APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

NA'RA'YANRA'V DA'MODAR, (ORIGINAL PLAINTIFF), APPELLANT, *v.* JAVHERVAHU, (ORIGINAL DEFENDANT), RESPONDENT.* 1887. *September* 21, 22, 29.

Hindu law—Joint family—Mortgage by a father—Decree against father on mortgage giving possession with interest and costs—Son's liability to satisfy the decree as to interest and costs—Practice—Amendment of plaint.

The plaintiff's father mortgaged certain ancestral property for a limited term. A suit was brought on the mortgage against the father, and a decree was passed, directing the mortgaged property to be handed over to the mortgagee for a certain time, and awarding payment of interest and costs by the father.

In execution of this decree, the mortgagee sought to recover the costs by sale of the property in question.

Thereupon the plaintiffs sued for a declaration that the property was not liable to be sold in execution of the decree against the father, on the ground that the debts contracted by the father were for immoral purposes, and that, therefore, the estate could not be bound by the decree at all. The Court of first instance found that the debts had not been incurred for any immoral purpose, and dismissed the suit. On appeal to the High Court,

Held, that under the decree passed against the father the interest and costs became a debt upon the whole estate, from which it could not escape, unless it was clearly made out that the debt was the result of fraud or immorality. Although the father alone was primarily liable for the fulfilment of the decree, still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable, just as they would have been liable if the father had compromised the suit, unless the transaction were tainted with fraud or immorality. In a united family the father is capable of acting as the representative of the family, except in the case of borrowing for fraudulent or immoral purposes. In this case he entered into litigation, which resulted in loss to himself and the family which he represented, and he could make the family responsible for any loss so incurred. The judgment-creditor could also make them liable.

Although where the father desires to represent the whole estate he can do so, yet he is not necessarily bound to do so, nor is the whole estate liable where he explicitly or impliedly binds only his own portion.

At the hearing of the appeal it was alleged that the plaintiffs had separated from their father before the mortgage decree was passed against him, and an application was made on their behalf that the plaint in this case should be amended by inserting an allegation to that effect.

Held, that the amendment could not be allowed. Such an amendment would entirely alter the points of contention between the parties. In suing in the form

* Appeal, No. 30 of 1885.

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adopted by the plaintiffs they doubtless intended to take the chance of getting a greater advantage than they would have obtained if they had sued merely as separated sons. They sought to liberate the property altogether from the liability, on the ground that the debt was immoral, and that the estate could not, therefore, be bound by the decree at all. That being so, and the plaintiffs having omitted to allege partition, they could not now ask the Court to put their suit on a new footing.

THIS was an appeal from the decision of M. H. Scott, District Judge of Ahmednagar, in Suit No. 4 of 1884.

The defendant obtained a decree on a mortgage against the plaintiff's father for possession of certain property which the latter had mortgaged to him. The decree also awarded interest on the mortgage-debt and costs of the suit.

The defendant sought, in execution, to recover the cost by sale of the mortgaged property. The plaintiffs objected to the sale; but their objection was disallowed, and they thereupon filed the present suit, praying for a declaration that the property in dispute was not liable to attachment sand ale in execution of the defendant's decree against their father, on the ground that the debts contracted by their father had been contracted for immoral purposes, and, therefore, were not binding on them as his sons. They also alleged that the property in suit had been granted as a *jághír* for the support of the family, and, as such, could not be alienated from the family.

The Court found that the father had not incurred any debts for immoral purposes, and that there were no incidents or conditions attaching to the estate to distinguish it from any other ancestral immovable property which was saleable for ancestral debts. The suit was, therefore, dismissed.

Against this decision the plaintiffs appealed to the High Court.

Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the appellant:—The decree directs payment of costs by the father personally. The costs are not thrown on the estate. The decree as to costs is, therefore, in the nature of a money decree against the father. In execution of such a decree the creditor has no right to proceed against the sons' share in the family property. The sons are not parties to the decree, and are, therefore, not bound by it—

Bhikáji Rámchandra Oke v. *Yashvantrávⁱ*(1); *Bábáji* v. *Dhuri*(2); *Murárrávⁱ Anandrávⁱ* v. *Pándurang Hari*(3). The property is a *jághír*, and, therefore, inalienable—*Nilmoni Singh Deo* v. *Bakranáth Singh*(4).

Mahádev Chimnáji Ápte for the respondent:—Even under a money decree the creditor has a right to proceed against every kind of property over which the father has a power of disposal. The father can sell his ancestral property to pay off his own debts. And the sale is binding on the sons, unless they can impeach it on the ground of illegality or immorality. If, then, the father can sell, so can the creditor. It is not necessary to make the sons parties to the proceedings against the father. The father, as the head of the family, represents the family both in his dealings with the outside world and for purposes of litigation. A decree against the father is, therefore, binding on the sons, though they be not parties to the suit in which it is passed. And the decree-holder has a right to proceed against the entire family estate—*Jagabhái Lalubhái* v. *Vijbhukandás Jagjivandas*(5); *Sakhárám Shet* v. *Sitárám Shet*(6); *Narasánna* v. *Gurápp*a(7); and *Nanomi Babuasin* v. *Modhun Mohun*(8). These cases show that a creditor can sell the whole family property in execution of a decree against the father. In the case of *Simbhunáth Pánde* v. *Goláp Singh*(9) the circumstances were peculiar. The mortgage which was executed by the father, the decree upon the mortgage, the proclamation of sale, and the sale certificate, —all purported to affect the father's interest alone. Under those circumstances the Privy Council held that what was put up to sale and what actually passed to the auction-purchaser was the right, title, and interest of the father alone. That ruling does not apply to the present case, where the whole family property is held in mortgage by the creditor, and he insists upon selling the whole in satisfaction of his debt.

R áv Sáheb *Vásudev Jagannáth Kirtikar* in reply:—In almost all the cases cited the question as to the son's liability arose after the

(1) I. L. R., 8 Bom., 489.
(2) I. L. R., 9 Bom., 305.
(3) Printed Judgments for 1885, p. 30.
(4) I. L. R., 9 Calc., 187.
(5) I. L. R., 11 Bom., 37.
(6) I. L. R., 11 Bom., 42.
(7) I. L. R., 9 Mad., 424.
(8) I. L. R., 13 Calc., 21.
(9) I. L. R., 14 Calc., 572.

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father's death. A son takes a vested interest in ancestral estate at his birth. That interest is, no doubt, subject to the liability of the estate for the debts of his father. But it is only when the father acts as the head and manager of the family that his transactions are binding on the sons. That is the case in a united family. But where the father is separated from his sons, his acts cannot bind them. In the present case we allege that a partition had taken place between the father and the sons a year before the defendant obtained a decree against the father.

[WEST, J.:—You did not rest your case on this ground in the lower Court.]

It is true there is no reference in the plaint to the partition; but the plaintiff's pleader in his statement (exhibit 18) distinctly asked that the two-third share of the property, which belonged to the sons, should be exempted from attachment and sale. I, therefore, ask to be allowed to amend the plaint so as to raise the question of separation.

Mahádev Chimnáji Ápte:—There is no mention of separation in the plaint. The parties went to trial on the footing of *union* between the father and the sons. The plaintiff has no right, at this stage, to set up a totally new case.

WEST, J.:—In this case the first point is, whether at this stage of the case it is proper to allow the appellants to make a change in the plaint of so material a nature as that asked for by them. Such an amendment would entirely alter the points of contention between the parties. It is not the practice to allow such a change after a cause has been disposed of, and we are not inclined to permit it in the present instance.

Those who have gone to issue on one aspect of the case cannot ask for a new decision on a different aspect of the case. The only circumstance in which the Courts have departed from this rule is in the case of a merely formal point of amendment. The appellants here are not persons who have for the first time been engaged in litigation. In suing in the form they chose, they, doubtless, intended to take the chance of getting a greater advantage than they would have obtained if they had sued merely as separated sons. They sought to liberate the property

altogether from the liability, on the ground that the debt was immoral, and, therefore, that the estate could not be bound by the decree at all. That being so, and the plaintiffs having omitted to allege partition, not only in their plaint, but in the statement of their pleaders, they cannot now come and ask the Court to have the suit put on a different footing.

We have, therefore, to consider what was the position of the plaintiffs with reference to the original suit The original suit was brought against the father on a mortgage for a limited time. The decree in that suit handed over the property to the mortgagee for a definite time, and awarded payment of interest and costs by the father. The payment of the interest and costs consequently became a debt upon the whole estate, from which it could not escape, unless it were clearly made out that the debt was the result of fraud or immorality. The possession given to the mortgagee was certainly valid, as the father was alive. The question of its validity, indeed, could not arise until the father's death, although the father alone was sued, and he alone was primarily liable for the fulfilment of the Court's decree; still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable, just as they would also have been liable if the father had compromised the suit, unless the transaction were tainted with fraud or immorality. This is the view held by the Privy Council in a recent decision.

The ruling in *Simbhunáth Páṇḍe* v. *Golapsingh*[1] might suggest a contrary decision. There the Privy Council determined the father had a right to deal with his sons' shares in the family property, but that the terms of the transaction might show that it was not his intention to do so in that particular case. The question of the sons' assent was raised, and the Privy Council held that it would be bound by the assent, if the sons intended their own shares to be affected. In calling in the sons to assent to a dealing with the family property by the father, the intention to affect their shares would generally perhaps be presumed; but the creditor ought to take care to make sons parties to execution proceedings if he wishes to make them liable in cases where their assent is a material point in his case as against them.

(1) I. L. R., 14 Calc., 572.

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In the present case, the sons' interest as well as that of the father has been attached, and they are made parties to the execution proceedings. The present case differs from the one we have referred to. The sons come in during the pendency of the execution proceedings and make themselves parties to it. We are, therefore, left very much in the same position as if the case already cited had not been decided. If we go back to the case of *Nanomi Babuasin* v. *Modhun Mohun* [1] we are bound to consider that in an united family the father is capable of acting as the representative of the family, except in the case of borrowing for fraudulent or immoral purposes. In the present case he entered into litigation, which resulted in loss to himself and to the family which he represented, and he can make the family responsible for any loss so incurred. The judgment-creditor can also make them liable.

The precise case which is before us now has not been dealt with heretofore, but the principles applicable to it have. In a recent appeal, *Jagabhái Lalubhái* v. *Vijbhukandás Jagjivandás*[2], we set forth the principles applicable to such cases, and we based our decision on the ruling in *Nanomi Babuasin* v. *Modhun Mohun*[3]. The principles enunciated in the case decided by this Court, which has been already referred to, are correct so far as they go, but that decision is to be supplemented by the following principle; that is to say, that although where the father desires to represent the whole estate he can do so, yet he is not necessarily bound to do so, nor is the whole estate liable when he explicitly or impliedly binds only his own portion.

The question as to the litigation having only affected the father's interests not having been raised and decided in favour of the present appellants in such a way as to liberate them from the responsibility of the decree against the father, we must confirm the decree of the lower Court with costs.

Decree confirmed.

(1) I. L. R., 13 Calc., 21. (2) I. L. R., 11 Bom., 37.

(3) I. L. R., 13 Calc., 21.