

APPELLATE CIVIL.

Before Fazl Ali and Rowland, JJ.

BHUBANESHWAR PRASAD NARAYAN SINGH

v.

BIHARI LAL.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 90—decree against Hindu father—joint family properties sold—sons, whether have locus standi to apply under rule 90.

Where in execution of a money decree obtained against the father of the appellants certain properties belonging to the joint Hindu family were sold, and the appellants applied under Order XXI, rule 90, Code of Civil Procedure, 1908, for setting aside the sale.

Held: (i) that under the Hindu law the pious obligation of the son to pay his father's debt arises during the life-time of the father and the son's share in the joint ancestral estate could be sold as a result of the father's debt even during the life-time of the father.

Raja Brij Narain Rai v. Mangla Prasad Rai(1), followed.

(ii) that, therefore, the appellants were persons "whose interest was affected by the sale", and that they had the locus standi to make the application for setting aside the sale.

Subbarayadu v. Pedda Subbarazu(2) and *Mcdni Prasad Singh v. Nand Keshwar Prasad Singh*(3), distinguished.

Appeals by the applicants.

The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

S. M. Mullick and B. B. Sahay, for the appellant,
Sir Sultan Ahmad (with him *A. P. Upadhaya*
and *K. P. Upadhaya*), for the respondents.

* Miscellaneous Appeals nos. 333 and 334 of 1934, from an order of Babu Anjani Kumar Sahai, Subordinate Judge of Motihari, dated the 14th September, 1934.

(1) (1923) 5 Pat. L. T. 1, P. C.

(2) (1892) I. L. R. 16 Mad. 476.

(3) (1923) I. L. R. 2 Pat. 386.

FAZL ALI, J.—It appears that in execution of two money decrees obtained by the respondents in the two appeals against the father of the appellant certain properties belonging to the joint family were sold and the appellants thereupon applied under Order XXI, rule 90, for setting the two sales aside. A question then arose as to whether the appellants had the *locus standi* to make an application under Order XXI, rule 90, or, in other words, whether they were persons whose interest was affected by the sale. The learned Subordinate Judge, in order to make up his mind on the question, required the appellants to state clearly whether their interest, if any, in the property which had been sold would pass to the auction-purchaser. The appellants did not like to commit themselves in the matter further than by saying that their interest had been affected by the sale and they also practically stated that they were members of a joint family. The learned Subordinate Judge, however, was not satisfied with this admission and dismissed the applications on the preliminary ground that they were not maintainable. It is against such an order passed by the Subordinate Judge in the two cases that the present appeals have been preferred.

The Subordinate Judge in rejecting the applications relied upon the decision of the Madras High Court in *Subbarayadu v. Pedda Subbarazu*(¹) and of this Court in *Medni Prasad Singh v. Nand Keshwar Prasad Singh*(²). It appears to me, however, that neither of these decisions is applicable to the facts of the present case. All that was held in the case decided by this Court was that where a joint family property is sold in execution of a decree obtained against some of the members of the family and for which such members are alone liable, any other member of the family having an interest in the property may sue to set aside the sale and is not bound to apply under Order XXI, rule 90, of the Code of Civil Procedure (1908). Again, the case decided by the Madras

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High Court was not one in which the joint family property was sold for a debt contracted by a father, but was one in which a certain person alleging himself to be the undivided brother and as such the legal representative of a deceased judgment-debtor had applied to have set aside a sale, which had taken place in execution of the decree, of certain property alleged by him to be joint family property. I think that the principle which is applicable to the present case is the principle which has been enunciated by the Judicial Committee of the Privy Council in *Raja Brij Narain Rai v. Mangla Prasad Rai* (1) where it has been held that under the Hindu Law the pious obligation of the son to pay his father's debt arises during the life-time of the father and the son's share in the joint ancestral estate could be sold as a result of the father's debt even during the life-time of the father. In this particular case it was not disputed before the Subordinate Judge that the appellants were joint with their father and in my opinion the Subordinate Judge was not justified in requiring the appellants to make any further admission. In this Court it is conceded by Mr. Mullick who appears on behalf of the appellants that the whole property including the interest of the sons could be sold in execution of the decree obtained by the respondents against the father of the appellants and in these circumstances it is clear that the interest of the appellants was affected by the sale and they were competent to apply under Order XXI, rule 90. I would in these circumstances set aside the order of the learned Subordinate Judge and direct that the case be disposed of on the merits according to law.

In passing this order, however, I should also state that one of the points raised on behalf of the respondents was that the appellants are bound by a compromise arrived at between the decree-holder-respondents and the father of the appellants as early as on the 31st July, 1934, by which it was agreed

(1) (1923) 5 Pat. L. T. 1, P. C.

that if the judgment-debtor would pay the decretal amount to the decree-holders by the 31st January, 1935, the sale would be set aside, but on his failure to do so, the sale would be confirmed. It is contended on behalf of the respondents that in arriving at this compromise, the father of the appellants acted as the karta of the family and represented the appellants and, therefore, the compromise would be binding upon the latter also. This is, however, a question of fact which it will be for the Subordinate Judge to investigate along with the other facts of the case.

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In my opinion these appeals must be allowed. Costs of these appeals will abide the result of the application under Order XXI, rule 90. Hearing fee ten gold mohurs.

It is not necessary to pass any order on the stay application which becomes infructuous in view of the order passed.

The Court below is directed to expedite the hearing of the application under Order XXI, rule 90.

ROWLAND, J.—I agree.

Appeals allowed.

APPELLATE CIVIL.

Before Macpherson and James, JJ.

JANKI GOPE

v.

JANGBAHADUR CHAUDHURY.*

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Res judicata—application under Order IX, rule 13, Code of Civil Procedure, 1908 (Act V of 1908)—finding as to service of summons whether operates as *res judicata* in a subsequent suit for setting aside the decree on the ground of fraudulent suppression of summons.

* Appeal from Original Order no. 124 of 1934, from an order of Babu K. N. Singh, Subordinate Judge of Muzaffarpur, dated the 3rd May, 1934, reversing the decision of Babu U. N. Singh, Munsif, 1st Court, Muzaffarpur, dated the 17th November, 1932.