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the Mitakshara in matters of inheritance. As mentioned above, it was not pleaded by the present appellant that his family was governed by the Mitakshara. In these circumstances the judgment relied upon can be no guide for the decision of this case.

For the reasons given above, we dismiss this appeal with costs.

FULL BENCH

Before Mr. Justice Bennet, Mr. Justice Ismail and Mr. Justice Verma

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October, 12

SHIVA PRASAD GUPTA (DECREE-HOLDER) *v.* GOKUL CHAND AND OTHERS (JUDGMENT-DEBTORS)*

U. P. Encumbered Estates Act (Local Act XXV of 1934), sections 2(a), 16—"Debt"—Money directed to be paid, upon partition of joint family property, by one coparcener to another by way of owelty for making up equal lots or shares —Whether "debt"—Section 7(1)(a)—Stay of execution—Recall of certificate transferring the decree for execution by another court outside the province—Whether the Act is operative as regards rights and properties outside the province.

Upon a partition of joint family property consisting of various kinds of items the decree directed, by way of adjusting the shares of the several members and in order to make distribution of the property in lots or shares of equal value, that one of the members to whom some particular items had been allotted should pay a certain sum of money to another member to whom some other items had been allotted:

Held, that the amount decreed did not come within the word "debt" as defined in section 2(*a*) of the U. P. Encumbered Estates Act. The amount was in no sense a loan, either in its nature or its origin; it was in fact a portion of the joint family property which was allotted to one member of the family as a part of his share. Having regard to the intention and the scheme of the Act, it is clear that the Act was not at all intended to apply to the subject of partition among the members of a joint family, and there was no reason why the Act should be introduced in order to give one member of the

*First Appeal No. 209 of 1938, from a decree of Ratan Lal, Civil Judge of Allahabad, dated the 10th of October, 1936.

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family more than his share of the family property and to give another member less than his share. It would be "repugnant to the subject" to give the word "debt" such a meaning as to make it apply to the present case, and the introductory words—"Unless there is anything repugnant in the subject or context"—in section 2(*a*) sufficiently indicate and justify the interpretation that the word "debt" was not intended to apply to this case. Execution of the decree was, therefore, not to be stayed under section 7(1)(*a*) of the Act.

Held, also, that the staying of all processes of execution, which is directed by section 7(1)(*a*) of the U. P. Encumbered Estates Act, includes the recalling of certificates for execution issued to other courts to which the decree may have been transferred for execution. On such transfer, the court which passed the decree does not altogether lose seisin of the decree, and as long as an execution certificate is outstanding there is a pending proceeding for execution going on in the court which passed the decree. So, where the court which has passed a decree and is executing it is directed by section 7(1)(*a*) to stay proceedings in execution, the court should recall any certificates for execution which it has issued to another court to which the decree has been transferred for execution, although such court may be one outside the United Provinces; and, so far as this point is concerned, the question does not arise as to whether the U. P. Encumbered Estates Act, being an Act of the local legislature of a province, can affect rights and properties outside the boundaries of that province.

Sir *Tej Bahadur Sapru* and Mr. *Gopi Nath Kunzru*, for the appellant.

Messrs. *B. Malik* and *Govind Das*, for the respondents.

BENNET, ISMAIL and VERMA, JJ.:—This is an execution first appeal by the decree-holder against an order of the learned Civil Judge of Allahabad to the following effect: "As the judgment-debtor has applied under the Encumbered Estates Act in Benares (vide order of Collector) execution cannot proceed and is shelved. Certificates sent shall be withdrawn."

This first appeal which was originally filed as a civil revision came before a Bench which recommended a reference to a Full Bench which has now been made. The ground of the reference was that there was a decree

passed in a partition suit in regard to properties belonging to a joint Hindu family and the decree directed the payment of a certain amount by one of the coparceners to another coparcener, and the question which arose was whether the amount which was to be paid constituted a debt within the meaning of the U. P. Encumbered Estates Act, Act XXV of 1934.

On the 25th May, 1922, there was an agreement between the members of a very wealthy joint Hindu family to refer to arbitration the partition of the joint family property. An award was given on the 30th November, 1925. That award is in a printed book. On the 25th February, 1926. the award was made a decree of court in the court of the Civil Judge of Allahabad. The applicant before us, B. Shiva Prasad Gupta, is the fourth party in the award and on 3rd February, 1934, he made an application for execution of his decree to the amount of Rs.9,75,567-0-9 due on the date of the application. The Allahabad court was asked to attach a small house in mohalla Daraganj and also to send transfer certificates for execution of the decree to courts in Benares, Jaunpur, Gonda and Calcutta. Such transfer orders were passed on 10th August, 1935, and 22nd August, 1935. Certificates were issued bearing the date of 11th November, 1935. The respondents in this first appeal who constitute the first party in the arbitration award, B. Gokul Chand and others, made an application to the Collector of Benares on the 5th October, 1936, under the Encumbered Estates Act. On that date the Collector transferred the application to the Special Judge. On the 9th October. 1936, the respondents made an application for stay of execution to the Civil Judge of Allahabad and on the 10th October, 1936, the Civil Judge passed the order which is now under appeal. The Civil Judge also issued letters to the Calcutta and Gonda courts on the 21st October, 1936, withdrawing the certificate of transfer of the decree. Some further proceedings took place in the court below and in this Court

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but as no decision was given on this matter there is no question of any *res judicata*. Now learned counsel for the appellant has formulated three points for the decision of this Full Bench: (1) Does the U. P. Encumbered Estates Act apply to partition decrees relating to joint family property? (2) Having regard to the words used in section 7 of the U. P. Encumbered Estates Act, could the proceedings in Calcutta relating to execution against property in Calcutta be stayed? (3) The U. P. legislature had no power to legislate with regard to property situated outside the United Provinces.

We shall first consider point No. 1. We refer to the printed book of the arbitration award which had been made a part of the decree of the court. The decree merely states that the decree is in terms of the award. The printed book states on page 3 that the first party, who are the respondents before us, should have an estate of one-third in the family property. The second and third parties, with whom we are not concerned, have a share of one-sixth each, and the fourth party, who is the appellant before us, has a share of one-third. The award divides the zamindari into four lots and the house property into four lots, also the jewellery and shares in companies and outstandings due to the Benares moneylending firm. Certain Government promissory notes and postal certificates and war loans are divided up on page 28, and also the business concerns of the family on pages 28, 29 and 30 which comprise among other things a cotton mill. On page 33 it is stated that "Taking into consideration the totality of all the circumstances we have decided to reduce the amount payable by the first party to the second, third and fourth parties to the extent indicated below: . . . To the fourth party Babu Shivaprasad Gupta, Rs.13,68,358-7-6. We declare that the first party, Raja Moti Chand and others, is liable to pay the above sum and we do hereby order that party to pay to the second, third and the fourth parties respectively the amount mentioned opposite their names." These sums are due as stated in the middle of

page 33 on account of the adjustments of the claims of the various parties as indicated above. On page 35 there were certain provisions made as to how the amount was to be paid. From this recital it is obvious that the amount in question was to be paid by the first party to the fourth party in order to make an equal distribution of the joint family property. The joint family property consisted not only of the zamindari and the house property but of various valuable movable properties which were either money or could be easily converted into money. It is to be noted therefore that the amount to be paid was in no sense a loan nor did it take its origin in any kind of loan. It was in fact a portion of the joint family property which was allotted to the appellant before us.

We now come to the question of the wording of the Encumbered Estates Act. This Act in its preamble sets out: "Whereas it is expedient to provide for the relief of encumbered estates in the United Provinces." That is, the intention of the Act is to give assistance and relief to estates which are encumbered, or in other words estates of which the owners have to pay debt or where debt is a liability on the property. In section 2(*a*) it is stated: "In this Act unless there is anything repugnant in the subject or context: (*a*) 'debt' includes any pecuniary liability except a liability for unliquidated damages."

In section 8 it is stated that the Special Judge shall call upon the applicant to submit to him a statement containing so far as may be practicable—"(*a*) full particulars respecting the public and private debts to which the landlord is subject, or with which his immovable property or any part thereof is encumbered."

Under section 9 a notice is published by the Special Judge calling upon the claimants having claims in respect of private debts both decreed and undecreed against the person or property of the landlord to make their claims.

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Under section 10 the claimant gives some details. Under section 14(2) the Special Judge examines each claim and after hearing the parties and considering the evidence he determines the amount, if any, due from the landlord to the claimant on the date of the application under section 4, and provision is made for the Special Judge to reduce the amount of the claim by applying the Usurious Loans Act or the Agriculturists' Relief Act, etc., and under sub-section (7) he passes a decree for the amount that he finds due.

Under section 16 the Special Judge ranks all debts for priority in the following order:

Class (1)—Debts recoverable under the Agra Tenancy Act III of 1926, the Oudh Rent Act XXII of 1886 and the Land Revenue Act III of 1901;

Class (2)—Public debts due to the Government and public debts due to a local authority creating a charge on immovable property;

Class (3)—Debts secured upon property against which the Collector may take action under the provisions of section 24 up to the value of the security;

Class (4)—Other secured debts;

Class (5)—Debts due on account of goods supplied or services rendered; and

Class (6)—Unsecured debts due to a local authority, debts falling into class (3), in excess of the value of security, and other unsecured debts.

It is admitted that if the particular amount decreed is to come under the Encumbered Estates Act in the present case it will fall under the words in class (6), "and other unsecured debts." The result of this would be that if the property were not sufficient to discharge all the other classes of debt then nothing would be awarded to the decree-holder. This appears to us to be a very anomalous result, considering that the appellant before us is a person who was a member of the joint family and the decree which he has obtained is a decree for part of his share of the joint Hindu family

property. The Encumbered Estates Act is to preserve the estates of the owners and in the present case if this result is to follow, the Act would be used to deprive the appellant of part of his share of the joint family property. We do not think that that can ever have been the intention of the legislature in passing this Act. In *Kent County Council* v. *Lord Gerard* (1) there is a passage in which LORD HERSCHELL says: "My Lords, it would not be legitimate, in my opinion, to strain the language used in order to make it apply to a case to which it does not legitimately, in its terms, apply, on account of the supposed intention of the legislature and the theory that that supposed intention can only be effectually carried out by giving to the words a meaning which they do not naturally bear."

Now in the present section 2(*a*) which we have to interpret in this appeal there occur the words "Unless there is anything repugnant in the subject or context." We have to consider whether the subject of a partition suit is in any way repugnant to the use of the word "debt" in the Encumbered Estates Act. Now a partition suit is a division of the joint family property between the members of a Hindu joint family. Each member who is entitled to a share of the joint family property should in equity receive the full amount of his share. We do not see why the Encumbered Estates Act should be introduced in order to give one member of the family more than his share and to give another member of the family less than his share. Such a principle is in no way the intention of the framers of the Encumbered Estates Act. No doubt the respondents will benefit by the reduction to a small amount or the total abolition of the amount which they were required to pay and the appellant would have a corresponding loss but we fail to see why the Encumbered Estates Act should be used in this manner. It does not in any sense preserve the estates of the members of

(1) [1897] A.C. 633(639).

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the family taken as a whole. It is merely causing loss to one for a gain to the other. The object of the Act was to preserve the estates in the United Provinces and to liquidate the debts which had accumulated on those estates. We do not think that the Act was intended at all to apply to the subject of partition among the members of a joint family, and accordingly in our opinion the subject is one which is repugnant to the definition of the word "debt" in section 2(*a*) of the Act.

We note that comments have been made in one of the text books on the fact that certain amendments should be made of this sub-section and the proposed amendment was the addition of the words, "Maintenance, decree for torts, trust money, trade debts unconnected with zamindari, and arrears of rents for houses and shops." There are no doubt many other amendments which might be made and in our opinion the present case is one which should not come under this sub-section. Instead of specifying all the matters which should be excepted from the operation of this definition the legislature has made provision for the discretion of courts in these words, "Unless there is anything repugnant in the subject or context." We consider that the present expression mentioned is quite sufficient for the purpose and that under that expression we can hold that the present Act does not apply the word "debt" to the present case.

On this view of the matter it is clear that the court below was incorrect in passing a stay order. Such a stay order was passed under section 7 of the Act which provides as follows: "(*a*) All proceedings pending at the date of the said order in any civil or revenue court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered, except an appeal or revision against a decree or order, shall be stayed, all attachments and other execution processes issued by any such court and then in force in respect of any such

debt shall become null and void, and no fresh process in execution shall, except as hereinafter provided, be issued."

In our view the proceedings under the Encumbered Estates Act will not apply to this particular debt and therefore the court below which has before it the execution of the decree for this particular debt should not have stayed the execution of the decree as it is not a debt to which the Act will apply.

It is not necessary for us to decide the remaining two points which have been argued but we consider that it will be useful to come to a decision on point No. 2. What the court below has done is to recall its certificate for execution of the decree in the court in Calcutta and this is objected to by learned counsel for the appellant. The objection which has been taken is that the Encumbered Estates Act, section 7, can only apply to property in the United Provinces and that the property which might have been taken in execution in Calcutta is property outside the purview of the legislature in these provinces. On the other hand it occurs to us that we have to see whether the court in Allahabad has taken any action which is correct for it to take under the provisions of section 7(1)(*a*) on the supposition that there was a debt which did come under the Encumbered Estates Act and that the order of the court was correctly passed for stay of execution. Now in this connection we may refer to the procedure laid down by the Civil Procedure Code in regard to transfer of decrees for execution. In the Code itself sections 38 to 46 deal with this matter of transfer of decrees for execution. There is provision in these sections for the court which passed a decree sending a certificate to another court, and under section 40 the court might be in another province. When such a decree has been sent for execution certain rules apply, namely, order XXI, rules 5 to 10. Now the Code does not provide under what circumstances the court which passed a decree is to recall its certificate.

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The procedure is that where a court to which a decree is transferred for execution completes execution in its jurisdiction it returns the certificate with a report as to what has happened in the execution. The court which has passed the decree has meanwhile kept the execution file pending and the execution file is not transferred to the record room as long as a certificate for execution issued to another court is outstanding. In this connection we may refer to a ruling of their Lordships of the Privy Council in *Jang Bahadur* v. *Bank of Upper India* (1), where their Lordships state on page 321 as follows: "Under clause (*c*) of section 39 of the Code of 1908 a decree directing the sale of immovable property situate outside the local limits of the jurisdiction of the court which passed it may be transferred for purposes of execution to the court within whose jurisdiction the property is situated. On such transfer the former court does not altogether lose seisin of the decree." It may therefore be said that as long as an execution certificate is outstanding there is a pending proceeding for execution going on in the court which passed the decree. Section 7(1)(*a*) states that all proceedings for execution pending at the date of the order shall be stayed. Is it a fair interpretation of this direction to say that the Allahabad court when it is directed to stay execution of this decree should recall the certificate which has been issued to Calcutta or should the Allahabad court allow proceedings in execution of this decree to go on in Calcutta although the execution is stayed in the court in Allahabad? We are of opinion that the Allahabad court was correct in adopting the former course, on the supposition that the matter came under the Encumbered Estates Act. It appears to us that where an execution court which has passed a decree is legally directed to stay proceedings in execution that court should recall any certificate for execution of the decree which it has issued to another court.

(1) (1928) I.L.R. 3 Luck. 314.

In this connection reference was made by learned counsel for the appellant to *Patiala Darbar* v. *Narain Das Gulab Singh* (1), in which a Bench of this Court has held that a court in the United Provinces is not competent under section 151 of the Civil Procedure Code to issue a stay order to a court in another province and that the object of the Encumbered Estates Act is solely to protect encumbered estates in the United Provinces, not to protect debtors. Now in that case the court in the United Provinces was asked to issue an injunction for the stay of proceedings of a decree passed by a court outside the United Provinces. That is not the case here because it is not the Calcutta court which passed the decree. The cases therefore are different. Learned counsel further argued on the third ground that the United Provinces legislature had no power to legislate in regard to property situated outside the United Provinces, and in this connection he referred to a decision of a Bench of this Court, of which two of us were members, in *Wahid Uddin* v. *Makhan Lal* (2). This ruling laid down that under section 80A(3) of the Government of India Act of 1919 the local legislature of a province cannot validly make laws to affect the rights and properties outside the boundaries of the province. We think that this point does not arise in the present case. Learned counsel desired that mention should be made in this connection of section 205(1) of the Government of India Act of 1935 which provided for appeals to the Federal Court where the case involved a substantial question of law as to the interpretation of that Act or any Order in Council made thereunder. He referred to the Order in Council styled "The Government of India (Adaptation of Indian Laws) Order, 1937" which provided in paragraph 7 as follows: "Subject to the foregoing provisions of this Order, any reference by whatever form of words in any Indian Law in force immediately before the commencement

(1) I.L.R. [1938] All. 650. (2) I.L.R. [1938] All. 781.

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of this Order to an authority competent at the date of the passing of that law to exercise any powers or authorities, or discharge any functions, in any part of British India shall, where a corresponding new authority has been constituted by or under any part of the Government of India Act, 1935, for the time being in force, have effect until duly repealed or amended as if it were a reference to that new authority."

The argument of learned counsel was that, under this paragraph, for the purpose of the Government of India Act of 1935 the Encumbered Estates Act, although passed before that Act, should be considered as having been passed after that Act and that therefore any question which would arise on the interpretation of that Act would give rise to an appeal under section 205 to the Federal Court. We do not desire to express any opinion on the merits of this argument.

In the present case we consider that our decision on the point No. 1 is sufficient for the purpose of this case. Accordingly we allow this first appeal with costs and set aside the order of the 10th August, 1936, of the learned Civil Judge and direct that the execution should proceed in whatever court the decree-holder desires.

MISCELLANEOUS CIVIL

Before Mr. Justice Bennet

DEBI CHAND (APPLICANT) *v.* SECRETARY OF STATE FOR INDIA AND OTHERS (OPPOSITE PARTIES)*

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October, 17

*Court Fees Act (VII of 1870), section 8; schedule II, article 17(iv)—U. P. Town Improvement Act (Local Act VIII of 1919), sections 57, 58—Award by Tribunal constituted under the Act—Is an order of a civil court—Appeal from award—*Ad valorem *court fee payable—"Set aside an award", meaning of.*

The court fee payable on a memorandum of appeal against an award by a Tribunal constituted under the U. P. Town Improvement Act of 1919 comes under section 8 of the Court

*Stamp Reference in First Appeal No. 288 of 1934.