## APPELLATE CIVIL.

*Before Khaja Mohamad Noor and Luby, JJ.*

1934.

*July*, 13,17.
*August*, 3.

MUSAMMAT PRABHAWATI KUER

*v.*

RAM SARAN LAL.*

*Hindu Law—separation—creditor's right to follow property in the hands of individual member.*

In order to enable a creditor of a joint Hindu family to follow the property in the hands of a separated member of the family, the binding nature of the debt must be proved in the presence of that particular member and the decree must be against him. Either he should be a party to the suit or be legally represented therein.

Where, therefore, as a result of the separation of the family, the widow (as mother) was allotted a certain specific portion of the family property of which she was in exclusive possession, and the creditor of her husband instituted a suit for the recovery of his dues impleading the sons, grandsons and the widow as defendants, and the suit was decreed against the sons and grandsons but dismissed against the widow, and the creditor sought to execute the decree against the property in the hands of the widow.

*Held*, that the property in possession of the widow could not be made liable in execution.

*Raghunandan Pershad* v. *Moti Ram*(1) *and Bankey Lal* v. *Durga Prasad*(2), distinguished.

Appeal by one of the judgment-debtors.

The facts of the case material to this report are stated in the judgment of Khaja Mohamad Noor, J.

*S. M. Mullick* and *Sarjoo Prasad*, for the appellant.

* Appeals from Original Orders nos. 292 of 1933 and 9 of 1934, from the orders of Syed Mohamad Ibrahim, Subordinate Judge, 1st Court, Gaya, dated the 27th March, 1933, and 29th July, 1933.

(1) (1929) I. L. R. 6 Luck. 497, F. B.

(2) (1931) I. L. R. 53 All. 868, F. B.

1934.

MUSAMMAT PRABHAWATI KUER v. RAM SARAN LAL.

*Manohar Lal* and *Raj Kishore Prasad*, for the respondent in Appeal no. 292.

*Aditya Narain Lall*, for the respondent in Appeal no. 9.

KHAJA MOHAMAD NOOR, J.—These two appeals arise out of two execution proceedings by two decree-holders against the same set of judgment-debtors. It seems that the respondents had certain claims against one Babu Ram Prasad, the husband of the appellant. They instituted two suits for recovery of those dues against his sons and grandsons, making the present appellant, his widow, also a party defendant to the suits. Before the institution of the suits, the family of Ram Prasad had separated, and certain properties are said to have been separately allotted to the appellant as the mother of her sons. Decrees were passed in the respondents' favour against the sons and grandsons, but both the suits were dismissed against the appellant. In one suit (relating to M. A. no. 9 of 1934) the Court in deciding issue no. 5 said as follows:—

> "Defendant no. 13 (the appellant) being the widow of Babu Ram Prasad is an unnecessary party in the presence of the sons and grandsons."

and dismissed the suit against her. In the other suit (relating to appeal no. 292 of 1933) the decree was passed on compromise by the sons and grandsons and dismissed against the appellant. The respondent decree-holders have executed their respective decrees and have attached, among others, the properties which are said to have been separately assigned to the appellant and of which she is stated to be in separate possession. She objected to the attachment, and the learned Subordinate Judge has disallowed her objections on the ground that the debt being for family purposes and binding on the family, the property in her possession was liable for that debt. The lady has preferred these two appeals.

In my opinion the learned Subordinate Judge has ignored the fact that in order to enable a creditor of the family to follow the property in the hands of a member of the family, the binding nature of the debt must be proved in the presence of that particular member and the decree must be against him. Either he should be a party to the suit or be legally represented therein. Had the family been joint, the karta of the family, or the sons and the grandsons were the only parties necessary to the suit and he or they would have represented the family. The widow having no special right to any particular property was not a necessary party. Her right of maintenance did not make her a necessary party. The position, however, became entirely changed when the family separated. The right of the appellant was no longer to receive maintenance, which could have been defeated by the creditor by bringing the family property to sale. Now she was in possession of a specific portion of the family property and was entitled to retain it unless its liability to be taken away is established against her. Her sons and grandsons could no longer represent her. This is not a question of the Hindu law. The property in her possession may be liable, but the question is how that liability can be enforced? It is purely a question of procedure; or, in other words, the question is whether the decree can be executed against her. In appeal no. 292 of 1933, as I have said, the decree was passed on compromise between the decree-holder and the sons and grandsons of Ram Prasad. The decree-holder contented himself by getting a decree against them, and getting his suit dismissed as against the appellant. In the other appeal (no. 9 of 1934) the suit was dismissed against her, and the plaintiff decree-holders did not pursue the matter further. The matter will be quite clear if I give an illustration. Supposing there is a family debt incurred by the father of the family. On his death, his sons separate. The creditor institutes his suit against one

1934.

MUSAMMAT PRABHAWATI KUER v. RAM SARAN LAL.

KHAJA MOHAMAD NOOR, J.

of the sons only. Can he in execution of this decree proceed to sell the separated properties of the other sons? Certainly not. The properties in their possession may be liable, but the decree is not against them. The separated brother did not represent them in the suit. Either the appellant may be treated as a party to the suit, or not. If the former, then the suits have been dismissed against her. If she be treated not as a party, she is not bound by the decree. In either case there is no decree capable of execution against her property. None of the cases relied upon by the learned Advocate for the respondents helps them. For instance, he relied upon a Full Bench decision of the Cheif Court of Oudh in *Raghunandan Pershad* v. *Moti Ram*(1). There a decree for a family debt was obtained against the father after he had separated from his sons. It is not clear whether the suit was instituted before or after partition. The creditor attached the separated properties of the sons. Their claim was allowed. The decree-holder instituted a title suit for a declaration that the properties were liable for the debt. The suit was successful. It is clear that the liability was determined in the suit in the presence of the sons. In the case before us the properties in possession of the appellant may be liable for the debt, but this liability must be determined in her presence. This cannot be done, as the suits have been dismissed against her. Another case relied upon is that of *Bankey Lal* v. *Durga Prasad*(2). In that case majority of the Full Bench (Mookerji, J. dissenting) held that if a father has been declared insolvent the receiver of his estate could seize the separated properties of the sons for family debts if separation had taken place without making arrangements for payment of debts. Mookerji, J., however, was of opinion that a suit was necessary. The majority agreed with the judgment delivered by Sulaiman, A.C.J. He having held that the share of the separated son was liable observed that

(1) (1929) I. L. R. 6 Luck. 497, F. B.
(2) (1931) I. L. R. 53 All. 868, F. B.

1934.

MUSAMMAT PRABHAWATI KUER v. RAM SARAN LAL.

KHAJA MOHAMAD NOOR, J.

the mode of enforcing the liability was a matter of procedure and the Insolvency Court being competent to decide questions of title could enforce it. The other cases cited are on the liability of the family property for family debt. That is not the issue in this case. The issue is whether the properties can be sold in execution of these decrees.

A question was raised before us that the properties claimed by the appellant were not in fact assigned to her separately. This is a question of fact, and the learned Subordinate Judge has not decided it. His judgment proceeds on the assumption that there was a partition and that the properties claimed were so assigned to the appellant. The materials before us are not sufficient to come to any conclusion in this respect.

I would set aside the orders of the learned Subordinate Judge, and remand the cases to him to decide whether in fact the properties claimed by the appellant were really, on a bona fide partition, separately assigned to her before the institution of the suit. Any property which may be found to have been so assigned to her will be released from attachment.

The appeals are, therefore, allowed, and the cases are remanded. In the circumstances of the case, the parties will bear their own costs.

LUBY, J.—I agree.

*Appeals allowed.*
*Cases remanded.*

## REVISIONAL CRIMINAL.

1934.

*August*, 9.

*Before Courtney Terrell, C. J. and Luby, J.*

DAROGA MAHTO

*v.*

THE KING-EMPEROR.*

*Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections* 195 (*1*) (*b*) *and* 476—*Penal Code*, 1860 (*Act XLV*

* Criminal Revision no. 330 of 1934, from an order of R. B. Beevor, Esq., I.C.S., Sessions Judge of Bhagalpore, dated the 1st May, 1934.