QUEEN-EMPRESS v. MARIAN CHETTI.

may be a perfectly reasonable one, and it may be one which the Local Government may make under section 6. On this we offer no opinion. At present it is enough to say there is no such rule having the force of law, and therefore the conviction as for breach of it must fall to the ground.

For these reasons we think the conviction should be set aside and the fine, if paid, refunded. We would add that in these cases where the charge in effect relates to an alleged breach of a rule passed under an Act, care ought to be taken to specify the particular rule said to have been infringed.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893. September 13. October 31.

RAMAYYA AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

VENKATARATNAM (PLAINTIFF), RESPONDENT.*

Hindu law—Liability of son for father's debts—Civil Procedure Code—Act XIV of 1882, *ss.* 43, 244—*Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of* 1877, *sch. II, arts.* 120, 122.

A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagor's two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons.

The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia*, on the ground that the plaintiff had an undivided brother:

Held, (1) that since the plaint (as amended) showed that the plaintiff sued as

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* Appeal No. 91 of 1892.

managing member of his undivided family, the omission to join his brother was a merely formal error and was not fatal to the suit;

(2) that the plaintiff was not precluded from maintaining this suit against the sons of the mortgagor by Civil Procedure Code, s. 43 or s. 244;

(3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor;

(4) that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to the subsequent instalments.

APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in original suit No. 7 of 1891.

In original suit No. 5 of 1877 the plaintiff brought a suit on a mortgage of 1873 against Chidambarayyar and his two sons and obtained a money decree of which the amount was made payable by instalments. Part only of the judgment-debt was discharged and Chidambarayyar died in 1883, two more sons having been born to him since the date of the decree. In 1888 the decree-holder applied for execution against his four sons and attached part of their family property. The two younger sons objected to the attachment so far as it affected their shares: their objection prevailed in the District Court and the attachment was accordingly raised. On an appeal by the decree-holder the High Court upheld the order of the District Judge in the view that the matter in controversy was one that should be determined in a regular suit and not in execution proceedings. In the meantime the other defendants in the previous suits had died, one of them leaving two minor sons.

The decree-holder now sued the two younger sons who had objected to the attachment, and also the infant sons of their brother, for a decree "declaring that the defendants are bound to "pay at once on the liability of the entire family property includ-"ing the defendants' property already caused to be attached by "the plaintiff, the amount with interest of the past instalments "due up to date and the amounts of the future instalments "according to their respective instalments, &c."

The defendants raised various pleas which are stated in the following judgment, including a plea that the suit was bad for non-joinder of an undivided brother of the plaintiff. This was the subject of the fifth issue which the District Judge decided in favour of the plaintiff on the ground that the mortgage sued on in 1877 was executed in favour of the plaintiff only. The third issue

RAMAYYA v. VENKATA-RATNAM.

raised the question when the younger sons of Chidambarayyar were born, and the District Judge found that they had not been born at the date of the decree in the previous suit. There was no plea or evidence that the secured debt had been incurred for immoral purposes, although it was averred that it had not been contracted for the benefit of the family. As to the question whether the suit was maintainable the District Judge in paragraph 14 of his judgment (which is expressly referred to by their Lordships) said :—"I have no hesitation in deciding that the suit will "lie. This was a debt incurred for family purposes by the father "of the first and second defendants, the grandfather of the third "and fourth defendants. The defendants have by survivorship "taken the family property. I can see no reason why this is not "a good suit. The Bombay cases cited *Merwanji Nowroji* v. "*Ashabai*(1) and *Bhavanishankar Shevakram* v. *Pursadri Kalidas*(2) "refer to decrees which could be executed, but this previous "decree cannot be executed against these defendants."

The District Judge passed a decree against all the defendants for payment out of the family property of all the instalments down to May 1895. The two defendants, who had objected to the attachment as above stated, preferred this appeal.

Pattabhirama Ayyar and *Venkatarama Sarma* for appellants.

The Advocate-General (Hon. *Mr. Spring Branson*) for respondent.

JUDGMENT.—Appellants' father, Maddi Chidambarayyar, was judgment-debtor and respondent Venkataratnam was execution-creditor in original suit No. 5 of 1877 on the file of the District Court of Kistna. Besides the minor appellants, who are twins, Chidambarayyar had two other sons named Veerayya and Rama Murti and subsequent to the decree in the above suit, the former died in coparcenary without issue and the latter died leaving him surviving two minor sons, the third and fourth defendants in the present suit. Prior to 1873, Chidambarayyar had dealings with Venkataratnam for several years, and on the 19th March of that year the former executed in favour of the latter the mortgage exhibit A as security for the sum of Rs. 8,000 then found due by the one to the other. It was upon this mortgage, original suit No. 5 of 1877 was brought against Chidambarayyar and his two elder sons Veerayya and Rama Murti, but only a money decree

(1) I.L.R., 8 Bom., 1. (2) I.L.R., 6 Bom., 292.

was obtained against them. The decree directed them to pay respondent Rs. 9,677-2-5 with interest at 6 per cent. per annum from date of suit to date of decree, Rs. 6,000 odd in three specified instalments in 1877 and 1878 and the balance 4,250 by yearly instalments of Rs. 250 commencing with the 1st May 1879. The decree was passed on the 19th October 1877 and Chidambarayyar died on the 28th December 1883 after having paid part of the debt. On the 19th April 1888, respondent applied for execution against Chidambarayyar's four sons, viz., Veerayya and Rama Murti, who were parties to the decree, and against appellants who, as alleged by respondent, are twins born subsequent to the suit, and in pursuance of this application he attached some of the property belonging to Chidambarayyar's family. On appellants objecting to the attachment so far as it affected their shares, the District Court raised it on the ground that the younger sons were not parties to the decree under execution and that a fresh decree should be obtained against them before the property which passed to them by survivorship could be proceeded against in execution. The District Court made its order on the 18th September 1889, and on appeal preferred from that order under section 244, Civil Procedure Code, the High Court confirmed it on the 21st October 1890. Hence this suit.

In his plaint, respondent prayed for a decree declaring that defendants are bound to pay at once on the liability of the entire family property including their interest and already caused to be attached Rs. 1,792, the amount of six past instalments from 1st May 1885 to 1st May 1890 and Rs. 1,250, the amount of five future instalments when they become due with the condition of paying interest in default of payment on the due date as per terms of the decree in original suit No. 5 of 1877. The plaint prayed also for an injunction, for costs of the suit and for such other reliefs as the Court may deem it proper to grant.

Respondent's case was that, as sons taking ancestral property by survivorship on the death of their father, appellants were liable for the debt sued for. The sons resisted the claim on the following grounds, viz., (1) that the suit is bad for non-joinder of respondent's brother, (2) that at the date of the former suit, appellants were alive and the suit is therefore barred by section 43, Civil Procedure Code, (3) that the claim is time-barred, and (4) that the debt in question is not binding upon them. The District

RAMAYYA v. VENKATA-RATNAM.

Judge gave judgment for respondent with costs and directed that defendants Nos. 1, 2, 3 and 4 do pay plaintiff Rs. 1,792 (the six past instalments and interest thereon), together with interest at 6 per cent. per annum from date of plaint to date of payment from the property of the family in the hands of the defendants and ordered further that the defendants do pay the five future instalments on the respective dates on which they fell due with interest at 6 per cent. from those dates from the property in their hands. Against this decree, first and second defendants have appealed and they reiterate the grounds of defence in support of their appeal and also urge that the suit is either not maintainable at all or at least in its present form. On the merits, there can be no doubt that appellants are liable to pay their father's debt. Respondent deposed that the debt in dispute was contracted on account of the trade which Chidambarayyar carried on and of the cultivation of his lands. Appellants offered no evidence to show that the debt was either illegal or immoral, nor did they allege either that no ancestral property came to them by survivorship or that such property as so came was not sufficient to satisfy respondent's claim. The contest in appeal has reference in the main to several preliminary objections urged against the claim and the first of them is the non-joinder of respondent's undivided brother as a co-plaintiff. This formed the subject of the fifth issue, and the Judge determined it in respondent's favour observing that no evidence need be brought on that issue. It appears that appellants and respondent's undivided brother asked that the latter should be included in the suit, but that their application was refused on the ground that he was not a necessary party. The procedure followed by the Judge cannot be reconciled with the policy of section 32, Civil Procedure Code, as explained in *Vydianadayyan* v. *Sitaramayyan*(1) and with the principle that, when the debt sued for is due to a joint Hindu family, the debtor is entitled to insist that all the joint creditors, from whom he can claim a discharge, ought to be parties to the suit in order that the decree which may be passed therein may effectually discharge him as against all. It appears, however, that respondent amended the plaint by describing himself as managing coparcener and representative of the joint family. The omission, therefore, to make respondent's brother a party to

(1) I.L.R., 5 Mad., 52.

the suit is by reason of the amendment a mere formal error by which appellants cannot be prejudiced. As regards the second preliminary objection that this suit does not lie, the Judge very properly disallowed it for the reasons mentioned in paragraph 14 of his judgment. The right which respondent seeks to enforce is that of the creditor to recover the debt of a deceased Hindu father from his sons to the extent they take ancestral property by survivorship, and the ground of action is that by Hindu law it is the pious obligation of the latter to discharge, so far as ancestral property permits, the debt which the former died without paying. The present suit is not a suit to enforce the original mortgage because it has merged in the money decree in original suit No. 5 of 1877. Nor is it a suit to enforce the decree in that suit which can only operate *inter partes*. It is a suit to enforce an obligation imposed by Hindu law on the son to pay upon his father's death his debt in certain contingencies, an obligation which was not adjudicated upon in the previous suit and which can only be enforced by a fresh suit. In *Arunachala* v. *The Zamindar of Sivagiri*(1) and *Natasayyan* v. *Ponnusami*(2), this Court allowed such obligation to be enforced by a new suit. In *Hanumantha* v. *Hanumayya*(3) the Full Bench observed that, to enforce the liability of ancestral property in the hands of sons to satisfy their father's debt, the holder of a money decree must have recourse to a separate suit.

The third preliminary objection is that the question whether ancestral property is liable or not for the father's debt in the present suit is one which relates to execution of the decree in original suit No. 5 of 1877, and that the order whereby this attachment was raised was an order made under section 244, Civil Procedure Code, and that no fresh suit can be brought. This contention is however at variance with the order of this Court passed in an appeal preferred under section 244 on the 21st October 1890. It must also be observed that this order is in accordance with the principle laid down by the Full Bench in *Hanumantha* v. *Hanumayya*(3). It may also be noted here that, under section 234, Civil Procedure Code, an execution-creditor can only proceed against the property of a deceased debtor in the hands of his representatives and not against the property of the representative. It is loosely said at times that joint ancestral property

(1) I.L.R., 7 Mad., 328. (2) I.L.R., 16 Mad., 99. (3) I.L.R., 5 Mad., 232.

RAMAYYA v. VENKATA-RATNAM.

in the hands of a son is under the Mitakshara law assets for the payment of the father's debt, but it is not so *per se*, but assets only when the debt is either admitted to be binding or when in case of a *bonâ fide* dispute, it is finally adjudicated in a fresh suit to be neither illegal nor immoral.

Another preliminary objection is that the order passed by the Judge on the 18th September 1889 and confirmed by the High Court on the 21st October 1890 was an order made under section 280 of the Civil Procedure Code and that a declaratory suit is the only one which can be maintained under section 283 for the purpose of rendering that order inoperative. That was clearly not an order made under section 280. It purported to be made under section 244, and there was an appeal to the High Court and the final adjudication there was to the effect that the matter then in controversy was one which ought to be dealt with not in execution, but in a regular suit.

The fifth preliminary objection is that appellants were in existence before the date of suit No. 5 of 1877, and that the present suit against them is consequently barred by section 43 of the Civil Procedure Code. We are not prepared to attach weight to this objection for two reasons, viz., (1) because the cause of action in the present suit is not the same as in the previous suit and (2) because we concur in the Judge's finding that appellants were born subsequent to the former suit. We adopt the reasons mentioned in paragraph 8 of the Lower Court's judgment.

Two more objections are argued in support of this appeal. It is urged that the plaint asked only for a declaratory decree and that the Judge passed a decree for payment not only of instalments which had accrued due prior to suit but also those which had not then become due. So far as it relates to future instalments, the decree should have been merely declaratory, and it was not competent to the Judge to direct payment of a debt in respect of which the cause of action had not arisen at the date of suit. The clause in the plaint which prays for a decree declaring that defendants are bound at once to pay Rs. 1,792, the amount of the past six instalments, is ambiguous, but it prays also for such relief as the Court may deem proper and a direction that the instalments which had become due be paid awards only such as are properly claimable on the facts of the case. However imperfect the wording of the clause may be, there is reason to think

that the intention was to claim consequential relief in respect of past instalments. The payment of the full institution fee, the words 'are bound at once to pay' and the prayer for such other relief as the Court may grant show that a reasonable construction has been placed on the plaint and that the decree is substantially correct in so far as it relates to past instalments.

The last preliminary objection is that the suit is time-barred. The Judge holds that time began to run from the date on which each instalment fell due and that the period of limitation is twelve years under article 122, schedule II of the Act of Limitations. But it is clear that article 122 is not applicable, for this is not a suit upon a judgment, and under the Civil Procedure Code no second suit will lie upon a previous judgment, the remedy provided being its execution in the manner therein prescribed. As was observed in *Nâtasayyan* v. *Ponnusami*(1), it is article 120 that governs the suit and the statutory period is six and not twelve years as considered by the Judge. According to article 120, time begins to run from the date when the right to sue accrues and applying this principle to the case before us, we agree with the Judge that time begins to run from the date on which each instalment becomes due. To this view, appellants' pleader objects first on the ground that the son's obligation to pay the father's debts arose immediately on the father's death, which in this case occurred on the 28th December 1883, whereas the present suit was not brought till the 3rd February 1891. But this objection is not sound inasmuch as the father's obligation was only incohate at the date of his death and the words 'right to sue' presuppose the existence of an obligation which is no longer incohate, but is perfected and clothed with a right of action. It is not correct to say that the obligor's death perfects all his incohate obligations which devolve on his heir and renders them enforceable at once without reference to the contract or rule of law which originated them. Suppose that the father executed an instalment bond for Rs. 10,000 payable in ten yearly instalments and died before the first instalment became due, leaving considerable separate property for his son to inherit, may the creditor demand the whole debt saying that the father's death perfected all his incohate obligations as against the heir? The general principle is

(1) I.L.R., 16 Mad., 99.

RAMAYYA v. VENKATA-RATNAM.

that the son succeeds to the father's assets and liabilities as they are at the death of the latter and that the father's death does not alter either the nature or extent of the rights or liabilities transmitted to the son. Why should the case then be otherwise where the obligation attaches to ancestral instead of separate property in the hands of the son? The theory of the son's pious obligation rests on this basis, that the non-payment of a debt is a sin and that so long as it remains unpaid is it is a source of torment to the *manes* of the father which it is the son's duty to relieve him against. The object is to afford relief to the father by discharging his debt when it becomes due, and not to benefit the creditor by making the debt more onerous against the son than it was against the father. The answer to the question when an obligation ceases to be immature and becomes actionable must depend upon the contract or the rule of law which is its cause, and not upon any new contract to be made by the Court for the parties concerned. In the case of a pious obligation devolving on the son under Hindu law when ancestral property survives, the obligation devolves on the son in the condition in which it would be enforceable against the father if he had been still alive. It is no doubt correct to say that the father's debt is binding on the son when ancestral property survives to him upon the father's death, but it is not correct to hold that the debt becomes always payable at once on the father's death. In most cases the debt may be, and is, one due at the date of the father's death, but cases may arise in which it may fall due some years after that event. It is, no doubt, stated in *Nataayyan* v. *Ponnusami*(1) that time runs from the date of the father's death, but it should not be forgotten that in that case the debt was overdue when the father died. We are therefore of opinion that the suit is not time-barred.

The result is that the decree of the Judge will be modified by omitting the direction about the payment of future instalments and by substituting for it a declaration that appellants are liable to pay future instalments as they fall due, and the decree is confirmed in other respects. The appeal having substantially failed, appellants will pay respondent's costs.

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(1) I.L.R., 16 Mad., 99.