APPELLATE CIVIL.

1939.

August, 16, 17.

Before Harries, C.J. and Khaja Mohamad Noor, J.

PRAHLAD DAS

v.

DASRATHI SATPATHI.*

Hindu Law—sons' pious obligation to pay father's debt—suit against father and sons—decree against father only—creditor, whether entitled to execute the decree against sons.

Where a creditor of a Hindu debtor wants to enforce the pious obligation of his sons to pay his debts, the debt not being illegal or immoral, and impleads the sons also in the suit, but the Court, rightly or wrongly, refuses to pass a decree against the sons and passes a decree against the father only, the decree cannot be said to have been obtained against the father both in his individual capacity and also as representing the sons, and such a decree against the father, not being a decree against the sons, cannot be executed against them, not because they were not under a pious obligation to pay the debt of their father but because the procedure of enforcing their liability having been adopted the Court had refused to enforce it.

In order to enforce the pious obligation of a son to pay his father's debt there must be a decree against him obtained in a suit in which he was a party or can be deemed to have been a party through his father.

Atul Krishna Roy v. *Lala Nandanji*(1), *Kishan Sarup* v. *Brijraj Singh*(2) and *Raja Ram* v. *Raja Bakhsh Singh*(3), relied on.

Jai Narain Mahto v. *Janki Saran Singh*(4), not followed.

Appeal by the decree-holder.

* Circuit Court, Cuttack, Appeal from Appellate Order no. 36 of 1938, from an order of A. N. Banarji, Esq., District Judge of Cuttack, dated the 31st December, 1935, confirming that of Babu S. C. Mahanty, Subordinate Judge of Cuttack, dated the 3rd December, 1934.

(1) (1935) I. L. R. 14 Pat. 732, F. B.
(2) (1929) I. L. R. 51 All. 932.
(3) (1938) I. L. R. 13 Luck. 61, P. C.
(4) (1937) M. A. 253 of 1936 (unreported).

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

H. Mahapatra, for the appellant.

G. Dhal, for the respondents.

KHAJA MOHAMAD NOOR, J.—The facts of the case out of which this miscellaneous second appeal has arisen are these.

The appellant brought a suit to enforce a simple mortgage executed in his favour by the defendants nos. 1 to 3 of the suit impleading their respective sons as defendants nos. 4 to 6. The suit was decreed and the mortgaged properties were sold in execution of the decree. The sale proceeds were insufficient to satisfy the decree, and the appellant applied for a decree under Order XXXIV, rule 6, of the Code of Civil Procedure. In this application he specifically asked for a decree against defendants nos. 1 to 3 only, and not against their sons, defendants nos. 4 to 6. A money decree was passed against defendants nos. 1 to 3 and in execution of it the appellant brought to sale the shares of these defendants in the joint family property. The decree, however, still remained unsatisfied and he wanted to sell the shares of the sons (defendants nos. 4 to 6) also in the joint family property. The executing Court refused to do so and the order has been upheld in appeal by the learned District Judge. The decree-holder has preferred this miscellaneous second appeal.

In my opinion the orders of the Courts below are correct, though they have not given their reasons in detail. Mr. H. Mahapatra, who appears on behalf of the appellant, has very strenuously contended that the decree is executable against the shares of the defendants nos. 4 to 6 in the joint family property. His whole argument is based upon the pious obligation of a son to pay out of the joint family property his father's debts not tainted with illegality or

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immorality. Nobody disputes this liability, but the question with which we are concerned is not the liability of defendants nos. 4 to 6 but whether it can be enforced against them under the decree as it stands. Because a son is liable to pay his father's debts it does not follow that his share in the property can be taken away without there being a decree in which either he is a judgment-debtor or can be deemed to be a judgment-debtor. Whether a decree against a father can be executed against his sons is not a question of the Hindu law, but of the Civil Procedure Code. Ordinarily a decree is enforceable only against the judgment-debtor named therein and on his death against his legal representatives to the extent the law makes them liable. But in cases governed by the Hindu law, if it is against a karta of a family and was obtained in a suit in which he was sued as such it is binding upon the junior members of the family also as they were represented in the suit by the karta. So if a father is sued for his personal debt, not tainted with immorality or illegality, he represents in the suit his sons who are joint with him and a decree thus obtained against him must be taken to be a decree against his sons also.

In a case where a creditor of a Hindu debtor wants to enforce the pious obligation of his sons to pay his debt, the debt not being illegal or immoral, if he so likes he can implead the sons also in his suit. If he obtains a decree against them as well no question can arise. The decree being against the sons in terms can be executed against their share of the joint family property. As the sons are parties to the suit the father cannot be said to have represented them in the suit. But if in such a suit the Court, rightly or wrongly, refuses to pass a decree against the sons and passes a decree against the father only, the decree cannot be said to have been obtained against the father both in his individual capacity and also as representing the sons and such a decree against the

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father, not being a decree against the sons, cannot be executed against them, not because they were not under a pious obligation to pay the debt of their father which, as I have assumed, was neither illegal nor immoral, but because the procedure of enforcing their liability having been adopted the Court refused to enforce it. The Court may be wrong but the decree is there.

The creditor may, however, sue the father only and a decree obtained in such a suit, if the debt was not illegal or immoral, is effective against the sons also as they though not parties by name were represented by their father and must be deemed to have been parties to the suit. If, however, the debt was for immoral or illegal purposes the father cannot represent the sons and the decree obtained in such a suit is not against the sons and the question of the nature of the debt can be gone into in the execution proceedings.

In *Atul Krishna Roy* v. *Lala Nandanji*(1), I had to deal with the question as to the circumstances under which a decree obtained against a father can be executed against his sons to enforce their pious obligation of paying his debts. I then following a decision of Niamat-ullah, J. in *Kishan Sarup* v. *Brijraj Singh*(2) was of the view that in order to enforce the pious obligation of a son to pay his father's debt there must be a decree against him obtained in a suit in which either he was a party or can be deemed to have been a party through his father. My brother Agarwala, J. was of the same view. Niamat-ullah, J. had held that a decree obtained against the father, when he was joint with his sons, was binding on the sons as they would be deemed to have been represented by the father in the

(1) (1935) I. L. R. 14 Pat. 732, F. B.
(2) (1929) I. L. R. 51 All. 932.

suit, whether the sons were represented by the father or not depended upon the subject-matter of the suit and if it was a debt which, not being tainted with immorality, was binding on the sons, the sons must be deemed to have been parties to the suit through the father. In the Patna case the point was how far a decree obtained against a father after the disruption of the family was binding upon the sons and the majority of the Special Bench of the Court held that such a decree could not be executed against the sons. The ratio decidendi of the decision was that in such a case there was no decree against the son as the father having separated could no longer represent him.

The simple question, therefore, before us is whether the decree which in its terms is against the fathers can be deemed to be one against their respective sons also. I have said before that when the sons themselves are parties to a suit the question of their fathers representing them cannot possibly arise. The position, therefore, is that if the debt was not tainted with illegality or immorality, the appellant was entitled to obtain a simple money decree against defendants nos. 1 to 3 and also against their respective sons, defendants nos. 4 to 6, but he deliberately did not proceed against the sons though they were parties to the suit and wanted a decree against the fathers only. Such a decree passed in a suit in which the sons themselves were parties cannot be said to be a decree against the fathers and also against the sons represented by the fathers.

Mr. Mahapatra, who appears on behalf of the appellant, produced before us a copy of a decision of this Court by Courtney Terrell, C.J. and Chatterji, J. in *Jai Narain Mahton* v. *Janki Saran Singh*(1), decided on the 20th November, 1937. It was held in

(1) (1937) M. A. 253 of 1936 (Unreported).

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that case that though a suit brought against a father and his son was dismissed against the latter, the decree-holder could execute the decree against the share of the son in the joint family property on the ground of his being under a pious obligation to pay his father's debt not tainted with immorality. Mr. Dhal, appearing on behalf of the respondents, has, however, placed before us a decision of their Lordships of the Judicial Committee in *Raja Ram* v. *Raja Bakhsh Singh*(1) in which exactly an opposite view was taken. In that case, for the mortgage executed by the father, a suit was instituted against his sons and grandsons. The grandsons were dismissed from the suit. Thereafter the decree was sought to be executed against the shares of the grandsons in the family property. Their Lordships held that the suit having been dismissed against the grandsons, the decree could not be executed against their shares in the family property. The remedy of the decree-holder was to appeal from the dismissal of the suit against the grandsons. In the face of the decision of the Privy Council on this point we are bound to hold that the decision of this Court relied on by Mr. Mahapatra cannot now be held to be a good law.

In my opinion, the decree as it stands is not executable against defendants nos. 4 to 6 and I would, therefore, dismiss this appeal with costs.

HARRIES, C.J.—I agree.

Appeal dismissed.

S. A. K.

(1) (1938) I. L. R. 13 Luck. 61, P. C.