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is true that in these latter cases, the property vested in the son's widow. In the present case the property does not vest either in the mother-in-law or in the daughter-in-law. I do not think this fact can affect the principle that where a person is in existence who is competent to adopt a boy in whom the full proprietary right will vest, that must be taken to be the limit of the exercise of the power by the donee to make successive adoptions. I have therefore come to the conclusion, though not without hesitation that the power of Kundana Devi to make a second adoption is not exercisable under the circumstances of this case. It is upon this ground alone that I hold that the appeal fails. I agree in dismissing it with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Oldfield.

1914. April 21, 22 and 29.

DEVAGUPTAPU KAMESWARAMMA (FOURTH DEFENDANT), APPELLANT,

v.

VADDADI VENKATA SUBBA ROW AND FOUR OTHERS (PLAINTIFF, DEFENDANTS NOS. 1 to 3 AND LEGAL REPRESENTATIVES OF FIRST DEFENDANT), RESPONDENTS.*

Hindu Law—Surety-debt of father—Son's liability for—Order in execution against father as surety—Subsequent partition between father and son—Attachment of property allotted to son's share—Non-liability of such property—Claim petition by son, dismissal of—Subsequent suit by son—Liability of surety, if enforceable in execution—Civil Procedure Code (Act XIV of 1882), ss. 253, 583 and 610—Civil Procedure Code (Act V of 1908), sec. 53, inapplicable, where father is living.

The second defendant obtained a decree for maintenance against the third defendant. Pending an appeal against the decree, the former recovered the amount in execution on the first defendant standing surety for the second defendant. The decree was reversed on appeal; the third defendant applied in execution proceedings for restitution against the first defendant as surety; an order was passed in execution for recovery of the amount against the first defendant and certain lands were attached. The plaintiff who was the son of the

* Second Appeal No. 1667 of 1912.

first defendant, filed a claim petition objecting to the attachment on the ground that under a partition between his father and himself made subsequent to the order against the first defendant but before the attachment, the properties in question had fallen to his (plaintiff's) share and consequently were not liable to attachment. The petition was dismissed. The plaintiff thereupon brought the present suit for a declaration that the suit properties were not liable to be attached under the order passed against the first defendant.

Held, that, under sections 253 and 583 of the Civil Procedure Code (Act XIV of 1882), an order can be passed against a surety for recovering in execution proceedings the amount due from him.

Held further, that a Hindu son is liable for the surety-debt of his father, to the extent of the joint family property which came to his hands at partition.

Ramachandra Padayachi v. *Kondayya Chetti* (1901) I.L.R., 24 Mad., 555, followed.

But a decree for such a debt obtained against the father before partition is not executable after partition against the son and the joint family property allotted to him.

Krishnasami Konan v. *Ramasami Ayyar* (1899) I.L.R., 22 Mad., 519, followed.

Section 53 of the Code of Civil Procedure (Act V of 1908), which provides that property, in the hands of a son, which under the Hindu law is liable for the payment of a debt of his deceased father in respect of which a decree has been passed, shall be deemed to be assets in the hands of the legal representative, only applies to the case of a deceased father; the principle of the section cannot be extended to a case where the father is living.

SECOND APPEAL against the decree of A. SAMBAMURTHI AYYAR, the Subordinate Judge of Rajahmundry, in Appeal No. 42 of 1912, preferred against the decree of V. RANGA RAO, the District Munsif of Peddapuram, in Original Suit No. 285 of 1908.

The material facts appear from the judgment of the High Court.

A. Krishnaswami Ayyar for the appellant.

The Honourable Mr. *B. N. Sarma* for the first respondent.

P. Narayanamurti for the fourth respondent.

WALLIS, J. WALLIS, J.—In this case the present second defendant obtained a decree for maintenance against the third defendant and recovered in execution Rs. 637 which she was allowed to draw on giving security under section 253, Civil Procedure Code. The surety was the first defendant, the father of the plaintiff. The decree was reversed by the High Court, and the first defendant as surety was ordered to pay the third defendant the money which had been recovered from him by the second defendant under the decree. The order was made under section 253, Civil Procedure Code, which read with section 583, Civil Procedure

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Code, was applicable to security for the performance of appellate decrees according to *Thirumalai* v. *Ramayyar*(1).

This decision has been questioned before us on the ground that it is inconsistent with the later decision in *Arunachallam* v. *Arunachallam*(2) decided by the same Judges. In that case the security had been given pending an appeal to the Privy Council, and it was necessary to invoke the aid of section 610, Civil Procedure Code, to render section 253 applicable to the case. The learned Judges apparently were of opinion that it might have been invoked but for the fact that in 1888 a special proviso had been introduced into section 610, that, in so far as the order awards costs to the respondents, it may be executed against a surety therefor to the extent to which he has rendered himself liable in the same manner in which it may be executed against the appellant. With great respect it appears to me that what we have to look to is the meaning of sections 253 and 610 as originally enacted in 1877. The fact that the legislature eleven years later in 1888 inserted a proviso in section 610 only shows the interpretation which the framers of the amendment were disposed to place upon the sections as they then stood. This interpretation is not authoritative, and in these circumstances the addition of the proviso is no reason for modifying the opinion which the Court would otherwise have arrived at on the construction of the original sections. Even where a proviso of this kind is introduced into a section at the time of enactment, it is often done *ex abundanti cautela*, and it by no means follows that the operation of the section is affected thereby. In these circumstances I prefer to follow the earlier decision of the learned Judges in *Thirumalai* v. *Ramayyar*(1), which has been cited with approval in *Chettikulam Venkatachala Reddiar* v. *Chettikulam Kumara Venkitachala Reddiar*(3), more especially as this interpretation of the sections had been adopted in the express provisions of the present Code. I am therefore of opinion that the order was rightly made against the first defendant.

This order the third defendant executed against property which fell to the plaintiff at a partition between himself and his

(1) (1890) I.L.R., 13 Mad., 1. (2) (1892) I.L.R., 15 Mad., 203.
(3) (1905) I.L.R., 28 Mad., 377.

father, the first defendant, after the date of the order against the father. The plaintiff objected that the properties were not liable to attachment and on the rejection of his claim filed the present suit to establish his right. The defence in the lower Court was that the partition was collusive and inoperative, but the lower Courts rejected this contention and gave the plaintiff a decree.

In Second Appeal the point has been taken that, even supposing the partition to have been good, the present third defendant is none the less entitled to execute decree against the plaintiff, to the extent of the joint family property which has come to him, the order equivalent to a decree which he obtained against the plaintiff's father before the partition. The order under section 253 may, I think, be considered as equivalent to a decree against the father and it appears to be now settled in this Court that a suretyship liability such as this is one which a Hindu is under a pious obligation to discharge.

I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the joint family property which came to his hands at partition, *Ramachandra Padayachi* v. *Kondayya Chetti*(1). The only question then is, is a decree for such a debt obtained against the father before partition executable after partition against the son and the joint family property allotted to him. In *Krishnasami Konan* v. *Ramasami Ayyar*(2), where the father had contracted the debt before partition, and a suit had been brought and a decree passed against him after partition, it was held that the decree could not be executed against the properties which had fallen to the son on partition, because "the principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father is, that the father, under the Hindu law, is entitled to sell on account of such debt the whole of the ancestral estate." This necessarily implies that at the time the property is attached it remains the undivided property of the father and the son. The same view has been taken under very similar circumstances by MILLER and KRISHNASWAMI AYYAR, JJ., in *Lakshmana Chettiar* v. *Govindarajulu*

(1) (1901) I.L.R., 24 Mad., 555. (2) (1899) I.L.R., 22 Mad., 519.

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Naidu(1), see also *Rathna Naidu* v. *Aiyanachariar*(2). It is sought to distinguish these cases on the ground that the order equivalent to a decree was made against the father in this case before the date of partition : but this circumstance does not appear to make any difference, as, at the date of execution the property now in question had ceased to be joint family property, and the cases referred to on the other side—*Jagabhai Lalubhai* v. *Bhubandas Jagjivandas*(3), *Deendyal Lal* v. *Jugdeep Narain Singh*(4), *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(5), *Nanomi Babuasin* v. *Modhun Mohun*(6) and *Govind* v. *Sakharam*(7)—were all cases in which the property remained joint and so subject to alienation by the father in satisfaction of his debt. Lastly it has been attempted to base an argument on section 53 of the present Code which provides that for the purpose of sections 50 and 52, property in the hands of a son which under the Hindu law is liable for the payment of the debt of his deceased father in respect of which a decree has been passed shall be deemed to be property of the deceased father which has come to the hands of his son as his legal representative. This statutory fiction however only applies to the case of a deceased father, and we should not be justified in extending it to a case where the father is still living, or in inferring, as has been suggested, that, as the decree could under the section be executed against the property in question if the father was dead, it must *a fortiori* be executable against the same property where the father is alive. The answer is that the legislature has not made any such provision. In the result the Second Appeal fails and is dismissed with costs.

OLDFIELD, J. OLDFIELD, J.—I concur.

K.R.

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(1) (1898) 8 M.L.T., 349.
(2) (1908) 18 M.L.J., 599.
(3) (1887) I.L.R., 11 Bom., 37.
(4) (1877) 4 I.A., 247.
(5) (1879) 6 I.A., 88.
(6) (1886) I.L.R., 13 Calc., 21 (P.C.).
(7) (1904) I.L.R., 28 Bom., 383.