

set up both in the objections of Radhe Ballabh and those of Musammat Maryam, but the learned Subordinate Judge has not looked at the matter from that angle.

Following the view taken in the ruling cited above, we are clearly of opinion that Faqir Bakhsh had no "locus standi" as regards the execution of the final decree that stands in the name of Radhe Ballabh, and in these circumstances it is not necessary for us to consider whether the question of the fictitious nature of the transfer in favour of Radhe Ballabh is "res judicata" or not by reason of the decision of the 16th of July, 1934. The decision of the learned court below was in our opinion substantially correct, and we accordingly dismiss these appeals with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice G. H. Thomas

SHEO GOPAL (APPELLANT) *v.* FIRM GANESH DAS RAM
GOPAL (RESPONDENT)*

1937

February, 17

Civil Procedure Code (Act V of 1908), section 2(11)—Legal representative—Joint Hindu family—Decree against deceased member of joint Hindu family—Brother, if legal representative along with sons—Decree, if can be executed against surviving brother.

Where there is a personal decree against a deceased member of a joint Hindu family, his surviving brother cannot be deemed to be the legal representative of the deceased within the meaning of section 2, clause 11 of the Code of Civil Procedure and in the presence of the sons of the deceased the property belonging to the brother cannot be proceeded against but only the assets of the deceased in the hands of his sons can be made available to pay off the decree against the deceased.

*Execution of Decree Appeal No. 51 of 1935, against the order of Babu Pratap Shankar, Additional Civil Judge, Lucknow, dated the 28th of February, 1935, upholding the order of Pandit Hari Shankar Chaturvedi, Munsif, South Lucknow, dated the 15th of November, 1934.

1937
SHEIKH
FAQIR
BAKSH
v.
MUSAMMAT
MARYAM

*Nanavutty
and
Smith,
J.J.*

1937

SHEO
GOPAL
v.
FIRM
GANESH
DAS
RAM
GOPAL

Ganesh Sakharam Saraf v. Narayan Shivram Mulaye (1), and *Nagappa Nadar v. Karuppiyah Nadar* (2), distinguished. *Dwarka Das, minor v. Krishna Kishore* (3), and *Chunilal Hari Lal v. Bai Mani* (4), referred to.

Mr. *M. H. Qidwai*, for the appellant.

Mr. *Ali Jawwad*, for the respondent.

NANAVUTTY and THOMAS, JJ.:—This is an appeal against an appellate order of the court of the learned Additional Civil Judge of Lucknow affirming the order of the court of the Munsif of South Lucknow, which directed that the name of the objector Sheo Gopal be brought on the record as one of the legal representatives of his deceased brother, Lalji Lal.

The facts, out of which this appeal arises, are briefly as follows:

On the 6th of February, 1929, the firm of Ganesh Das Ram Gopal obtained a money decree against Lalji Lal, a deceased brother of the appellant Sheo Gopal. On the 16th of September, 1930, a compromise was arrived at between Lalji Lal and the firm of Ganesh Das Ram Gopal whereby a sum of Rs.1,185-15 was found due to the firm. Lalji Lal died in 1933, and on the 28th of May, 1934, an application for execution of decree was filed by the firm of Ganesh Das Ram Gopal, and it was sought to implead as the legal representative of the deceased judgment-debtor Lalji Lal not only his two sons but also Sheo Gopal, a pleader of Bahraich, and the brother of the deceased. On the 4th of August, 1934, Sheo Gopal objected and stated that he was neither the heir of his brother nor was he in possession of any property of his brother, and therefore he should not be impleaded as the legal representative of Lalji Lal. The lower court found that the family of the judgment-debtor was joint, but it held that there was no proof of any nucleus of joint family property. Nevertheless, both the lower courts held that the objector Sheo Gopal was the legal representative of his brother Lalji Lal and ordered

(1) (1931) I.L.R., 55 Bom., 109.

(2) (1925) A.I.R., Mad., 456.

(3) (1921) 61 I.C., 628.

(4) (1918) I.L.R., 42 Bom., 504.

that he should be brought on the record as the legal representative of his brother Lalji Lal. Sheo Gopal has, therefore, filed this appeal and his learned counsel has strenuously argued that Sheo Gopal cannot be deemed to be the legal representative or heir of his brother Lalji in the presence of the sons of the deceased. It seems to us that the contention of the appellant must be sustained. Clause 11 of section 2 of the Code of Civil Procedure defines a legal representative to be "a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

Section 53 of the Code of Civil Procedure lays down that property in the hands of a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come into the hands of the son or other descendant as his legal representative.

In the present case the decree sought to be executed was admittedly a personal decree against Lalji Lal and the only person who could be made liable to pay that decree under the Hindu Law, would be the sons of the judgment-debtor Lalji Lal and not his brother Sheo Gopal the appellant. Sir Dinshah Mulla in his Treatise on Hindu Law (8th Edition, page 250, paragraph 229) lays down the law on the subject very clearly. He writes:

"On the death of a coparcener, his interest in the coparcenary property does not pass by succession to his heirs. It passes by survivorship to the other coparceners, subject to the rule that where the deceased coparcener leaves male issue they represent his rights to a share on partition."

It is thus clear that even if Sheo Gopal be deemed to be joint with his brother Lalji Lal, still in the presence of the sons of Lalji Lal, the property belonging to Sheo

1937

SHEO
GOPAL
v.
FIRM
GANESH
DAS
RAM
GOPAL

*Nanavatty
and
Thomas,
J.J.*

1937
 SHEO
 GOPAL
 v.
 FIRM
 GANESH
 DAS
 RAM
 GOPAL

*Nanavutti
 and
 Thomas,
 JJ.*

Gopal cannot be proceeded against but only the assets of the deceased in the hands of his sons can be made available to pay off the decree of the respondent firm against Lalji Lal. In *Diwan Dwarka Das, minor, and another v. Diwan Krishna Kishore and another* (1), the Lahore High Court held that on the death of a member of a joint Hindu family, the surviving members of the family are not his legal representatives within the meaning of the definition contained in section 2, clause 11 of the Code of Civil Procedure. As pointed out by Mayne in his Hindu Law (8th Edition, page 339) "there is no such thing as succession properly so called, in an undivided Hindu family".

Similarly a Bench of the Bombay High Court in *Chunilal Harilal and others v. Bai Mani* (2) held that surviving coparceners of a joint Hindu family were not bound by the decree against one member of the family, and on no construction of the term "legal representative" could members of a joint Hindu family be brought within the definition as contained in section 2, clause 11 of the Code of Civil Procedure. Section 53 of the Code of Civil Procedure imposes the liability to pay the decree on the son or other descendant of the judgment-debtor and not on any collateral of the judgment-debtor.

The learned counsel for the respondent has relied upon a ruling of the Bombay High Court reported in *Ganesh Sakharam Saraf and others v. Narayan Shivram Mulaye* (3) and also on a ruling of the Madras High Court reported in *T. S. Nagappa Nadar v. T. S. Karupiah Nadar and another* (4). The case decided by the Bombay High Court and reported in *Ganesh Sakharam Saraf v. Narayan Shivram Mulaye* (3) was the case of sons and naturally the sons, under section 53 of the Code of Civil Procedure, were made liable to pay the decrees passed against their father. In the case decided by the Madras High Court cited above and reported in *Nagappa*

(1) (1921) 61 I.C., 628.

(2) (1918) I.L.R., 42 Bom., 594.

(3) (1931) I.L.R., 55 Bom., 709.

(4) (1925) A.I.R., Mad., 456.

Nadar v. Karuppiah Nadar (1), it was the *karta* or head of a joint Hindu family who died, and it was held that when the head of the family died, the next managing member of the joint Hindu family was the person on whom would devolve the representative character, and he could therefore come in as the legal representative of the deceased. Both these rulings are, therefore, clearly distinguishable from the facts of the present case and cannot be made applicable to a case like the present where the decree-holder seeks to make one brother liable for the personal debt of another brother, on the ground that the former is the legal representative of the latter.

In our opinion this appeal must succeed. The respondent can proceed against the assets of the deceased Lalji Lal in the hands of the sons of the deceased who are already brought on the record of the case. We accordingly allow this appeal with costs, set aside the orders of the lower courts and allowing the objection of the appellant Sheo Gopal, direct that his name be removed from the record as one of the legal representative of the deceased Lalji Lal.

Appeal allowed.

(1) (1925) A.I.R., Mad., 456.

1937

SHEO
GOPAL
v.
FIRM
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and
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