APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Krishnan and Mr. Justice Curgenven.*

1923, November 12.

KODURU VENKUREDDI AND ANOTHER (FIFTH AND SIXTH DEFENDANTS), APPELLANTS,

v.

MAGUNTA VENKU REDDI AND OTHERS (PLAINTIFF AND FIRST TO THIRD DEFENDANTS), RESPONDENTS.*

Hindu Law—Joint family—Suit for partition by a son against his father and his other sons, impleading alienees of the share of one of the sons—Personal debt of the father incurred prior to suit for partition—Debt neither illegal nor immoral—Liability of sons' shares for the father's debt incurred prior to partition suit—Right of alienees of son's share—Alienees' rights, whether subject to liability for father's debts—Suit by creditor pending suit for partition—Decree, exonerating alienees—Res judicata.

Where a personal debt, not being of an illegal or immoral character, was incurred by a Hindu father, and subsequently a suit for partition was instituted by one of his sons against the father and his other sons impleading also alienees of the share of one of the sons, and it appeared that the father's creditor had, pending the partition suit, sued to recover his debt from the father, his sons and the alienees and obtained a decree against the father personally and the joint family estate, the alienees being, however, exonerated,

Held, that the liability of the alienees of the son's share for the father's debt was not *res judicata* by the judgment in the creditor's suit; that, in the suit for partition, the Court should provide for the payment of the father's debt which was incurred prior to the suit, out of the joint family estate of the father and his sons, before directing partition of the estate by metes and bounds, and that the alienees of the son's share were entitled to their vendor's share, only subject to such liability.

* Second Appeal No. 1269 of 1923.

VENKUREDDI v. VENKU REDDI.

SECOND APPEAL against the decree of T. JIVAJI RAO, Additional Subordinate Judge of Nellore in A.S. No. 12 of 1922, preferred against the decree of T. M. VENKATARAGHAVA ACHARIYAR, Principal District Munsif of Nellore, in O.S. No. 1431 of 1916.

The material facts appear from the judgment.

A. Krishnaswami Ayyar (with *B. Somayya*) for appellants.—The son is not liable after partition for a pre-partition debt of his father. There is no charge, in respect of the father's promissory note debt, on the son's share. The father cannot ask the son to pay. The creditor can proceed against the son's share, if he was undivided, but not after partition.

K. Krishnaswami Ayyangar for respondent.—The father's debt should be paid first, then the joint family assets should be divided. See Mayne's Hindu Law, page 441, paragraph 308.

The alienees (appellants) came in, pending the partition suit; hence their claim is affected by the rule of *lis pendens*; the alienees are entitled only to whatever property can be assigned to their alienor. The alienor's share will be reduced by the father's debts. Reference was made to section 52 of the Transfer of Property Act.

A. Krishnaswami Ayyar in reply.—The pious obligation is not a charge on the son's share—*See* Mayne's Hindu Law, page 411, paragraph 307-A. After severence, the father cannot sell the son's share for his (father's) pre-partition debt. After a suit for partition has been instituted, the father cannot insist on his pre-partition debt being paid out of the son's share. By filing a plaint for partition, there is a severence of status; then in the partition suit the father cannot ask for provision for payment of his debts. The creditor of the father may proceed against the son's share before partition but not thereafter. There is no *lis pendens* in such a case. An execution creditor of the son and execution purchaser of his share will not be subject to this pious obligation.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—I have had the advantage of perusing the judgment about to be delivered by my learned brothers. I agree with them and have nothing to add.

KRISHNAN, J.—The question referred in this case to the Full Bench is "where a father or a managing member of a joint Hindu family contracts a simple debt and then there is a partition among the members of the family, can the creditor proceed against the property allotted to the other members for such a debt." When the appellant opened his case in the Full Bench it was found that the question formulated did not properly arise and it was decided that it need not be considered but that the whole Second Appeal should be treated as before the Full Bench for disposal. We have thus heard arguments in the Second Appeal.

The Second Appeal arises in a suit brought by a Hindu son against his father and his two younger brothers, defendants 1 to 3, for a partition of their joint family property and the delivery over to him of his share. The fourth defendant was joined as an illatom son-in-law but his claim was disallowed by the trial Court and he is not before us. Fifth and sixth defendants are the purchasers of the second defendant's share in the family property when this suit was pending before the District Munsif and they were added as parties by an order of Court. They are the appellants before us.

The only point argued in the Second Appeal relates to a debt incurred by the father, the first defendant, on a promissory note executed by him on a date prior to the suit to a third party. That creditor had brought a suit on his note while this suit was pending and had obtained a decree against the father personally and against the joint family property; the father and all the sons were parties to that suit as also defendants 5 and 6. These latter were exonerated as they could not be made liable on the promissory note which they had nothing to do with.

VENKUREDDI v. VENKU REDDI. — KRISHNAN, J.

In ascertaining the net assets available for partition the lower Courts have held the debt abovementioned to be a debt payable out of the family property and have made the second defendant's share liable for a proportionate share of the debt and declared the fifth and sixth defendants entitled as purchasers only to such a reduced share. They contend in Second Appeal that they should get the whole share without the liability for the debt.

It is not denied that the debt was a proper debt of the father, being neither immoral nor illegal. It is a debt which on account of the law of the pious obligation of the Hindu son to pay his father's just debts out of the joint family estate, was payable from the estate. The debt had become a decree debt during the pendency of this suit, by which the joint family estate was expressly made liable. It is first argued in Second Appeal that as in the suit on the promissory note in which defendants 5 and 6 were parties they were exonerated, the debt should be held to be not chargeable on the second defendant's share in their hands. As pointed out by the learned Subordinate Judge they were exonerated because they could not be made liable on the note as they had nothing to do with it. Nevertheless a decree was passed against the joint family estate. These defendants are not therefore entitled to rely on the decree to say that that estate should not be charged in their hands with the liability for the debt. The purchaser of an undivided share of a Hindu co-parcener, it has been held, gets only an equity to enforce partition and takes the share when partitioned subject to all the liabilities on it in the hands of his vendor. Clearly therefore the fifth and sixth defendants can get the second defendant's share only subject to the liability for the debt, if it is subject to that liability in second defendant's hands. Furthermore the parties here were

co-defendants in the suit on the note and there was no contest and no decision between them on any point and consequently no question of *res judicata* arises and defendants 5 and 6 cannot rely on the judgment against the plaintiff.

The learned vakil then raised a novel point and argued that in a partition suit between a Hindu father and sons the father must be left to pay all the debts incurred by him, even if they are just debts, out of his own share and that the shares of the sons are not liable for them. He contends that as soon as the partition suit is brought there is a severance of status between the father and the sons and the shares of the sons are not liable for the father's debts thereafter. This argument may be sound with reference to the debts incurred by the father after the partition suit has been brought, but as regards debts previously incurred, it is clearly erroneous. The fallacy is in failing to note that what is decided in a partition suit is the rights and liabilities of parties on the date of the plaint. The decree refers back to the date of suit; unless indeed the partition suit is based on an antecedent severance of status when the Court will have to decide the rights and liabilities as on that date and pass a decree accordingly. In either case the date to which the decree refers will be the date when the severance took place. As on that day the father's power to sell the joint property for his just debts is subsisting, the Courts have to recognize in their decree the existence of such debts as are payable out of the joint estate and make the necessary provision for their liquidation before directing partition by metes and bounds. For purposes of partition, an account has to be taken of the debts and liabilities binding on the estate. In the case of a managing member of a joint family, all debts which he has incurred for proper legal

VENKUREDDI v. VENKU REDDI.

KRISHNAN, J.

necessity of the family he is entitled to have paid out of the joint property before the shares are allotted to the several co-parceners; and in the case of a father he can ask all his debts which are neither immoral nor illegal to be so paid out of the joint estate of himself and his sons before partition whether such debts be shown to be for legal necessity or not. That view has been long recognized and the practice of our Courts has been in conformity with it. No authority has been cited to the contrary by the learned vakil for the appellant and I see no reason to depart from it.

The only two points urged in Second Appeal failing, it must be dismissed with costs of respondents 1 and 4.

CURGENVEN, J.

CURGENVEN, J.—I agree that this Second Appeal must be dismissed with costs. It is immaterial that the appellants were exonerated in the suit upon the promissory note. We have to consider the family assets and liabilities as they stood on 21st November 1926, when the plaintiff filed his suit for partition. At that date, among the debts was this debt of the father's not contracted for any illegal or immoral purpose. No authority has been produced for the position that, upon a partition, the sons do not share liability with the father for such a debt. Such a doctrine would be in conflict with the indisputable principle that the family property is liable for a father's untainted debts. In the partition, therefore, the share of the second defendant would have to be ascertained with reference to this debt as well as to other debts binding upon the family members; and it follows that the share of the appellants who have succeeded by purchase to his rights and liabilities, must be ascertained in the same manner.

K.R.