NOTES.

[**STATUTORY CHANGES**—

Sec. 17, cl. (2), of XVI of 1908 :—

"(2) Nothing in clauses (*b*) and (*c*) of sub-section (1) applies to—

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer."

This clause was also inserted by Act VII of 1888. *Before* the passing of this Act, "doubts were entertained as to whether or not a certificate of sale required registration" and the addition of this clause puts an end to such doubts and the conflicting decisions thereon.—

See 7 B. H. C. A. C. J. 136; 10 B. H. C. R. 435, 6 M. H. C. R. Ap. xi; 3 Mad. 37; 4 Bom. 155; 2 All. 392.

For *Contra, see* 9 Cal. 82; 7 Mad. 418; 5 All. 84; 5 All. 568.]

---

[42] APPELLATE CIVIL.

The 30th April, 1881.

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE KERNAN.

Sangili Virapandia Chinnathambiar, Zamindar of Sivagiri............(Defendant) Appellant

versus

Alwar Ayyangar............(Plaintiff) Respondent (in No. 389).

Thambu Chinnammal Janaki............(Plaintiff) Respondent (in No. 390).

Minatchi Ammal............(Plaintiff) Respondent (in No. 391).

Muttusamia Pillai............(Plaintiff) Respondent (in No. 392).*

Liability of son to pay his father's debt under Hindu Law—under Section, 234 Civil Procedure Code— Ex parte *order of attachment, appeal Against.*

As the entire interest in an impartible Zamindari passes upon the death of the father to the son, there is nothing in the estate itself which can be attached as assets of the father under a decree against him or which can be made available in execution of the decree against his son as his representative.

Though a son is bound under Hindu Law to pay his father's just debts from any property he may possess, yet, when he is made a party to a decree as representative of his deceased father for the purpose of executing it, his liability is limited to the amount of assets of the deceased which may have come to his hands and has not been duly disposed of.

An appeal lies from an *ex parte* order directing attachment in execution of a decree.

THE facts and arguments in these miscellaneous appeals sufficiently appear in the following **judgment** of the Court (INNES and KERNAN, JJ.) :—

V. Bhashyam Ayyangar for Appellant.

---

*Civil Miscellaneous Appeals Nos. 389, 390, 391 and 392 of 1880 against the orders of the Subordinate Judge of Tinnevelly, dated 31st March 1880.

The Advocate-General (Hon. *P. O'Sullivan*) for Respondents in Appeals Nos. 389-390.

Mr. *Shephard* for Respondents in Appeals Nos. 391-392.

Judgment:—The Zamindar of Sivagiri died in 1873. In his lifetime several decrees were passed against him. After his death execution of these decrees was sought against his son as his personal representative. The appeals with which we now have to deal—389 to 392—are appeals from orders passed by the Subordinate Judge directing attachments to issue.

[43] Appeals 389 and 390 are appeals from orders passed on petitions 196 and 197 of 1878.

The petitions upon which the orders were passed in the other two cases were 55 of 1877 and 437 of 1878, respectively. The representative did not put in any counter-petition to the petitions 196 and 197 of 1878. To the other two petitions, counter-petitions were put in contesting the grounds upon which the prayer for execution is in each case based.

The *Advocate-General* contended that under the circumstances there could be no appeal against the bare order passed upon petitions Nos. 196 and 197 for attachment, as no objection had been taken to the prayer for execution and nothing has been done beyond directing an attachment in accordance with the unopposed prayer of the petition. Mr. *Bhashyam* contended that he had a right of appeal from an order passed, as these were, under Section 244,* whether the granting of the order was actively opposed or not.

It appears to us that the Code admits of an appeal from an *ex parte* order in execution, and that there is an appeal in these cases.

Appeals Nos. 389 and 390 proceed upon the ground that the petition for execution in each case disclosed that the property is not the property of the deceased and that orders for attachment should not have issued.

In Appeals Nos. 391 and 392 Mr. *Bhashyam* contends that although the petitions for execution did not, as in the other cases, disclose the nature of the property, the grounds upon which it should be exempted from attachment were pointed out in the counter-petitions.

The attachments were issued against the zamindari lands. This property, he contends, became at the moment of the Zamindar's death the property of the son, and execution cannot be had against it for the judgment-debts of the Zamindar.

Question to be decided by Court executing decree.

*[Sec. 244 :—The following questions shall be determined by order of the Court executing a decree and not by separate suit, namely—

(*a*) questions regarding the amount of any mesne profits as to which the decree has directed inquiry ;

(*b*) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit between the date of its institution and the execution of the decree, or the expiration of three years from the date of the decree ;

(*c*) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution of the decree.

Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.]

He refers to Section 234 of the Civil Procedure Code which says: If a judgment-debtor dies "before the decree be fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

[44] "Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of," &c.

The *Advocate-General* on the other hand, in cases 389 and 390, contends that the son being liable to discharge his father's debts if they were not immoral can be held liable in execution, and that it is not necessary to institute separate proceedings against him to enforce this duty.

In 391 and 392 Mr. *Shephard* took the same ground as the *Advocate-General* in support of the order. He noticed that in the Court below the appellant claimed exemption on the ground that the debt was not contracted for proper family purposes, and that there was no suggestion that the debt was immorally incurred, and that it followed that the son is liable to discharge the debt.

It was intimated that there had been attachments on the property in these cases prior to the Zamindar's death and that the present attachments were in fact a mere continuation of those already subsisting, but this was not insisted on, nor was any evidence referred to as showing that the present orders were merely to revive or keep alive existing attachments. We are therefore relieved of the task of considering whether the fact of an attachment having been made in execution of a decree in the Zamindar's lifetime would devolve the property to the son at the moment of the Zamindar's death charged with the liability to satisfy the judgment-debt in respect of which the attachment was made. The coparcenary rights in such an estate do not cease to exist, though they are in abeyance. This is clear from the right of the coparceners in a family council to put an end to the custom of impartibility and replace the property in the position of ordinary coparcenary property. The only difference between zamindari property and ordinary coparcenary property is in the mode of its beneficial enjoyment. The custom requires that the estate should continue compact and united and the coparcener in whom it is vested for life has not therefore the independent power of alienation of even his own share. But the custom is the custom of the estate and concerns the family, not the public, and it does not seem to follow from the existence of such an estate that it is exempt from liability for the individual debts of the **[45]** person in whom it is vested for the time being, or that where a decree has passed against such a person and an attachment under the decree has issued in his lifetime against the estate and is still subsisting at his death, it should not have operation given to it to the extent of the interest which the Zamindar had as a coparcener at the date of his death.

For the reasons already mentioned, however, it is not necessary to determine this somewhat difficult question.

The orders under appeal must be treated as orders affecting fresh attachments at a period long subsequent to the Zamindar's death. If, according to the doctrine hitherto recognised by this Court, the entire interest in the zamindari passed at the moment of the Zamindar's death to the son, there is nothing in the estate itself which is attachable as assets of the late Zamindar, or which can be made available in execution of the decree against his representative *qua* representative.

We do not agree with the argument of the *Advocate-General* and Mr. *Shephard* that, because the representative is also the son of the deceased, he can be held liable in these execution-proceedings as son to discharge the debts of his father.

Section 234 sufficiently shows the limit of the liability of a representative, and the Appellant is not within that limit.

He has been made a party to the decree solely for the purpose of representing his father and of being made liable in respect of any assets of the father. It is admitted that the zamindari does not enure as assets of the father properly so called.

Under the decision of the Judicial Committee in *Girdhari Lal* v. *Kantu Lal* (L. R., 1 I. A., 321) the son is held liable to discharge the debts of the father out of his own property, and a decision of the Bombay High Court regards this decision of the Judicial Committee as having the effect of converting the entire family estate into assets of the father for the purpose of paying his debts. But all that is meant by this is that the son is not allowed to confine his obligation to discharge the father's debts to the assets actually inherited from his father, but must discharge them from whatever property he possesses.

[46] This liability, however, to whatever extent it might be held to affect the son in any new proceeding against him, cannot alter the rule of procedure that the only parties against whom execution can be issued are the parties to the decree.

The son is a party to the decree only as representative of his father and can only be held liable under the decree to the extent of such assets of his father as may have come to his hands and not been disposed of. The zamindari not being assets of the father in the hands of the son the order for attachment is not sustainable and must be reversed with all costs.

NOTES.

[HINDU LAW—MITAKSHARA—SON'S LIABILITY—

I.—ASSETS—

(1) " Ancestral property surviving to the sons are not assets in their hands to be attached in execution of money decree obtained against father alone" :—(1882) 5 Mad. 232; (1890) 13 Mad. 265 ; (1894) 16 All. 449 ; (1891) 18 Cal. 157=17 I. A. 194 P. C. ; (1909) 32 Mad. 429=19 M. L. J. 401 ; (1906) 5 C. L. J. 80.

(2) With regard to *impartible* estates, the successor to a holder takes it as his assets and so he is liable to all his debts :—(1909) 32 Mad. 429 ; 19 M. L. J. 401.

II. LEGAL REPRESENTATIVE—

Whether son was his father's legal representative under Sec. 234 C. P. C. was the subject of decision in (1907) 34 Cal. 642 F. B. The majority of the Full Bench held that he was and as such the question of liability of ancestral property under the decree might be considered in execution proceedings if the legal representative was legally brought on record under Sec. 234 C. P. C. :—(1907) 34 Cal. 642 F. B.

See (1900) 6 C. W. N. 223 ; (1903) 31 Cal. 224.]