Before Mr. Justice Banerji and Mr. Justice Aikman.

1899
April 8.

DHARAM SINGH AND OTHERS (DEFENDANTS) *v.* ANGAN LAL AND OTHERS (PLAINTIFFS).*

Hindu Law—Joint Hindu family—Liability of sons to pay debts incurred by father—Creditor's remedy against sons not barred by reason of his having sued the father separately—Mortgage—Act No. IV of 1882 *(Transfer of Property Act), section* 85.

Although a decree may have been obtained against the father of a joint Hindu family for a debt incurred by him, a subsequent suit is maintainable against the son in respect of the same debt for the enforcement of the son's liability for it, such debt being one which the son is legally bound to pay.

The creditor may in his original suit implead the son, but his omitting to do so will not deprive him of his subsequent remedy against the son.

There is no difference in principle as regards the subsequent remedy of the creditor against the son between the case of a debt secured by a mortgage and a simple money debt.

Lachmi Narain v. *Kunji Lal* (1); *Balmakund* v. *Sangari* (2); *Bhawani Prasad* v. *Kallu* (3); *Ramasami Nadan* v. *Ulaganatha Goundan* (4); *Ariabudra* v. *Dora Sami* (5) and *Nanomi Babuasin* v. *Modhun Mohun* (6) referred to.

The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action is not a single cause of action which is exhausted upon a decree being obtained against one of them only. *Hemendro Coomar Mullick* v. *Rajendro Lall Moonshee* (7); *Dhunput Sing* v. *Sham Soonder Mitter* (8) and *Hoare* v. *Niblett* (9) referred to.

THE facts of this case sufficiently appear from the judgment of Banerji, J.

Munshi *Ram Prasad* and Pandit *Sundar Lal,* for the appellants.

Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji* for the respondents.

BANERJI, J.—For a proper understanding of the questions raised in this appeal it is necessary to state the following facts.

* First Appeal No. 267 of 1896 from a decree of Rai Anant Ram, Additional Subordinate Judge of Aligarh, dated the 30th June 1896.

(1) (1894) I. L. R., 16 All., 449.
(2) (1897) I. L. R., 19 All., 379.
(3) (1895) I. L. R., 17 All., 537.
(4) (1898) I. L. R., 22 Mad., 49.
(5) (1888) I. L. R., 11 Mad., 413.
(6) (1885) I L. R, 13 Calc., 21.
(7) (1878) I. L. R, 3 Calc., 353.
(8) (1879) I. L. R., 5 Calc., 292.
(9) L. R., 1891, 1 Q. B., 781.

1899

DHARAM SINGH v. ANGAN LAL.

One Lekhraj, whose sons and grandsons are the appellants before us, executed two mortgages in respect of the same property, which was ancestral property, in favour of Bhawani Prasad, the deceased father of the plaintiffs-respondents, on the 29th of June, 1879, and the 30th of July, 1880. Bhawani Prasad sued Lekhraj upon the mortgages and obtained a decree for sale on the 18th of August, 1887. He did not make the present appellants parties to his suit. The mortgaged property was sold by auction on the 23rd of July, 1889, in execution of the decree, and the present plaintiffs (Bhawani Prasad having in the meantime died) purchased it. Lekhraj had mortgaged the same property to one Chandan Singh on the 30th of November, 1874. Sobha Ram and Ganesh Lal, the sons of Chandan Singh, brought a suit upon that mortgage, obtained a decree, and in execution of it caused the mortgaged property to be advertised for sale. Thereupon the present plaintiffs who, as stated above, had already purchased the property, satisfied the decree on the 21st of December, 1889, by payment of Rs. 1,612-14-5, the amount due upon it, and remained in possession of the property. On the 26th of November, 1895, Dharam Singh, Bhawani Singh, Jiwa Ram and Ram Charan, the four sons of Lekhraj, sued the present plaintiffs for recovery of possession of a four-fifths share of the property, on the ground that the property was ancestral, that they had not been joined as parties to the suit brought by Bhawani Prasad upon his mortgages, and that the decree obtained by Bhawani Prasad could not consequently affect their interests in the property. On the 11th of March, 1896, a decree was passed in their favour on the strength of the ruling of the majority of the Full Bench in *Bhawani Prasad* v. *Kallu* (1). Thereupon the present suit was instituted on the 25th of March, 1896, against the sons and grandsons of Lekhraj, to recover four-fifths of the amount due under the mortgages in favour of Bhawani Prasad, and of the amount paid by the plaintiffs on account of Chandan's mortgage by sale of the four-fifths share of

(1) (1895) I. L. R., 17 All., 537.

the mortgaged property for which the sons of Lekhraj had obtained their decree.

The Court below has decreed the greater portion of the claim. The defendants have preferred this appeal, and the plaintiffs have taken objections under section 561 of the Code of Civil Procedure.

In order to clear the ground it may be stated that it is not contended in this appeal that the debts incurred by Lekhraj, in respect of which decrees for sale were obtained, were tainted with immorality, nor is it suggested that they were not in fact incurred, or that at the time when the suits for sale were instituted against Lekhraj the claims of the mortgagees were time-barred. It may also be observed that, although in the memorandum of appeal to this Court pleas were taken to the effect that sections 13 and 43 of the Code of Civil Procedure barred the claim, the learned advocate for the appellants did not press those pleas. Having regard to the fact that the present defendants were not parties to the suits brought against Lekhraj those pleas could not be sustained. The only contention of the learned counsel in the argument before us was, that the original mortgagees having sued their mortgagor, Lekhraj, upon the mortgages executed by him, and obtained decrees which were enforced, it was not open to the plaintiffs who stand in the shoes of the mortgagees to maintain the present suit in respect of the same debts. He does not urge that section 85 of the Transfer of Property Act, 1882, stands in the way of the plaintiffs and precludes them from bringing this suit. He concedes that, although the sons of the mortgagor, of whose interests in the mortgaged property the mortgagees had notice, were necessary parties to the mortgagees' suits, and the result of the omission to join them in the suits was, according to the rulings of this Court, that the suits were liable to dismissal, there is nothing in section 85 which forbids the institution of a second suit against persons who were not parties to the former suits. This is what was practically held by the Full Bench in *Balmakund* v. *Sangari* (1).

(1) (1897) I. L. R., 19 All., 379.

1899

DHARAM SINGH v. ANGAN LAL.

Mr. *Ram Prasad*, however, argues that on general principles a second suit is not maintainable after judgment has been obtained and recovered upon the original debt. He refers to the case of joint obligors of a bond and to the rule which obtains in England that "a judgment recovered against one of joint obligors of a bond merges the joint liability on the bond, and is a bar to an action against the others." (See Leake on Contracts, 3rd edition, page 808,) and the cases cited therein. See also *Hoare* v. *Niblett* (1). Whether the law in this country is the same or not, it is not neccessary in this case to decide, as I am of opinion that the analogy of the liability of joint debtors under the same contract does not apply to the case of the pious liability of a Hindu son for the debt of his father not tainted with immorality. Such liability arises, not from the contract entered into by the father, but from the fact that he is the son of the father and that the debt incurred by the father is of such a nature that it is the duty of the son to pay it. It is a liability which the Hindu law imposes on the son, and is independent of the contract made by his father. Whether the debt of the father has merged in a decree, or whether it subsist as a debt in respect of which no decree has been passed, the son is liable for it, provided that it was not incurred for immoral or impious purposes. The question we have to determine is whether the creditor's remedy against the son for the enforcement of the latter's liability is lost to the creditor by reason of his omitting to make the son also a party to the suit against the father. Their Lordships of the Privy Council have held in several well known cases, to which it is unnecessary to refer in detail, that the son's liability for his father's debt is unaffected by the procedure to which the creditor may have resorted against the father alone for the recovery of the debt. In *Nanomi Babuasin* v. *Modhun Mohun* (2) their Lordships said :—The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against the creditor's remedies for their debts, if not

(1) L. R., 1891, 1 Q. B., 781. (2) (1885) I. L. R., 13 Calc., 21.

1899

DHARAM SINGH v. ANGAN LAL.

tainted with immorality." "If the father's debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." From these observations of their Lordships it is clear that, despite the passing of a decree against the father alone, the son may bring a suit to try the fact and the nature of the debt of the father. Upon the same principle on which a suit is allowable to the son, it seems to me it is open to the father's creditor to bring a suit against the son to establish the latter's obligation to pay his father's debt. In the case of a debt not secured by a mortgage it was held by this Court in *Lachmi Narain* v. *Kunji Lal* (1) that "if the creditor desires to obtain a remedy against the ancestral property, or any part of it, in the hands of the son, he must seek that remedy in suit against the son." That ruling was approved of in the Full Bench case of *Bhawani Prasad* v. *Kallu* (2), and is an authority, so far as this Court is concerned, for the proposition that, although a decree may have been obtained against the father, a subsequent suit is maintainable against the son, in respect of the same debt, for the enforcement of the son's liability for it. In the case of a simple debt the creditor could, if he had so chosen, have made the son a party to his suit against the father [see *Ramasami Nadan* v. *Ulaganatha Goundan* (3)]. The fact of his omitting to implead the son in his first suit has been held not to preclude him from suing the son afterwards. In my opinion there is no difference in principle, so far as the present question is concerned, between the case of a debt secured by a mortgage and a simple money debt. In the case of a mortgage debt the creditor was bound under section 85 of Act No. IV of 1882, as interpreted by this Court, to make the son a party to his suit, if he had notice of the son's interests.

(1) (1894) I. L. R., 16 All., 449. (2) (1895) I. L. R., 17 All., 537,
(3) (1898) I. L. R., 22 Mad., 49.

1899

DHARAM SINGH v. ANGAN LAL.

The effect of his omission to do so is that the decree obtained against the father alone is not enforceable as such against the son's interests in the mortgaged property, and this is what was held by the majority of the Full Bench in *Bhawani Prasad* v. *Kallu*, referred to above. I am unable to hold that in the case of a mortgage debt the creditor is in a worse position than the holder of an unsecured debt. As regards debts of both descriptions the liability of the son to pay them is the same. If in the one case the creditor is not precluded from bringing a subsequent suit against the son to enforce the latter's liability, I can see no principle or rule of law which bars a similar suit in the other. It is conceded that section 85 of the Transfer of Property Act, 1882, is no bar to it. In *Bhawani Prasad* v. *Kallu* the argument proceeded on the assumption that such a suit would be maintainable. In my dissentient judgment in that case I said, at p. 549 :—" It is said that the creditor will not be without his remedy, and that he will still be able to bring a suit against the sons to enforce his mortgage against their interests in the ancestral estate on the ground of their pious obligation to pay their father's debts. It cannot possibly be held that no remedy will be open to the creditor, as such a decision will render the rulings of their Lordships of the Privy Council on the question of the liability of Hindu sons in respect of their father's debts wholly nugatory." To this view I still adhere, and I do not find from the report that on this point my learned colleagues expressed a different opinion. In *Ariabudra* v. *Dorasami* (1) it was held by the Madras High Court that " an execution-creditor is not precluded from instituting an independent suit against the appellants [sons] to recover from them the balance of the judgment-debt which remained unsatisfied, to the extent of the value of the ancestral property which had come to their hands." That was a case in which a mortgagee, who had obtained a decree for sale against the father without joining the sons as parties, brought a suit against the sons to recover the

(1) (1888) I. L. R., 11 Mad., 413.

balance of the judgment-debt from their interests in the mortgaged property, the Court executing the decree having allowed the objections of the sons respecting the sale of those interests. That case is therefore very similar to the present case, and supports the respondent's contention that a suit like the present is maintainable. The learned Judges who decided that case repelled the plea that section 244 of the Code of Civil Procedure was a bar to it, and held that the limitation applicable to it was that prescribed for a suit to enforce a mortgage. I agree with the view of the learned Judges, and hold that a suit like the present, in which it is sought to enforce against Hindu sons their pious obligation in respect of their father's debts not tainted with immorality, is maintainable, whether the debts were or were not secured by a mortgage, and whether a decree in respect thereof has or has not been obtained against the father alone. We have not been referred to any ruling in which a contrary view has been held, and I think the principle of the unreported judgment of my brothers Blair and Burkitt in second appeal No. 426 of 1898, decided on 20th July, 1898, to which the learned vakil for the respondents has invited our attention, to some extent favours the respondents' case.

As I have already said, the analogy of a decree against one of several joint promisors does not apply to a case of this description. The obligation of joint contractors has been held to be single and undivided, and the cause of action against them to be one and the same. It was observed by Garth, C. J., in *Hemendro Coomar Mullick* v. *Rajendro Lall Moonshee* (1), "that the cause of action is exhausted and satisfied by a judgment being obtained by the plaintiff against all or any of the joint contractors whom he chooses to sue. If a plaintiff under such circumstances were allowed to sue each of his co-debtors severally in different suits, he would be practically changing a joint into a several liability." It has been held that where the obligation is joint and several "a decree obtained against one of the promisors

(1) (1878) I. L. R., 3 Calc., 353.

1899

DHARAM SINGH v. ANGAN LAL.

without satisfaction is no bar to a suit against another."—(*Dhunput Sing* v. *Sham Soonder Mitter* (1)). The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father; and the creditor's cause of action against the father and the son is not a single cause of action which is exhausted upon a decree being obtained against one of them only. A judgment recovered against the father only does not therefore bar a suit against the son. The fact of the mortgaged property having been once sold by auction in execution proceedings against the father alone does not amount to a satisfaction of the decree, where, as in this case, a large part of the property sold has been taken out of the hands of the creditor, purchaser, by the sons on the ground that they were not joined as parties to the creditor's suit. As four-fifths of the property which the creditor purchased at auction in satisfaction of his debt has been decreed to the sons, and the creditor has thus been deprived of that portion of the property, his debt must be held to have remained *pro tanto* unsatisfied. And as it has not been established that the debt was tainted with immorality, the sons, defendants in this case, are liable for it. There may, it is true, be instances in which the interests of the father alone fetched at auction-sale a price sufficient for the complete satisfaction of the debt. In such a case there would be no debt of the father due to the creditor for which the latter might proceed against the sons. But it has not even been hinted that this is a case of that description. The plaintiffs were therefore entitled to claim the amount decreed to them. No objection was taken in the argument before us as to the form of the decree passed by the Court below. As no other point was argued before us, this appeal must fail and be dismissed with costs.

The objections under section 561 of the Code of Civil Procedure are not pressed and are dismissed with costs.

AIKMAN, J.—I concur.

Appeal dismissed.

(1) (1879) I. L. R., 5 Calc., 292.