, cannot be different if they are under a legal liability to discharge the decretal debt due by their father; and this liability must be capable of being enforced in the same manner as a personal decree against them. Whether this could be done only by making the sons parties to the sale or execution proceeding, is another matter to which we would advert presently; but so far as the legal liability of the sons is concerned, as the debts incurred by the father have not been shown to be immoral or irreligious it must be held that under

(1) [1952] S.C.R. 544 at 556.

the rule of Hindu law mentioned above, there is a legal liability on the part of the sons to discharge these debts and the creditor can enforce this liability by attachment and sale of the sons' interest in the same manner as if it was a personal debt due by them. The fact that the father was not the *karta* or manager of the joint family or that the family did consist of other coparceners besides the father and sons, does not affect the liability of the sons in any way. This view has been taken in quite a number of cases(1) by the Allahabad as well as the Madras High Courts, and in our opinion it is quite a sound view to take.

Holding, as we do, that the sons were liable in this case to discharge the decretal debt due by their father, the further question arises as to how this liability could be enforced? Could the interest of the sons in the joint property be attached and sold without making the sons parties to the suit and the execution proceedings? The point does not seem to us to present much difficulty. Strictly speaking, the sons could not be said to be necessary parties to the money suit which was instituted by the creditor against the father on the basis of a promissory note. If a decree was passed against the father and the sons jointly, the latter would have been personally liable for the debt and the decree could have been executed against their separate or personal property as well. No doubt the sons could have been made parties to the suit in order that the question of their liability for the debts of their father might be decided in their presence. Be that as it may, the money decree passed against the father certainly created a debt payable by him. If the debt was not tainted with immorality, it was open to the creditor to realise the dues by attachment and sale of the sons' coparcenary interest in the joint property on the principles discussed above. As has been laid down by the Judicial Committee in a series of cases, of which the case of *Nanomi Babuasin* v. *Modun Mohun*(2) may

(1) Vide *Lalta Prashad* v. *Gazadhar*, 55 All. 28; *Chhotey Lal* v. *Ganpat* 57 All. 176; *Virayya* v. *Parthasarathi*, 57 Mad. 190.

(2) 13 I.A. 1. Also see *Bhagbut Pershad* v. *Mst. Girja Kour*, 15 I.A. 99; *Minakshi Naidu* v. *Immudi*, 16 I.A. 1; *Mahabir Pershad* v. *Markunda*, 17 I.A. 11; *Sripat* v. *Tagore*, 44 I.A. 1.

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be taken as a type, the creditor has an option in such cases. He can, if he likes, proceed against the father's interest alone but he can, if he so chooses, put up to sale the sons' interest also and it is a question of fact to be determined with reference to the circumstances of each individual case whether the smaller or the larger interest was actually sold in execution. In the present case it has been found as a fact by the trial judge—and this finding has not been reversed in appeal —that the executing court intended to sell and did sell a four annas share in the joint property which included the undivided interest of the sons of defendant No. 1. According to the view taken by the Privy Council in *Nanomi Babuasin's* case(1), all that the son can claim in such cases is that not being made party to the sale or execution proceeding, he ought not to be barred from trying the nature of the debt or his liability to pay the same in any suit or proceeding started by him or to which he might be made a party. He could raise the point either by way of objection in the execution proceeding itself or he could himself file a suit for a declaration that the debt was not binding on him. He could also raise it by way of defence when the auction purchaser seeks to have his rights defined and demarcated in a partition suit. In the case before us, the sons, who were made defendants to the partition suit, had that opportunity given to them. Unfortunately, however, they did not choose to avail themselves of this opportunity. Defendant No. 2, the major son of defendant No. 1, did not file any written statement or contest the suit at all. A written statement was indeed filed on behalf of the minor sons, defendants 3 and 4, who were represented by a pleader guardian and there this point was specifically raised. But it appears from the records that they did not invite the court to frame any issue on the point, nor did they lead any evidence upon it. They failed to show, therefore, that the debt was one which they were not obliged to pay under the rule of Hindu law. It may be further noted that although the trial court's decision was against the sons, they did not choose to challenge the decree by way of an appeal. The appeal was filed only by their

(1) 13 I.A. 1.

father and they were made respondents; and it was only at a very late stage that the appellate court transferred them to the category of appellants. The learned Judges of the High Court seem to be of the opinion that the principle enunciated by the Judicial Committee in *Nanomi Babuasin's* case(1) or the other cases that followed it could apply only when the father was the head of the family and in that capacity could represent his sons in the suit or the execution proceeding. But if the father was not the *karta*, this principle, it is said, would not apply and the purchaser could only acquire the right, title and interest of the father alone even though the court purported to sell the interest of the sons as well. This does not seem to us to be a sound view to take. It is true that in all the cases referred to above, the father was actually the head of the family but that does not make any difference in principle. If the difference is sought to be made on the basis of the father's capacity to represent the sons in any litigation, it may be said that, subject to the rights of the sons to assert and prove that the debt contracted by their father was not such as would be binding on them under the rule of Hindu law, the father, even if he was not a *karta*, could represent the sons as effectively in the sale or execution proceedings as he could do if he was the *karta* himself. Without being a *karta* he could, as a father, completely represent his branch of the coparceners consisting of himself and his sons; and *vis-a-vis* his sons his position would not improve in any way by his being a *karta* of the family. It has been observed in a Madras case(2) and we think rightly that so long as the family remains joint, all the members of a branch or a sub-branch of the family can form a distinct and separate corporate unit within the larger unit. Of such a smaller unit consisting of the father and his sons, the father would undoubtedly be the head and legal representative, although he is not the head of the larger unit. In our opinion, therefore, the High Court was not right in holding that the plaintiff could not claim 4 annas share in the property on

(1) 13 I.A 1.

(2) Vide *Sudarsanam v. Narasimhulu*, I.L.R. 25 Mad. 149, 155.

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the strength of the purchase by his predecessor in the execution sale simply because the father was not the manager or *karta* of the joint family at that time. The result is that this appeal is allowed, the judgment and decree of the High Court are set aside and those of the trial judge restored. The plaintiff will have costs of this court as well as of the court below.

Civil Appeals Nos. 54 and 55 of 1951.

Coming now to the money appeals, the point for consideration is a short one. The suits out of which these appeals arise were instituted by the plaintiff in the partition suit against the first party defendants for recovery of his 4 annas share of the income or profits of the properties specified in the schedules to the plaints and which were included admittedly in his purchase, on the allegation that the defendants first party appropriated the entire profits to themselves and refused to give the plaintiff his legitimate share. The High Court has held that this claim of the plaintiff must fail. All that he purchased at the execution sale was the undivided interest of the coparceners in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour. In our opinion, this is the right view to take and Mr. Daphtary, who appeared in support of the appeals, could not satisfy us that in law his client was entitled to joint possession on and from the date of his purchase. The result is that these appeals are dismissed with costs.

Appeal No. 53 allowed.
Appeals Nos. 54 and 55 dismissed.

Agent for the appellant: *Rajinder Narain.*

Agent for the respondents Nos. 1 & 2: *P. G. Aggarwal.*