APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Kendall.

GAYA PRASAD AND ANOTHER (JUDGEMENT-DEBTORS) *v.* MURLIDHAR (DECREE-HOLDER).*

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Act No. IV of 1882 (*Transfer of Property Act*), *section* 53—*Fraudulent transfer—Hindu law—Joint family property—Partition after decree obtained against the father.*

The sons in a joint Hindu family at any time up to attachment of the joint family property can enter into a partition with their father with the express object of avoiding attachment of what up to the time of the partition has been joint family property, and if they do so, their individual property acquired by the partition will not be liable to attachment. The partition can only be set aside on evidence showing fraud, and the mere fact of the desire to save their property will not be sufficient to justify an inference of fraud. *Indar Pal* v. *The Imperial Bank of India* (1), distinguished. *Bhagwant* v. *Kedari* (2), *Krishnasami Konan* v. *Ramasami Ayyar* (3), and *Peda Venkanna* v. *Sreenivasa Deekshatalu* (4), followed.

THE facts of this case were as follows:—

A mortgage of joint family property was executed by the father and one out of several sons. The mortgagee sued on his mortgage, impleading not only the actual mortgagors but the other sons as well. He obtained a decree, which was a simple money decree, against the father and the son who was a party to the mortgage, and the suit was dismissed as against the

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*Second Appeal No. 1352 of 1926, from a decree of Piare Lal, Additional District Judge of Aligarh, dated the 18th of May, 1926, reversing a decree of Raj Rajeshwar Sahai, First Additional Subordinate Judge of Aligarh, dated the 13th of March, 1926.

(1) (1916) I.L.R., 37 All., 214.
(2) (1900) I.L.R., 25 Bom., 202.
(3) (1899) I.L.R., 22 Mad., 519.
(4) (1917) I.L.R., 41 Mad., 136.

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other sons. When, however, the mortgagee decree-holder applied for attachment of the joint family property, he was met by the objection that since the date of the decree the joint family property had been partitioned, and, therefore, the shares in the hands of the other sons were not liable to attachment and sale. The trial court allowed the objection. In appeal the Additional District Judge held that the partition between the father and his sons (the present appellants) "was executed during the pendency of the suit and to all intents and purposes was executed in order to defeat the appellants' claim." He accordingly set aside the order of the court below. The respondents appealed to the High Court.

Babu *Piari Lal Banerji* and Babu *Surendra Nath Gupta*, for the appellants.

Munshi *Panna Lal*, for the respondent.

The judgement of ASHWORTH, J., (after setting forth the facts as above) thus continued :—

In this second appeal by the sons it is contended that there was no evidence to justify the finding of the lower appellate court that the partition of the 15th of August, 1925, amounted to a fraudulent transfer within the meaning of section 53 of the Transfer of Property Act, and that the sons had a right to partition the joint family property in order to avoid the risk of their father's judgement-creditor attaching the whole of the joint family property in execution of the decree against the father.

The appeal is resisted on two grounds. The first ground taken up is that from the moment when a father incurs a debt which is not for immoral purposes, the joint family property, as it exists at the time when the debt is incurred, becomes from that moment liable for

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the debt of the father. No authority has been shown to us to justify this contention. The contrary appears to be too well established to need reference to any decision. The rule, as set forth in Mulla's Hindu Law, is as follows :—

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"It is now well established that the special liability imposed by the Hindu law on sons and grandsons as such to pay the debts of their father and grandfather is not a personal liability. It is confined to their undivided interest in the joint family property. That is to say, the separate property of the sons and grandsons is in no case liable for the debts of their father and grandfather; the liability arises only—

(1) if the sons and grandsons are joint with their father and grandfather, and

(2) there is joint family property."

To hold otherwise, it appears to us, would in effect entirely nullify the rule of law, so emphatically laid down by their Lordships of the Privy Council, that a father cannot bind the joint property by a transfer which is not for family necessity or in consideration of an antecedent debt. If, from the moment that he incurred a personal debt, the joint property became liable, notwithstanding that it might subsequently be the subject of partition, then the transfer by the father would be as operative against the joint property as if there had been no such rule of law to the contrary.

We hold that the liability imposed on the sons only continues as long as they are joint in property. The partition which took place in this case just before the respondent obtained his decree, if not liable to be set aside, was a partition which put an end to the existence of joint family property, that is to say, property in the joint ownership of the appellants and respondent. From that moment there was no property in which the sons were interested that could be attached or sold in execution of the decree against the father. The sole

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question is whether that partition is liable to be set aside or avoided by the respondent. The lower appellate court apparently relied on section 53 of the Transfer of Property Act. It appears that the evidence relied upon for attracting that section was the fact that the effect of the partition was to defeat or delay the claim of the respondent which was then *sub judice*, but the mere fact that the partition had this effect (which effect may be admitted) will not justify the application of section 53 of the Transfer of Property Act. What may be described as the leading decision on the matter is contained in *Bhagwant* v. *Kedari* (1). It was there held that the mere probability or even certainty of a transfer having the effect of delaying or defeating the attachment by a judgement-creditor was not a sufficient reason for invoking section 53, and that, in such a case, there must either be the additional fact of the transfer being for a grossly inadequate consideration or something else which would raise a presumption of fraud. There can be no question in this case of inadequate consideration. What the father gave by the partition agreement was joint ownership in the whole property in consideration of receiving absolute ownership of a portion of the property. Again the judgement of the lower court fails to point out any other evidence on which an inference of fraud could be based. We must, therefore, presume that there was no other evidence. Indeed, it is clear that the lower appellate court thought that it was sufficient to show that the result of the partition would be to delay or defeat the respondent. We fail to see how it can be fraudulent for a son to exercise a right of partition which pre-existed the incurring of the debt by the father. Accordingly we are of the opinion that the sons of a father at any time up to attachment of the joint family property can enter into a partition with their father, with

(1) (1900) I.L.R., 25 Bom., 202.

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the express object of avoiding attachment of what up to the time of the partition has been joint family property. If they do so, their individual property acquired by the partition will not be liable to attachment. The partition can only be set aside on evidence showing fraud, and the mere fact of the desire to save their property will not be sufficient to justify an inference of fraud. The only decision at all to the point which has been brought to our notice is that of *Indar Pal* v. *The Imperial Bank of India* (1). This was a decision by a two Judge Bench of this Court. Both the Judges held that a partition between a father and sons effected just after a decree against the father could be held by the lower court to have been collusively and fraudulently made to defeat the creditor. The reported judgement does not make it clear beyond all doubt that the partition took place between the date when the creditor obtained his decree and the date when attachment of the property was applied for. If it took place after attachment was applied for, then the decision in no way disagrees with the view taken by us. Assuming, however, that it took place before attachment was applied for, no facts are set forth in the judgement to show on what basis the trial court had held the partition to be made collusively and fraudulently. It is not stated in the decision that the mere fact that it had the effect of defeating or delaying the attachment of the joint family property was sufficient *per se* to justify a finding that the partition was collusive and fraudulent. The decision, therefore, affords no safe precedent. If it could be construed to mean that the mere fact that the object of the sons was to save the joint family property from the hands of the creditors of the father rendered the partition voidable, then we should feel constrained to disagree with it.

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For the above reasons we are of the opinion that the lower appellate court in holding that the partition deed was voidable under section 53 of the Transfer of Property Act (it is clear that that court invokes section 53 because it uses the words "in order to defeat the appellants' claim") was misconstruing the section. In other words, the court was applying a rule of law that did not exist in the form applied. We would, therefore, allow this appeal and restore the decision of the trial court. The appellants should get their costs in the lower appellate court and in this.

KENDALL, J. :—I agree with the order passed. In my opinion the dictum in Mulla's Hindu Law that a son's pious obligation to pay his father's personal debt is not a personal liability must be interpreted to mean that it will not follow the son after he has been separated from his father by a partition. It is clearly wrong to argue that it is a liability that is attached to his property, because then we should be faced with this position that a father by incurring a personal debt could create a charge on the joint family property of himself and his sons. It is well known that he cannot do so except for legal necessity or for antecedent debt. When a partition takes place, however, as has been held by a number of authorities, among which may be mentioned *Krishnasami Konan* v. *Ramasami Ayyar* (1) and *Peda Venkanna* v. *Sreenivasa Deekshatalu* (2), the son rids himself of his liability to pay his father's debt, provided that the partition takes place before the property has been actually attached.

Appeal allowed.

(1) (1899) I.L.R., 22 Mad., 519. (2) (1917) I.L.R., 41 Mad., 136