APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Krishnan.

KANDASAMI GOUNDAN (PLAINTIFF), APPELLANT,

v.

KUPPU MOOPPAN AND FIVE OTHERS (DEFENDANTS, NOS. 2, 3, 4, 5, 6 and 1), RESPONDENTS.*

1919, December, 2 and 3.

Hindu Law—Mortgage by father, not for necessary purpose—Conditional decree—Personal decree against father and against ancestral properties of father and sons—Civil Procedure Code (V of 1908), O. XXXIV, r. 6.

A suit was instituted against a Hindu father and his sons on a mortgage bond executed by the father alone. The Courts found that it was not for any purpose binding upon the sons;

Held, that the mortgagee was entitled to a conditional decree, under Order XXXIV, rule 6, Civil Procedure Code, against the father personally, and against the joint family property of himself and his undivided sons, for the recovery of the balance, in case the sale-proceeds of the father's share of the mortgaged property was insufficient.

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU Garu, the Subordinate Judge of Coimbatore, in Appeal Suit No. 70 of 1918, preferred against the decree of N. KAILASAM AYYAR, the Principal District Munsif of Coimbatore, in Original Suit No. 47 of 1918.

The material facts appear from the judgment.

N. Sivaramakrishna Ayyar for *T. M. Krishnaswami Ayyar*, for the appellant.

K. R. Rangaswami Ayyangar for first to fourth respondents.

The JUDGMENT of the Court was delivered by

KRISHNAN, J.—The lower Courts have found that the suit mortgage was neither executed for an antecedent debt, nor for any necessary purpose binding on the sons. It is therefore clear that the mortgage as a mortgage is not enforceable against the sons' shares in the property mortgaged, and no mortgage decree for sale of those shares can be passed against them. This is not controverted by the appellant. KRISHNAN, J.

It is, however, claimed for the appellant that a conditional decree for the recovery of any balance left in case the net

* Second Appeal No. 305 of 1919.

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proceeds of the sale of the father's share of the mortgaged property is found to be insufficient to pay the amount due to him should have been passed under Order XXXIV, rule 6, Civil Procedure Code, against the first defendant, the mortgagor, personally and against the ancestral properties of himself and his sons, as prayed for by him in his plaint.

That a conditional decree under section 90 of the Transfer of Property Act can be passed in the mortgage suit itself, without waiting for the mortgaged property to be sold to ascertain if any balance will be left over, is clear from the observations of the Privy Council in *Musammat Jenna Bahu* v. *Rai Parmeshvar Narayan Mahtha Rai Bahadur*(1). We think the same rule will apply under Order XXXIV, rule 6. In the present case it is not denied that the present claim against the mortgagor under the mortgage deed is within time and is legally enforceable against him. A conditional personal decree for any balance should therefore have been passed against him in this suit.

Such a personal decree is in the nature of an ordinary money decree for a debt due by the father; and for such a decree unless the debt is shown to be of an illegal or immoral character the ancestral property in the hands of the sons will be liable on the basis of their pious obligation to pay their father's just debts. It was recognized by the Privy Council itself in *Suraj Bunsi's* case(2), that in execution of a money decree against a Hindu father for a debt due by him joint ancestral property of himself and his sons can be sold and the purchaser will get a valid title to the sons' shares as well, unless they show that the debt is of an illegal or immoral character. See page 171. It has also been decided in this Court that a creditor could join the sons in the suit on the father's debt and obtain a decree making their shares in the family property liable: see *Ramasami Nadan* v. *Ulaganatha Goundan*(3). This view was further developed in a later Full Bench in *Mallesam Naidu* v. *Jugala Panda*(4), where it was held that the cause of action against the father and the sons on the debt was one and

(1) (1919) 36 M.L.J., 215 (P.C.).
(2) (1880) I.L.R., 5 Calc., 148 (P.C.).
(3) (1899) I.L.R., 22 Mad., 49 (F.B.). (4) (1900) I.L.R., 23 Mad., 292 (F.B.).

the same. After these decisions it has been the practice to give decrees in suits against Hindu fathers on money claims not only personally against them but also against the joint family property of themselves and their undivided sons, where such sons are made parties and do not allege and prove the illegality or immorality of such claims. That a similar decree could be given in mortgage suits under section 90 of the Transfer of Property Act corresponding to the present Order XXXIV, rule 6, Civil Procedure Code, was expressly decided in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh*(1); a similar view was taken in *Addaika Pattar* v. *Natesa Pillai*(2), and an observation in support of it is also found in *Sami Ayyangar* v. *Ponnammal*(3).

It is argued however for the respondents that the recent decision of the Privy Council in *Sahu Ram's* case(4), has entirely altered the law on the point and the observations of their Lordships on page 444 have been relied on. This Court has considered the effect of this ruling in two cases recently, in *Peda Venkanna* v. *Sreenivasa Deeshatulu*(5), and in the Full Bench, *Armugham Chetty* v. *Muthu Koundan*(6); and it was held that the pious obligation of the sons did arise during the father's lifetime and that the debt involved in a mortgage was an antecedent debt which attracted the pious obligation of the sons to pay, even though the mortgage as a transfer of an interest in joint ancestral property failed. The mortgage as an alienation of property may fail if there was no necessity for it and there was no debt really antecedent to the mortgage transaction; but the sons will nevertheless be under a pious obligation to pay the mortgage debt qua debt unless it is an illegal or immoral one. We are bound by these views, and must hold that the observations in *Sahu Ram's* case(4) do not alter the law on the point we are considering, and we must follow the rule in the earlier cases. In fact such a point was not raised at all before the Privy Council; the point that their Lordships were considering was whether the mortgage was as such binding on the sons and whether a mortgage decree could be passed against them.

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(1) (1907) I.L.R., 34 Calc., 735.
(2) (1907) 17 M.L.J., 287.
(3) (1898) I.L.R., 21 Mad., 28.
(4) (1917) I.L.R., 39 All., 437 (P.C.).
(5) (1918) I.L.R., 41 Mad., 136.
(6) (1919) I.L.R., 42 Mad., 711 (F.B.).

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In the present case though the plaintiff prayed expressly for a decree under Order XXXIV, rule 6, against the ancestral property the sons did not plead or prove that the debt was illegal or immoral. They cannot be given a fresh opportunity for the purpose The plaintiff is therefore entitled to a decree as he asks for under rule 6 against the first defendant personally and against the ancestral property of himself and his sons.

The further point raised in this case is that the father's share liable for the mortgage decree is a one-fourth share and not a one-fifth share as one of his sons now on record, the fifth defendant, was born after the mortgage was executed. This is not denied and therefore the decrees of the lower Courts should be modified by also stating that a one-fourth share of the mortgaged property is saleable under the mortgage decree. With the above modifications the second appeal is dismissed but without costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

1919, December, 3.

HARI KRISHNAMURTI (FIFTH DEFENDANT AND SIXTH COUNTER-PETITIONER), APPELLANT,

v.

AKELLA SURYANARAYANAMURTI AND TWO OTHERS (PETITIONERS NOS. 1 AND 2 AND SECOND COUNTER-PETITIONER), RESPONDENTS.*

Limitation Act (IX of 1908), Art. 182, cl. 5—Application for execution of decree by transferee—Injunction against transferee—Subsequent application by persons entitled to execute decree—Limitation—Bar, whether saved by previous application.

An application for execution of a decree, made by a transferee of the decree after he has been restrained by injunction from "executing it or otherwise realizing the decree-debt," will operate to save the bar of limitation in respect of a later application for execution made by persons held to be legally entitled to execute the decree.

APPEAL against appellate order of T. VARADARAJULU NAYUDU Garu, the Acting District Judge of Gōdāvari, in Appeal Suit No. 207 of 1917, preferred against the order of MIRZA HASAN ALI ISPAHANI SAHIB BAHADUR, the Temporary District Munsif of Razole at

* Appeal against Appellate Order No. 34 of 1918.