Panchaiti Akhara Maha Nirvani vs Bindeshri Prasad And Ors. on 30 March, 1950

Equivalent citations: AIR1952ALL337, AIR 1952 ALLAHABAD 337

JUDGMENT

Wali Ullan, J.

1. This is an appeal fay the decree-holder against au 'order passed by the execution Court whereby the objections filed by the sons of Bindeshri Prasad, the judgment debtor, were allowed and their three-fourths share in the property attached was released from attachment.

2. It appears that a simple mortgage deed was executed on 8-10-1928 by Bindeshri Prasad for Rs. 5,600 payable in five years in favour of the plaintiff, the Panchayati Akhara. The deed carried interest at fourteen annas per cent. per mensem. It also provided that if the mortgagor did not pay the interest within the stipulated period of five yeara, the mortgagee would be entitled to realise the entire amount of the mortgage debt either within the stipulated period or after the stipulated time, A suit for sale on the basis of the mortgage was instituted on 11-10-1932 and there was a clear allegation in the plaint that the mortgagor had not paid the interest as agreed upon. To this suit Bindeshri Prasad as well as bis three minor sons were impleaded as defendants.

3. The claim was resisted by Bindeshri Prasad, the mortgagor, on the ground that the suit was premature and further on the ground that the executant had not signed the deed in the presence of the marginal witnesses of the document in suit. In addition to these pleas, the sons further pleaded that the mortgage debt was without legal necessity and that it was tainted with immorality as well.

4. The trial Court found that there was legal necessity for the debt, that it was not tainted with immorality and lastly, that the deed had been duly executed. In view of these findings the suit was decreed for gale against all the defendants.

5. The defendants went up in appeal to the High Court. It was P. A. No. 513 of 1938. The only ground pressed before the High Court however was that the mortgage deed had not been duly executed, The High Court found that the document was not proved to have been duly attested. In the result, the appeal was allowed and the decree of the Court of first instance was set aside; but inasmuch as the deed contained a personal cover ant to pay the amount borrowed with interest and the suit had been brought within six years of the registered mortgage deed, the High Court passed a simple money decree in favour of the plaintiff against Bindeshri Prasad, the executant of the deed. The suit was dismissed as against the sons. (The case is reported in Sindeshri Prasad v. Panchayat Akhara Maha Mirbani 1936 A. L. J. 297.

6. The decree-holder applied for execution of the simple money decree. In execution of the decree, some house property was attached. This property admittedly belongs to Bindeshri Prasad, the father (against whom the decree was passed) and also his three sons.

7. The sons filed objections to the effect that the decree could not be executed against them as the suit was dismissed by the High Court so far as they were concerned. They claimed that their three-fourths share in the house property attached should be exempted from attachment and sale.

8. This objection of the sons has been allowed by the Court below which has followed a ruling of the Judicial Committee of the Privy Council reported in Raja Ram v. Raja Baksh Singh, 13 Luck. 61. Against this order, the decree-holder has come up in the appeal to this Court.

9. The only question which has to be decided in this appeal is whether the BODS' share in the house property attached can be attached and sold in execution of the simple money decree.

10. It has been strongly contended by Mr. Zutshi, the learned counsel for the appellants, that under Hindu law the entire joint family property including the shares of the sons, can be attached and sold in execution of the decree passed against the father. It has been further contended that the sons having failed to prove in the suit that the debt was tainted with immorality cannot now object to the attachment and sale of the property.

11. On the other hand, it has been strongly contended by the learned counsel for the respondents that in a case like the present where the suit was dismissed as against the sons, the Privy Council decision in the case of Raja Ram v. Raja Bakhsh Singh. 13 Luck. 61 : A. I. R. (25) 1938 P. C. 7 applies with full force and the decree cannot be executed against the sons' interest in the joint family property. It has been contended that it was open to the Court which passed the decree against the father to pass a decree against the sons as well to the extent of their interest in the joint family property. When the Court did not pass such a decree, but actually dismissed the claim as against the sons, it was not open to the decree-holder in execution proceedings to proceed against such property on the ground that there was pious obligation of the sons to pay their father's debt.

12. Learned counsel for the appellant has strongly relied on the Full Bench decision of the Madras High Court in Periasami Mudliar v. Seetharama Chettiar, 27 Mad. 243 and also on the Division Bench decision of that Court in the case of Krishnan Naidu v. Somi Naidu, I.L.R. (1940) Mad. 815 : A. I. R. (27) 1940 Mad. 544. He has also referred us to a number of rulings of this Court as well as of some other Courts in support of his contention.

12a. On the other hand, the learned counsel for respondents has relied strongly on the Privy Council case referred to above. He has cited in support of his contention the Division Bench ruling of the Patna High Court in Prahlad Das v. Dasrathi, A. I. R. (27) 1940 Pat. 117 and the Division Bench rulings of the Oudh Chief Court in Kesho Ram v. Mt. Bam Dulari, 17 Luck. 319: A. I. B. (29) 1942 Oudh 9 and Bijai Baj Singh v. Ram Padarath, 11 Luck. 523 : (A. I.R. (23) 1936 Oudh 139).

13. Before proceeding further, I may note here that no decision of our own Court given after the Privy Council decision in the case of Raja Ram v. Raja Bakhsh Singh, (13 Luck. 61 : A.I.R. (25) 1938 P. c. 7) (ubi supra) has been brought to our notice.

14. I now proceed to discuss the rulings to which our attention has been invited in the course of arguments. In the case of Baja Bam v. Raja, Bakhsh Singh, A. I. R. (29) 1938 P. C. 7 : (13 Luck. 61), the facts were these. A mortgage deed was executed by two persons named Badri Singh and Chandika Singh, members of a joint Hindu family governed by the Mitakshara in favour of Raja Earn. Badri Singh died. After his death a suit was brought by Raja Ram to enforce the mortgage. He impleaded Ohandika Singh, the surviving executant, and also Badri Singh'a sons, Gaya Singh and Randhir Singh, and their five sons (i. e. grand.sons of Badri Singh). Eventually a simple money decree was passed as against Chandika Singh personally and against the estate of Badri Singh in the bands of his sons, Gaya Singh and Randhir Singh. The suit was dismissed as against the other defendants i. e., the grandsons of Badri Singh. The decree-holder Raja Ram applied for execution of his decree not only against Chandika Singh and the two sons of Badri Singh--against whom the decree had been specifically passed--but also against the grandsons of Badri Singh and their interest in the family property although they had been dismissed from his suit with costs. The grand-Sana objected that execution of the decree could not be had against them but the objections were dismissed by the Court of first instance. On appeal, the Chief Court of Oudh set aside the order of the Court of first instance and directed that the interests of the grandsons in the family property be released from attachment The decree-holder went up in appeal to the Privy Council. While dismissing the appeal, their Lordships observed thus at p. 8:

> "If the debt in question was not contracted for purposes regarded as immoral by the Hindu law, and if the respondents being grand-sons of Badri Singh were liable therefor to the extent of their interest in the joint family property, then the subordinate Judge's decree of 13-5-1931, was erroneous. The appellant should have appealed therefrom, claiming that, instead of dismissing the suit as against the respondents, the Subordinate Judge should have given a decree against them in like manner as against the two sons of Badri Singh and Chandika Singh, namely as representatives of Badri Singh for a sum to be realised: out of any property of Badri Singh come to their hands. Such a decree passed in accordance with Section 52, Civil P. C. would have attracted the operation of 8. 58 and the respondents' (grand-sons') interests in the joint property would have been liable to attachment under the decree. .. The same result might have been attained in more way than one had the appellant recovered judgment against Badri Singh in his lifetime. But the interests of the respondents (grand-song) cannot be regarded as property of their deceased ancestor come to the bands of the coparceners or any of them. The respondents having been dismissed from the suit with costs cannot be made liable under the decree."

15. It is clear from the above quotation that their Lordships of the Judicial Committee laid great stress on two points : (i) the fact that the suit was instituted against the sons and grandsons after the death of Badri Singh who had executed the mortgage deed and not against Badri Singh in his lifetime and (ii) that the grand-sons having been dismissed from the suit could not be held liable

under the decree passed in that suit. From the facts of that case, it is also clear that the creditor endeavoured to enforce the liability of both the sons as well as the grand sons for payment of the debt due from their father and grandfather respectively, but by dismissing the claim against the grand-sons the Court appears to have refused to enforce the pious liability of the grandsons to pay the debt in question. Whether the decree passed in the suit was correct or erroneous the execution Court in executing the decree could not enforce a liability i.e., the pious liability under the Hindu law, which the Court passing the decree had declined to enforce.

16. Next, reference may be made to the case of Prahlad Das v. Dasrathi Satpathi, A.I.R. (27) 1940 Pat. 117, decided by two learned Judges of the Patna High Court. The facts of that case were these. A simple mortgage deed was executed in favour of Prahlad Das by three persons. A suit to enforce the mortgage was instituted by Prahlad Das against the three executants as well as against their respective sons. The suit was decreed and the mortgaged property was sold in execution of the decree. The sale proceeds were, however, insufficient to satisfy the decree. The decree-holder then applied for a decree under Order 34, Rule 6, Civil P. C. In this application, he specifically asked for a decree against the three executants of the mortgage only and not against their sons. A money decree was passed and in execution of it the shares of the executants of the deed in the joint family property were sold. The decree, however, still remained unsatisfied. The decree-holder then endeavoured to sell the shares of the sons of the executants in the joint family property. To that the sons objected. The lower Courts upheld the objection. The decree holder preferred a second appeal to the High Court. It was held:

> "Where the creditor impleads the sons of a Hindu debtor as parties to a suit along with their father, the son being panics to the suit, the father cannot be said to have represented them in the suit. If in such a suit, rightly or wrongly, the Court 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, nut because they were not under a pious obligation to pay the debt of their father, which is neither illegal nor immoral, out because the procedure of enforcing their liability having been adopted the Court refused to enforce it."

17. In this case the learned Judges have discussed the procedure which hag to be followed in enforcing the pious liability of a Hindu son to pay his father's debts. In effect the principle was laid down that in order to enforce the pious obligation of a son to pay his father's debts there must be a decree against him obtained in a suit in which either lie was actually a party or can be deemed to be a party through his father. A son cannot be deemed to be represented by his father when either the father is separate from the son or when the son is actually impleaded along with the father, but is dismissed from the suit and the decree is passed only against the father.

18. Next, reference may be made to the case of Bijai Raj Singh v. Ham Padarath, 11 Luck 523 : A. I. R. (23) 1936 oudh 139, decided by two learned Judges of the Oudh Chief Court, In a mortgage suit the, sons of the mortgagors were impleaded as defendants with the object of making their interest in

the joint family property liable for the claim of the plaintiff mortgagee. It was open to the plaintiff to claim for a relief making the interests of the sons liable for his claims, but he did not do so nut sought for nothing but a personal decree against them, which relief was not granted. In execution of the decree against the father, the mortgagee sought to proceed against the interest of the sons also.

Held: "That it was not only desirable but proper and necessary that all questions between the sons and the plaintiff for their liability for the claim should have been decided in the suit Hence the plaintiff was barred by the rule of constructive res judicata from contending in execution proceedings that the interest of the sons and grand-sons was liable to be proceeded against."

Held further; "That the plaintiff mortgagee had omitted to claim relif against the sons in respect of their interest in the property, therefore he could not sue for such relief in a subsequent suit much less could he be allowed to enforce it in the execution proceedings."

19. This decision refers with approval to the case of Ramaswami Nadan v. Ulaganath Goundan, 22 Mad. 49 decided by a Full Bench if the Madras High Court where a creditor of a Hindu brought a suit against him and his sons whom it was sought to make liable on the ground that the debts were incurred for the benefit of the family, but he did not obtain a decree against the sons. It was held by the Full Bench that the plaintiff could have prosecuted his claim against the sons in that suit and could have obtained a decree making their shares in the family property liable for the father's debts. It also refers with approval to the decision of the Chief Court in the case of Raja Ram v. Raja Bakhsh Singh, A. I. R. (20) 1933 Oudh 309 ; 8 Imck. 700 which was upheld by their Lordships of the Judicial Committee on appeal vide, Raja Ram v. Raja Baksh Singh, A. I. R. (25) 1938 P. C. 7 I 13 Luck. 61.

20. Next, I may refer to the case of Kesho Ram v. Mt. Ram Dulari, A. I. R. (29) 1942 Oudh 9 : 17 Lack, 319 where exactly the same view, as was taken in the earlier decisions of the Chief Court in the case of Btjai Raj v. Ram Padarath, 11 Luok. 523 : A. I. B. (23) 1936 Ondh 139 (ubi supra) and in the case of Raja Ram v. Raja Bakhsh Singh (13 Luck. 61 ; A. I. R. (25) 1938 P. C. 7) (ubi supra) was taken.

21. It would be noted that in these decisions of the Oudh Chief Court emphasis has been laid on the dismissal of the claim against the sons and consequently on the application of the principle of constructive res judtcata.

22. Next, I proceed to consider the decisions of the Madras Sigh Court on which great reliance has been placed by the learned counsel for the appellant in this case. Principal reliance has, however, been placed on a decision of the Full Bench of the Madras High Court in the case of Pertaswami Mudaliar v. Seetharama Chettiar, 27 Mad. 243. The facts of this case were that a certain sum of money in respect of the purchase of certain goods was due from a Hindu who constituted a joint family with his song. A simple money decree was obtained against the father alone. Shortly afterwards, he died before the decree could be executed. The decree-holder attempted to execute the decree against the family property in possession of the sons. He was unsuccessful. The decree-holder thereupon instituted a suit against the sons and some other members of the family.

The Bait was decreed against the sons, but dismissed against the others. This decree was affirmed on appeal. In a second appeal before the High Court, the substantial question raised was whether the cause of action for the suit could be taken to have arisen on the date of the decree which was passed against the father. In view of the importance of the question and the conflict of authority in that Court, one of the questions referred to the Fall Bench was:

> "Whether independently of the alleged debt arising from the original transaction, the decree against the other by its own force creates a debt: as against him, which his sons, according to the Hindu Law, are under obligation to discharge, unless they show that such debt was illegal or immoral ?"

The other questions referred to the Fall Bench in that case are not material for the purpose of the present case and we are not concerned with them here. It was held by the Fall Bench :

> "Independently of the debt arising from the original transaction, the decree against the father by its own force, created a debt as against him which his sons, according to the Hindu Law, were under an obligation to discharge, unless they showed that the debt was illegal or immoral."

23. Obviously, in this case, there was no question of the enforcement of a simple money decree against the interests of the sous in the joint family property by means of execution proceedings. A regular suit had been instituted for enforcement of the some liability to discharge a decree debt incurred by a Hindu father In dealing with the question referred to the Pull Bench Bhashyam lyyangar, J., has made important observations on the obligation of a son under the Hindu law to discharge the debts incurred by his father. After answering she question in the affirmative, the learned Judge proceeded to give his reasons. At p, 250, it was observed :

> "As the decree debt cannot be recovered from the son (after the death of the father) by executing the decree against him personally or in respect of joint family property in his hands and as it is always open to him to contend that the decree debt is illegal or immoral and therefore it does not bind him, the reason why no suit could be brought against the father himself for recovery of the judgment-debt is inapplicable to a suit being brought against the sou for recovery of the decree debt."

24. On the question whether the decree obtained against the father could be executed against the son, the learned Judge observed thus at p. 251:

> "The decree against the father can of course, like any other decree against him, be executed against that the son, IN his character as legal representative to the extent of the separate or self acquired property of the father which has come to his hands."
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> "In cases, therefore, where a decree for money has been obtained against the father, but he dies before execution of the same, the creditor has besides executing the same against the sons as legal representative, the option of suing the son either on the

original cause of action if it be one in respect of which the son as such would be liable or to enforce payment of the decree amount aa a debt of record due by the father."

25. It must be noted that this case arose under the old Civil P. C. of 1882.

26. The next case relied upon by learned counsel in the case of Reddy Krishnan Naidu v. Chintala Somi Naidu, A. I. R. (37)1840 Mad. 644. The facts were these. In a suit on a promissory note executed by the father alone, the sons were impleaded on the ground that tbe debt was incurred for family necessity. Subsequently, the suit was in effect withdrawn as against the sons who were consequently dismissed from the suit and a decree was passed against the father alone. In execution, the decree, holder asked for attachment and sale of the sons' interest in the family property. The sons objected on the ground that, as they had been dismissed from the suit they could not be held liable for their father's debt. The Munsif upheld their objection, but, on appeal, the Subordinate Judge held that they could be held liable in execution proceedings. The sons then appealed to the High Court. The appeal was allowed by King J. who relying on the Privy Council decision in the case of Raja Ram v. Raja Bakhsh Singh, (13 Luck 61; A. I.R. (25) 1988 P. C. 7) (ubi supra), held that it had in effect overruled the decisions on which the Subordinate Judge had relied. Leave was, however, granted for an appeal under the Letters Patent It was held by the Letters Patent Bench that the decree-holder could proceed to execute the decree against the sons' interest in the family property. The learned Judge relied principally upon the Full Bench decision of their own Court in Periasami Mudaliar v. Seetharama Chettiar, (27 Mad. 243) (ubi supra) They also referred to two other oases decided by Division Benches of their Court in Doraiswami v. Nayasami, A. I R. (16) 1929 Mad. 898 and in Periasami v Vaithilinga Pillai,. A.I. R. (24) 1937 Mad. 718- The learned Judge distinguished the decision of the Privy Council in Raja Ram's case by observing that "There the suit was brought against the grandsons after the death of the grandfather against whom no decree had been obtained. The dismissal of the grandsons from the suit amounted to a decision in their favour of the question of their liability. That is not the position here."

It was further held that the Privy Council decision did not overrule the decision of the Full Bench in 27 Mad. 243.

27. With regard the two decisions of the Madras High Court, just referred to above, it must be observed that the only point relevant to the present discussion, which was decided by the Full Bench in the case of Periasami Mudaliar, (27 Mad. 243) (ubi Supra) was that a decree passed against a Hindu father, by its own force, created a debt as against him which his sons, according to the Hindu law, were under an obligation to discharge unless they showed that the debt was illegal or immoral. There was no question regarding the procedure which has to be followed in enforcing such a liability of the sons Further, it is to be observed that in the case of Reddi Krishnan Naidu, (A. I. R (27) 1940 Mad. 844) (ubi supra) the suit must be deemed to have been actually withdrawn, at the appellate stage so far as the sons were concerned. The same was the position of the sons so far as the case of [eriasamt v. Vaithilinga Pillai, A. I. R. (24) 1937 Mad. 718 was concerned. In this view of the matter, it was rightly held that the result of the withdrawal of the suit as against the sons did not exonerate then and consequently it could not bring into operation the rule of res judicata embodied in Section 11, C. P. C. In such circumstances what happens in a suit does not in any sense amount to an

adjudication that the sons are not liable in respect of the decree debt. The facts of the present case are, therefore, clearly distinguishable from the facts of these Madras decisions.

28. Learned counsel for the appellant has invited our attention to a number of decisions of this Court, but, as already observed no case decided by this Court after the decision of the Judicial Committee of the Privy Council in the case of Raja Ham v. Raja, Baksh Singh,'(13 Luck. 61: A. I. E. (25) 1938 P. c. 7) (ubi supra) has been brought to our notice.

29. The first case referred to us is Karan Singh v. Bhup Singh, 27 ALL. 16 decided by a Full Bench of three learned Judges of this Court. The facts of that case were that Karan Singh and others had obtained a decree for profits in a revenue Court against one Tota Ram, the Lambardar of the village. Tota Ram was the head of a joint Hindu family. In execution of that decree, certain immovable property belonging to that family was attached. Thereupon the sons and grandsons of Tota Bam instituted a suit against the decree-holders in which they sought a declaration that their interests in the property attached were not liable to attachment and sale in execution of the decree for profits against their father to which they were not parties. The Courts below had decreed the son's suit. On appeal the Full Bench held:

> "When the joint ancestral property of a Hindu family is attached in execution of a personal decree obtained against the father of the family, the interests of the sons can only be exempted from attachment and sale, if the latter can show that the debt in respect of which such decree was obtained was either tainted with immorality or was such a debt as it was not the pious duty of the sons to pay,"

30. Obviously in that case the decree for money passed against Tota Bam was passed against him as the head of the family. He must, therefore, be deemed to have represented his sons and grand-sons in that suit. Such a decree must be deemed in law to be a decree against the sons and grand-sons as well. There can, therefore, be no valid objection to the execution of such a decree against the interests of the sons and grand, sons in the joint family property.

31. The next case is that of Shiam Lal v. Ganeshi Lal, 28 ALL, 288 decided by a Division Bench of this Court. The facts of this case were these : One Kishan Lal borrowed Rs. 300 on a promissory note from one Jainti Prasad. Jainti Prasad instituted a suit, on foot of the promissory note and impleaded therein not only Kiahan Lal, but also his minor son-Ganeshi Lal. The suit was contested on behalf of the son on the ground that he was not a party to the promissory note and therefore the suit could not be properly decreed as against him. The Court of first instance accepted the defence and dismissed the suit as against the son. A decree, however, was passed against the father and in execution the assignee of that decree caused a portion of the joint family property to be sold. Thereupon, Ganeshi Lal instituted a suit for a declaration that such a decree could not be properly executed against his interest in the family property. Both the Courts below dismissed the suit, but on appeal to the High Court a learned single Judge reversed the decrees of the Courts below and held, in effect, that in view of the dismissal of the suit upon the promissory note as against the son, not merely was he personally exempted from liability in respect of the debt, but his interest in the family property also could not be sold in execution of the decree passed against his fattier. On an appeal

under the Letters Patent, the Division Bench reversed the decision of the learned single Judge and it was held that the dismissal, as against the son, of the suit on his father's promissory note left him (the son) exactly in the position in which, he would have been if he had never been impleaded in that suit i. e. it left Mm liable as a Hindu son to pay his father's debt unless--which was not suggested there--the debt was tainted with immorality.

32. The principle underlying this decision undoubtedly supports the contention of the learned counsel for the appellant, but the question remains whether it is good law after the decision of the Judicial Committee of the Privy Council in the case of Raja Ram, (13 Luck. 61 : A. I. R. (25) 1938 P. 0. 7) (ubi supra). It seems to me that the principle laid down by the Judicial Committee in Raja Ram's case tuns counter to the principle underlying this decision. It must, therefore, be considered be have been impliedly overruled and to be no longer good law. Moreover, it would be observed that no reference is made to any authority in support of the conclusion reached by the Division Bench nor is there any reference in it to the principle of res judicata or the principle underlying Order 2, Rule 2, Civil P. C.

33. The next case to be noticed is that of Chhannu Tiwari v. Dwarka, 3 ALL. l. J. 488 decided by a learned single Judge of this Court, Banerji J. In that case Channu Tiwari brought a suit against one Jhinak Kuar, his sons, and another person, on the basis of three usufructuary mortgages executed in his favour by Jhinak Kuar. In the suit it was prayed that he might be put into possession of the mortgaged property of which the defendants bad dispossessed him and in the alternative he asked for a decree for the amount of the mortgage. The Court gave him a decree for the mortgage money under Section 33, T. P. Act. This decree was passed against the father, but the sons were exempted from liability. In execution of his decree, the decree-holder attached the sons' rights and interests in the joint family property whereupon the sons brought a suit for a declaration that the family property was not liable to sale in execution and that, in any event, their interests in the family property were not saleable inasmuch as they had been exempted from liability in the suit brought by the mortgagee decree holder. It was held that the exemption of the sons did not relieve them from their liability as Hindu sons to pay their father's debts, not tainted with immorality.

34. In this case the learned single Judge followed the Division Bench ruling then recently given in Shiam Lal v. Ganeshi Lal, (28 ALL, 288) (ubi supra). A perusal of the judgment of the learned Judge leaves no doubt in one's mind that the learned Judge disagreed with the view taken by the Division Bench in Shiam Lal's case but sitting singly he was bound by the ruling of the Division Bench and decided the case in accordance with that ruling.

35. The next case cited is Indar Pal v. Imperial Bank, 37 ADD. 214, decided by a Division Bench of this Court. In this case one Moti Lal, father of Inder Pal and Sham Lal, borrowed money on a promissory note from the Imperial Bank. A suit was brought against Moti Lal to which Indar Pal and Sham Lal were also impleaded as defendants. The sons were subsequently exempted and a decree was obtained against Moti Lal alone. Thereafter the joint family property of the judgment-debtor and his sons was attached. The sons preferred objections to the attachment of the property inter alia on the ground that the joint family property could not be attached in execution of the decree against the father. It was held, following the decisions in the case of Shiam Lal, (28 ADD. 288) (ubi supra)

and in the case of Channu Tiwari, (3 ALL. l. J. 433) (ubi supra) that:

> "A creditor who has obtained a decree against the father of a joint Hindu family, is entitled to put to Bale the family property. The son whose interests are threatened is entitled to an opportunity of contesting both the factum and the nature of the debt and there is nothing in law to prevent him from coming into Court in the execution department and preventing, if possible, on these two grounds the passing of his interest to the auction-purchaser. If the points are decided against him, the Court in execution can put the property to sale."

36. It would be observed that in this case the suit was on the basis of the promissory note against the father and the sons, but it was virtually withdrawn so far as the sons were concerned. It was observed by Piggot J. at p. 219 :

> "It seems to me that the creditors made a mistake in impleading the sons along with the father, but recognised that mistake in time, and cannot be put in a worse position as regards the execution of their decree than they would have occupied if they had simply sued the father on his unsecured debt and obtained a money decree against him, as they actually did."

37. As I have already observed in an earlier part of this judgments, the withdrawal of the suit against the sons does not bring into operation the rule of res judicata. It only entails the statutory penalty enacted in Order 23 Rule 1, Civil P. C. which is that no fresh suit can be instituted against the sons on the same cause of action. It cannot, therefore, be said that what happened in the suit amounted to an adjudication that the sous were not liable in respect of the decree debt. In this respect the case is distinguishable from the case before us.

38. The next case relied upon by learned counsel for the appellant is Mahon Lal v. Bala Prasad, 44 ALL. 649, decided by a Division Bench of this Court. The facts of this case are not fully set out in the report. It, however, appears that in that case, inter alia, a simple money decree was passed against one Ganga Prasad. In execution of that decree, certain property belonging to a joint Hindu family of which Ganga Prasad waa the head was attached. Objection was then taken on behalf of Bala Prasad and Nannhe, minor sons of Ganga Prasad, to the effect that the interests of the minor sons of Ganga Prasad could not be attached and gold in execution of the decree. The execution Court allowed this objection. The appeal by the decree-holder was allowed by the High Court. The point of law which the Court had to consider in that case is thus formulated by Piggot, J. at p. 651:

> "What is to be determined is, what property is or is not available to the decree-holder in execution of his simple money decree against the father alone."

39. The Court held that the point of law raised was well settled so far as, at any rate, this Court was concerned by the decision of the Fall Bench in the case of Karan Singh v. Bhup Singh, 27 ALL. 16. In this case, there appears to have been no question either raised or discussed as regards the effect of a simple money decree passed against the father, in a suit to which the sons are also parties, but the

suit is dismissed aa against the sons. The general proposition of law as laid down by the Full Bench in Karan Singh's case on which the decision in Mohan Lal's case, (44 ADD, 649) is based is not, in any way, in conflict with the principle laid down by the Privy Council in the case of Raja ram (13 Duck 61: A. I. R. (25) 1938 F. c. 7). aS a matter of fact that very principle has been fully recognised in the case of Sripat Singh v. Prodyot Kumar, 44 Cal. 524 and in the case of Masit-Ullah v. Damodar Prasad, 48 ALD. 518.

40. The last case relied upon by learned counsel is that of Kishan Samp v. Brij Raj Singh, (1929) ALL. D. J. 941, decided by a Division Bench of this Court. In this case, in a joint Hindu family consisting of a father and his two minor sons, the father borrowed money on promissory notes. The creditor instituted a suit against the father alone for recovery of the money and obtained a simple money decree. Before the execution of the decree could take place, the sons after obtaining a preliminary decree for partition of the family property, instituted a suit to obtain A declaration that the creditor was not entitled to execute his decree against the two thirds share of the sons in the family property declared to be their property under the partition decree. Various issues were raised in that case with regard to the genuineness of the partition proceedings, whether the partition was effected in good faith and whether the debt incurred by the father under the promissory notes was tainted with immorality. For purposes of the present case, it ia not necessary to consider many of the points decided in that case. The only point material is that in that case the debts incurred by the father were held to be good as they were not tainted with any illegality or immorality. The basis of a son's liability under a decree obtained against the father alone has been very clearly indicated by Niamat Ullah J. at p. 953, where that learned Judge observes:

> "A decree obtained against a father alone binds the Bone, because they are represented by the father in such a suit. It is, therefore dear that the liability of the sons which arises before a partition between them and their lather and the corresponding right of the creditor to recover his money from them to the extent indicated cannot be affected by a partition which the father and and sons may choose to make and to which the creditor is not a party."

41. From a review of the authorities discussed above, in my judgment, it is clear that in order to enforce the pious obligation of a Hindu son to pay his father's debt there must be a decree against him obtained in a suit in which either he is actually a party, or in which he can be deemed to be a party through his father. A decree against the father, when he is joint with his sons, is binding on the sons because they are deemed to have seen respresented by the father in the suit. Whether the sons are represented by the father in a particular case would depend upon the subject-matter of the suit e. g , if it is a suit for realising a debt which is not tainted with immorality, the debt being binding on the sons, the decree in the suit is binding upon the sons in as much as the sons must be deemed to have been parties to the suit through their father.

42. The simple question in the present case is whether the simple money decree against the father, which in its terms is against the father alone, can be deemed to be one against the sons also. It seems to me that when the sons themselves are pan ies to a suit along with their father, the question of the father representing the sons does not arise. In the present case, the eons were parties to the

suit in which the simple money decree was passed against the father alone, hut the suit was dismissed so far as the sons were concerned. Therefore, it follows that the decree in the present case cannot be executed against the interests of the sons in the joint family property.

43. The appeal, therefore, fails and is dismissed with costs.

Sankar Saran, J.

44. I agree.