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obtained by such deceased person during his life, may, after his death, be instituted by his legal representative, without a certificate first obtained. If the Court is satisfied that the debt is being withheld from "vexatious," that is, unreasonable or merely dilatory, "motives," and not from any "*bonâ fide*" objection on the part of the debtor to the title of the person seeking recovery, it may decree the claim, absence of certificate notwithstanding. If on the other hand the Court considers that the debtor has grounds for "a reasonable doubt" as to the party entitled, it may refuse to issue any compulsory process to enforce payment,* until the plaintiff has obtained the requisite certificate. We therefore do not think that it is an imperative condition precedent to the institution of a suit by the legal representative of a deceased person for a debt due to his estate, that such legal representative should first obtain a certificate under Act XXVII of 1860. We accordingly allow the application for revision, and direct the Small Cause Court Judge to restore the case to his file, and, having regard to our preceding observations, to proceed to dispose of the case according to law.

Application allowed.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

PHUL CHAND (DEFENDANT) v. LACHEMI CHAND (PLAINTIFF).*

Hindu Law—Joint Hindu family—Debts contracted by Father as manager of family business—Sale of ancestral property in execution of decree against Father—Son's share.

N, a member of a joint Hindu family, consisting of himself, his wife, and his minor son, L, managed the joint family business, which was carried on under the style of "Atma Ram Anokhe Lal." As manager of such business he contracted certain debts, for which he was sued as the "proprietor" of the firm of "Atma Ram Anokhe Lal," and for which decrees were passed against him, in execution of which ancestral property of the family was sold. L, his minor son, sued to have such sale set aside, and to recover his share of such property, on the ground that such decrees had been passed against his father personally, and only his interest in such property passed by such sale. Held that, looking at the capacity in which N was sued, and the nature of the debts for which such decrees were given

* Second Appeal, No. 1409 of 1881, from a decree of M. S. Howell, Esq., Judge of Shâhjahânpur, dated the 9th September, 1881, reversing a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Shâhjahânpur, dated the 13th December, 1880.

such decrees must be taken to have been passed against *N* as the managing head of the family, and *L* was therefore not entitled to recover his share of such property.

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THE facts of this case were as follows:—About thirty years before the institution of the present suit one Durga Prasad set up business as a banker at Sháhjahánpur under the style of "Atma Ram, Anokhe Lal". On his death his son Nanak Chand, a defendant in the present suit, carried on the same business under the same style. After some time Nanak Chand added to his banking business a produce business. In the course of this latter business he entered into certain time-bargains for the delivery of grain with two firms at Cawnpore named respectively Phul Chand, Makhan Lal, and Hazari Lal, Bakhtawar Lal, defendants in this suit. These time-bargains resulted in a pecuniary loss to Nanak Chand, regarding which litigation ensued between the Cawnpore firms and him, and those firms obtained decrees for money against him on the 5th September, 1877, and the 24th June, 1878.

In execution of their decrees the Decree-holders caused the rights and interests of Nanak Chand in certain ancestral properties to be attached and proclaimed for sale. Thereupon Lachmi Chand, the minor son of Nanak Chand, the plaintiff in the present suit, applied by his next friend, his mother Ganga Dai, to the Court executing the decrees to exempt from sale his rights and interests in the properties under Hindu law, which amounted to a moiety of the properties. This application was refused on the 24th August, 1880. On the 25th August, 1880, the properties were put up for sale in execution of the decree held by the firm of Phul Chand, and were purchased by Phul Chand. In September, 1880, the present suit was instituted on behalf of Lachmi Chand by his mother against the members of the Cawnpore firms and his father, in which he sued to set aside the order of the 24th August, 1880, and for a declaration of his right to one moiety of the properties which had been put up for sale on the 25th August, 1880. The Court of first instance dismissed the suit on the ground that the decrees were binding on the family of Nanak Chand, inasmuch as the business in which the loss, eventuating in the decrees and the sale of the properties, resulted, was undertaken by Nanak Chand for the benefit of the whole family. The plaintiff appealed, and

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the lower appellate Court fixed the following issues for determination :—“ Was or was not the debt which resulted in the sale under reference incurred for a purpose which in the terms of the Hindu law was “immoral?” Is the plaintiff, with reference to the provisions of the Hindu law, as stated by the decisions of the Courts, entitled to a decree?”

In respect of the first of these issues the lower appellate Court observed that a time-bargain could not, in the class to which the plaintiff and his father belonged, be properly called illegitimate business, and that, had the particular transactions under reference resulted in a gain instead of a loss, the plaintiff would have shared in the benefit arising from them. In respect of the second issue, being of opinion that the ascertainment of the true nature of the debts and decrees being essential to a right decision of such issue, and their true nature not having been distinctly determined, the lower appellate Court remanded the case for the decision of the following issue :—“ When he contracted the obligations which resulted in the suits in which decrees were passed on the 5th September, 1877, and the 24th June, 1878, or when he contracted either of them, and if so which, was Nanak Chand acting in a purely individual capacity, or as the head and representative of the joint family consisting of himself, his wife, and his minor son?”

The Court of first instance found on this issue that Nanak Chand contracted the obligations, and was sued, as representative of the family, and not in his individual capacity. The lower appellate Court accepted the former part of this finding, *viz.*, that Nanak Chand contracted the obligations as the representative of the family; but not the latter part, *viz.*, that Nanak Chand was sued in respect of those obligations as the representative of the family; and held that the plaintiff was entitled to a decree for a moiety of the properties. It observed on this point as follows :—“ The creditors might have sued the members of the firm under their real names or under the name of the firm, “Atma Ram, Anokhe Lal,” like any other unregistered company. As a matter of fact they seemed to have sued Nanak Chand under his own name. In *Samalbai Nathubhai v. Someshvar* (1), relied on by the res-

(1) I. L. R., 5 Bom. 38.

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pondents, the creditors sued all the three members of the family by name. Here the suits were brought against "Nanak Chand proprietor of the firm named Atma Ram, Anokhe Lal," and "Nanak Chand proprietor of the firm of Atma Ram, Anokhe Lal;" and the decrees were passed against "Nanak Chand, defendant." The two sale-certificates describe the judgment-debtor as "Nanak Chand," and certify that the respondent Phul Chand bought the properties therein described, some of which are described as belonging to the "judgment-debtor," while the rest are not described as belonging to any one. It seems therefore that the respondent Phul Chand bought only Nanak Chand's share—*Venkataramayyun v. Venkatasubramania Dikshatar* (1); *Pursid Narain Singh v. Nonooman Sahai* (2); *Luchmun Dass v. Giridhur Chowdhry* (3); *Bika Singh v. Lachman Singh* (4); *Nanhak Joti v. Jaimangal Chaubey* (5). The authorities to the contrary—*Deva Singh v. Ram Manohar* (6); *Gaya Din v. Raj Bansi Kuar* (7); *Ram Narain Lal v. Bhawani Prasad* (8)—differ in that in these cases there was a decree directing the sale of property mortgaged by the father, to enforce the lien against which the suit had been bought, so that there was a clear indication throughout the litigation that the creditor was proceeding against the whole family property, whereas here there was none, for "proprietor of the firm *etc.*" may mean simply "a proprietor." It seems to me therefore that the appellant (plaintiff) is entitled to recover his half share of the property."

The defendant Phul Chand appealed to the High Court, contending that, regard being had to the fact that the plaintiff's father had acted as the representative of the family in the matter of the contracts in respect of which he had been sued, and such contracts were lawful, the lower appellate Court had improperly held that the plaintiff was entitled to recover his share of the property, merely because he was not a party to the suit against his father.

Pandit *Ajudhia Nath*, for the appellant.

Pandit *Bishambhar Nath* and *Babu Ratan Chand*, for the respondent.

(1) I. L. R., 1 Mad. 358.

(5) I. L. R., 3 All. 294

(2) I. L. R., 5 Calc. 345.

(6) I. L. R., 2 All. 746

(3) I. L. R., 5 Calc. 355.

(7) I. L. R., 3 All. 191.

(4) I. L. R., 2 All. 300.

(8) I. L. R., 3 All. 443.

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The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—It is unnecessary to detail at length the facts out of which the question of law to be determined by this appeal arises, as they are very fully set forth in the judgments of the lower Courts. It is found as a fact that the firm of Atma Ram, Anokhe Lal, was a joint family concern, that Nanak Chand the father of the plaintiff was the manager, that the debts in respect of which the decrees of 1877 and 1878 were passed were incurred in the course of the business of the firm, and that they were not immoral or improper, but that on the contrary, if profit had accrued from the transactions out of which they had arisen, the plaintiff would have participated in it. In all these findings the two lower Courts coincide, but the Judge has decreed the plaintiff's claim on the technical ground, that as he was not made a party to the suits in which the decrees were passed against his father Nanak Chand, his interest in the joint property was not affected by them, and that the auction-purchasers at sale in execution of decree acquired no more than the right, title, and interest of Nanak Chand.

Having regard to the course of recent decisions and to the opinion of the Privy Council, that "in execution proceedings the Courts will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right," we cannot adopt the conclusion of the Judge. The firm of Atma Ram, Anokhe Lal, was founded by the grandfather of the plaintiff, and Nanak Chand his father was jointly interested in it from his birth, and so in his turn was the plaintiff. When Nanak Chand succeeded Durga Prasad, the firm continued under the same name, and the business was conducted as heretofore, except that Nanak Chand was the manager instead of his deceased father. As the plaintiff by birth became entitled to share in the business as one of the joint proprietors, so did he necessarily become liable to contribute his proportion towards the discharge of any debts that might be incurred or losses made by the managing member. When the suits of 1877 and 1878 were instituted, Nanak Chand was cited as proprietor of the firm of Atma Ram, Anokhe Lal, and looking at the capacity in which he was

sued, and the nature of the debts for which the decrees were given, we think they must be taken to have been passed against him as the head of the family. We may add that the first Court found very clearly that the present suit was in reality instigated by Nanak Chand for the purpose of depriving his creditors of a considerable portion of the fruits of their execution against him. In the majority of suits of the description of the present, a similar state of things is to be found, and it is well known that litigation of this kind, which involves a direct breach of the first duties of allegiance and respect from Hindu sons towards their fathers, would scarcely, if ever, be instituted without collusion on the part of the latter. Consequently a claim by a son, alleging the immorality of his father as the ground for setting aside a transaction entered into by the latter, must always be viewed with great suspicion, especially when the interests of a *bona fide* purchaser for value at sale in execution of decree have to be considered. The appeal must be decreed with costs and the judgment of the first Court dismissing the plaintiff's claim restored.

Appeal allowed.

CIVIL JURISDICTION.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

BALAK TEWARI (PLAINTIFF) v. KAUSIL MISR AND OTHERS (DEFENDANTS),*

Incidental decision of issue—Appeal—Objection by respondent—Act X of 1877 (Civil Procedure Code), s. 561.

The plaintiff sued the defendants for compensation for the wrongful taking of the fruit on a tree which he alleged belonged to him. The defendants set up as a defence that the fruit on such tree had not been removed, and that such tree belonged to them. The Court of first instance dismissed the suit on the ground that the fruit on such tree had not been removed, but found incidentally that such tree belonged to the plaintiff. The plaintiff appealed from the decree of the Court of first instance; and the defendants objected to the decree, contending that such tree belonged to them. *Held* that, inasmuch as the Court of first instance did not, in deciding that such tree belonged to the plaintiff, decide a question substantially in issue, it did not decide in this matter "against the defendants," within the meaning of s. 561 of the Civil Procedure Code, and, as the decree was limited

* Application, No. 19 of 1882, for revision under s. 622 of Act X of 1877 of a decree of T. Benson, Esq., Judge of Azamgarh, dated the 18th September, 1881, affirming a decree of Maulvi Kamar-ud-din, Munsif of Azamgarh, dated the 16th June, 1881.

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