Sukhnandan Lal And Ors. vs Musammat Raj Kali And Ors. on 3 February, 1953

Equivalent citations: AIR1954ALL462, AIR 1954 ALLAHABAD 462

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. On 19-3-1938, a preliminary decree for sale was passed in favour of Sukhnandan Lal and others mortgagees on the basis of a mortgage deed executed by Chhottan Lal in their favour in 1928 with respect to zamindari property and houses. The decree was against Chhottan Lal, Mohammad Akram Khan, Mohammad Azam Khan and Mohammad Umar Khan subsequent transferees from Chhottan Lal & Srimati Chhajia who had a subsequent mortgage and a deed of further charge over the mortgaged property. Chhottan Lal died on 12-5-1949, and Srimati Chhajia on 1-9-1938. Their legal representatives were duly brought on the record.

2. Azam Khan and Umar Khan, two of the judgment-debtors, appealed against that decree in November 1936. The appeal was dismissed on 27-10-1942.

3. During the pendency of the suit Chhottan Lal applied under Section 4 of the Encumbered Estates Act on 29-10-1936. He did not mention the debt under this mortgage or decree in his written statement under Section 3 of the Encumbered Estates Act. Sukhnandan Lal and others decree-holders too did not file any claim under Section 10 of the Act. The Special Judge passed decrees under Section 14 of the Act on 27-5-1941.

4. The decree-holders filed an application on 31-8-1943, for the preparation of a final decree. Among other grounds it was contended that the decree-holders had no right to apply for a final decree because they had not proved their debts before the Special Judge in the Encumbered Estates Act proceedings. This contention found favour with the learned Civil Judge and he rejected the application. The decree-holders appealed.

5. This appeal came before a Division Bench and was heard by it. The sole point for consideration before it was whether by virtue of Section 13 of the Encumbered Estates Act there was a discharge of a debt, jointly and severally due, from a landlord applicant and a non-applicant debtor to the Encumbered Estates Act proceedings, not only as against the landlord applicant but also as against

the non-applicant debtor. The learned Judges constituting the Bench considering the importance of the question, and the opinions expressed by two Division Benches, referred the case for decision to a Full Bench.

6. The contention for the appellants is that the true import of Section 13 of the Encumbered Estates Act was to discharge, so much of a joint debt only as be due from a landlord-applicant himself, and not to lead to the discharge also of that portion of the debt which could be recovered from the non-applicant joint debtor. The contention of the respondents, however, is that Section 13 should not be so construed because of its language and further because of the provisions of Section 9(5) of the Encumbered Estates Act. I am of opinion that the contention for the appellants is sound.

7. Section 13 of the Encumbered Estates Act is in these words :

> "Every claim decreed or undecreed against the landlord in respect of a private debt, other than a debt due to a co-operative society registered under the Co-operative Societies Act (2 of 1912) by its members shall, unless made within the time and the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged."

It is clear that what is deemed "for all purposes and on all occasions" to have been duly discharged is "a claim decreed or undecreed against the landlord" in respect of a private debt other than a debt due to the co-operative society. A joint debt is a debt taken jointly by more than one person. Each such person is liable to pay his share of the debt to the creditor. It is only in cases of joint and several liability that each debtor is liable to pay the entire debt to the creditor & has, on such payment, a right to recover such amount from each joint debtor as he is liable to pay his share of the entire debt. It is clear, therefore, that any joint debtor has the ultimate liability to pay his own share in the joint debt, whether the debt be merely joint or joint and several.

I am, therefore, of opinion that whenever a special Act like the Encumbered Estates Act which was enacted to benefit indebted landlords speaks of the debt of a landlord applicant it must be taken to mean such portion of the debt only for whose payment the landlord is ultimately liable.

Further, the claim that is required by Sections 9 and 10 to be filed by a creditor is not a claim with respect to the entire debt but is a claim with respect to what be due from the landlord applicant. Section 8 requires the landlord applicant to mention in his written statement full particulars respecting the public and private 'debts to which the landlord be subject', or with which his immovable property or any part thereof is encumbered. Section 9 authorises the Special Judge to call upon all persons having "claims in respect of private debts both decreed and undecreed against the person or the property of the landlord by or on whose behalf the application has been made."

Section 14(2) enjoins the Special Judge to examine and to determine the amount, if any, 'due from the landlord to the claimant' on the date of the application under Section 4. The whole object of the Encumbered Estates Act is to relieve the landlords of their debts. It did not intend to relieve non-applicant debtors. Claims against them were to be decided according to the ordinary law. I shall

refer to Section 9, Sub-section (5) and its effect later.

8. Section 13 could not, therefore, have contemplated the discharge of the debts due from joint debtors. The language of Section 13 does not lead to that conclusion either, for it only speaks of a claim against the landlord and does not speak of the debt decreed or undecreed to which the landlord or his property be subject. If such an expression had been used, then there might, have been something to be said in favour of the proposition that the entire debt is to be taken as a unit and that the failure of the creditor to file a claim with respect to that debt led to the discharge of the entire debt and not only to so much of the debt as would have been recoverable from the landlord applicant. The expression "for all purposes and on all occasions" in Section 13 does not in my opinion cover suits against non-applicant debtors.

9. The language of Section 13 of the Encumbered Estates Act is practically identical with that of Section 12 of the Bundelkhand Encumbered Estates Act (Local Act I of 1903) which is: "Every claim against the proprietor in respect of a private debt shall, unless made within the time and in the manner required by this Act, be deemed, for all purposes and on all occasions, to have been duly discharged." In -- 'Makund Rao v. Janki Bai', 30 All 141 (A), it was observed at p. 142 :

> "In our opinion the effect of Section 12 of the Encumbered Estates Act is to discharge the decree to the extent of the joint liability of the five judg-ment-debtors who took advantage of the Act."

In -- 'Mt. Beti Bai v. Tantya Singh', AIR 1926 All 138 (2) (B), where in a suit for the redemption of a mortgage made by one of the five mortgagors it was contended that in view of three of the mortgagors having applied under Section 6 of the Bundelkhand Encumbered Estates Act the entire debt became discharged and therefore there was no occasion for redemption, the mortgagee being in adverse possession since the date of discharge, Sulaiman, J., as he then was, observed at p. 138 :

> "But under Section 12, it was only the claim against the proprietors who had applied that was duly discharged, and not also their claim against those who had not applied. But the mortgagees also cannot now claim the whole of the debt from those who had not applied, on the ground that they were jointly liable for the whole. The legal effect of the proceedings is that the integrity of the mortgsge must be deemed to have been broken up by operation of law so far as the share in the joint debt of those who applied was concerned."

He expressed agreement with the view of piggott, J. in -- Pohkar Singh v. Ram Din', 10 All LJ 171 (C) to the effect :

> "The failure of the mortgagees to make any claim under the Act as against some of the mortgagors had the same effect in law as if they had accepted from these mortgagors their proportionate share of the mortgage-debt and freed their share from encumbrance i.e., it has the effect of partially breaking up the integrity of the mortgage-debt".

In view of the interpretation put on Section 12, Bundelkhand Encumbered Estates Act there can be no room for giving a different interpretation to the effect of Section 13, U. P. Encumbered Estates Act both because the two sections are practically similarly worded and because the Legislature must be deemed to have used practically the same language knowing full well the interpretation put upon the language used in the previous Act.

10. The contention for the respondents, as already mentioned, is based more on the interpretation of the provisions of Section 9(5) (a), (b), (c) and (d) of the Encumbered Estates Act than on the expression used in Section 13. At present I need just mention that Sub-clauses (c) and (d) were introduced in the Act by the Amending Act 11 of 1939. No amendment was made in Section 13 by that Act.

It can be said to follow from this that the interpretation of Section 13 should not, therefore, be dependent on the effect of the provisions of Section 9(5) (c) and (d). It must continue to bear the same interpretation which it would have borne without those provisions. This is besides the consideration that a certain provision of an Act is primarily to be interpreted according to the language used in that provision and that help from other provisions of the Act in interpreting it ought to be taken only when its provisions be capable of more than one meaning.

11. It may also be mentioned for the sake of clarity that there is no other provision in the Encumbered Estates Act except Section 13 which speaks of the discharge of any debt or speaks of the discharge of the liability of non-applicant debtors in case of joint debt when the creditor does not file a claim against the debtor applicant. It should follow, therefore, that the right of a creditor to realise his claim from, the non-applicant debtors should not be taken away by mere implication of certain provisions of the Act unless the implication was so strong as to leave no other conclusion possible.

12. Before I deal with the interpretation of Section 9(5) I should like to quote it here:

> "9 (5) (a). If one or more of several joint debtors, who are not members of same joint Hindu family, apply under Section 4 but all the joint debtors do not apply then the Special Judge shall determine the amount of the joint debt which is due by the debtor or debtors who have applied and the amount due by those who have not applied. For the purpose of this determination the Special Judge shall make the joint debtors who have not applied parties to the proceedings and shall hear any objection that they may make before recording his finding.
>
> (b) If all the joint debtors have not applied under Section 4 the creditor shall have a right to recover from the debtors who have not applied only such amount on account of the joint debt as may be determined by the Special Judge to be due by them,
>
> (c) Where no suit has been instituted or where no application for execution of a joint decree has been made in any other Court in respect of such joint tie t or joint decree the creditor may on application to any Court having jurisdiction to entertain such suit, or execute such decree, obtain a decree, or get the decree executed against

non-applicant joint debtors, for the amount so determined, subject to the payment of the court-fee payable on such execution application or on a plaint in a suit for the amount determined by the Special Judge:

Provided that notwithstanding anything contained in the Indian Limitation Act, 1908, or any other law for the time being in force, in computing the period of limitation for such suit or such execution application the period from the date of the order of the Collector under Section 6 to the data of determination of such debt by the Special Judge under Clause (b) shall be excluded in either case.

(d) Where a suit in respect of the joint debt had been instituted or an application for the execution of the joint decree made, and proceedings therein were stayed under Sub-section (1) of Section 7, the Court in which such suit had been instituted or such execution application was made shall, on the application of the creditor, proceed with such suit, or execute such application in accordance with Sub-section (c) as against those joint debtors who had not applied under S 4, in respect of the amount of the joint debt determined by the Special Judge to be due from such joint debtors.

Provided that in a suit in respect of a liability of a firm, not being a joint family firm and not being a landlord itself, the creditor shall be entitled to proceed in respect of the whole debt against the property of the firm; but the amount recoverable from the applicant partner personally shall be determined in accordance with the provisions of Section 14 :

Provided further that for the purposes of this Act, a person who is liable for a debt as a surety shall not be deemed to be a joint debtor; Provided further that notwithstanding anything to the contrary in the Code of Civil Procedure, 1908, nothing in this Act shall prevent the institution of a suit for the recovery of debt against a surety, but no decree shall be passed in such suit for an amount in excess of the amount determined or which could have been determined in accordance with the provisions of Section 14 against the landlord;

Provided also that the total amount which may be recovered from the landlord and the surety shall not exceed the amount determined or which might have been determined by the Special Judge against the landlord."

13. The object of the Encumbered Estates Act was to relieve the debtor applicant by determining his debts and then by liquidating them. It was for this primary purpose that the applicant was called upon to detail his debts and the creditors were required to file their claims. As already mentioned Section 14(2) of the Act required the Special. Judge to determine the debts due from the applicant debtor, it, therefore, became necessary not only to provide for the determination of the debtor applicant's liability personally but of his joint debtors as well. If such debts were not brought within the fold of the Encumbered Estates Act, such debts would have remained undetermined and outstanding against the debtor applicant in spite of all the proceedings under the Encumbered. Estates Act, either recoverable in the suits by creditors or in suits for contribution by co-debtors,

who-might have paid off the debt of the creditor.

It is for this purpose that Section 9 (5) (a) provides that in case of the joint debt of the debtors who had not applied the Special Judge was to implead the non-applicant debtors and determine the amount due from them as well. It is to be noted here that there is no provision in Section 9(5) (a) or any other section of the Encumbered Estates Act empowering the Court to implead a creditor whose debts happen to be mentioned by the debtor applicant in his written statement under Section 8 but who failed to file a claim. In cases in which the creditor files a claim and all the necessary parties are before the Special Judge, the Special Judge could decide the proportionate liability of the debtor applicant and the non-applicant debtors in the joint debts provided he (the Special Judge) was given the jurisdiction to determine it.

It was for this reason that the Special Judge was given this power to determine the liability of the non-applicant debtors and such decision was to be an effective decision in the sense that this determined liability could not be reopened between non-applicant debtors and the creditors that Section 9(5)(b) provided that the creditor was to have a right to recover only the amount so determined by the Special Judge from the non-applicant debtors. If there was no such provision the creditor could agitate in the ordinary civil court that his right to recover what he could recover under ordinary law from the non-applicant debtors remained intact irrespective of all what the Special. Judge had done. The proceedings of the Special Judge would have been ineffective and the result would have been in some cases that the creditor would have been doubly paid.

The fact that the absence of a provision empowering the Special Judge to implead the creditor for the purposes of determining the amount due from the non-applicant debtors makes it clear that such determination was contemplated and enjoined by the Act only in those cases in which the creditor had filed a claim and sought such determination and that such determination was not to be made in cases in which the creditor had not filed a claim though the debtor applicant had mentioned the debt in his written statement under Section 8. Of course, if the debtor applicant had not mentioned it in his written statement under Section 8, and the creditor had not filed a claim, the Special Judge could not have determined the liability of the non-applicant debtor for the obvious reason that he would not have had information about the debt or of the joint debtors.

It appears to me, therefore, that the provisions of Section 9(5) and Sub-clauses (a) and (b) will come into effect only when the creditor has filed a claim before the Special Judge against the debtor applicant and not in any other case. It may be repeated here that in the case before us, neither the debtor applicant mentioned the debt in his written statement, nor the creditor filed a claim and, therefore, the Special Judge could not have determined it. I am, therefore, of opinion that the provisions of Section 9(5)(a) and (b) do not apply to this case. It cannot, therefore, be held that because the creditor did not get the liability of the non-debtor applicants determined by the Special Judge, he cannot now sue them on the basis of that liability in the ordinary Courts and cannot get a decree therefrom.

14. Section 9(5)(c) and (d) lay down the procedure for the creditor to realise what has been determined as due from the joint debtors. Clause (c) deals with a case in which either no suit had

been instituted by the creditor or the suit had ended in a joint decree and execution of the joint decree had not been sought. In such a case he could just put in an application for a decree or for the execution of the decree on payment of the necessary court-fees. The proviso to Clause (c) shows that he could claim the period between the order of the Collector under Section 6 and the date of determination of such debb over and above the usual period of limitation for the institution of the suit or the execution application. If no such determination is made in certain contingencies as discussed above, it would follow that, if the Special Judge was the sole authority to decide this apportionment, & if the necessary result of his failure was to deprive the creditor of his right to sue the non-applicant debtors, that the Special Judge should have power to apportion the liability of the debtor applicant and a non-applicant debtor whenever the creditor wants it.

Such cannot be the position in law as that would mean keeping undecided indefinitely the liability of the debtor applicant which has to be determined under Section 14 and which is to be deemed to be discharged under Section 13 if no claim is filed. It may also be said that after the debt against the landlord applicant has been discharged in view of Section 13, and this would be, latest, when decrees passed under Section 14 have been sent to the Collector under Section 19, there remains no such joint debt which was against the landlord applicant and which required apportionment and that, therefore, Section 9(5) no more controlled the creditor's right to sue and recover the amount due from the non-applicant debtors.

15. Clause (d) deals with a case when a suit or an execution proceeding in respect of the joint debt had been stayed under Section 7(1). In such a case the decree-holder has simply to apply that proceedings be revived against the non-applicant debtors in respect of the amount of the joint debt determined by the Special Judge to be due from such joint debtors. These provisions cannot apply to the case in which proceedings were not stayed under Sub-section (1) of Section 7. Section 7(1), Clause (a) provides that pending proceedings in respect of debts to which the landlord was subject or with which his immoveable property was encumbered, shall be stayed.

This means that an order for their stay is to be passed by the Court in which the proceedings were pending. It does not mean the automatic stay of the proceedings nor does it mean, to my mind, that the Court in which the proceedings were pending lost jurisdiction over those proceedings the moment the Collector passed an order under 3. 6. It is when it is or ought to the notice of the Court that in view of Section 7(1)(a) those proceedings should be stayed that the Court has to pass an order of stay in the proceedings and in such a case the provisions of Section 9(5)(d) would apply. It is to be presumed that the creditor, when his suit gets stayed, does positively come to know of the institution of the Encumbered Estates Act proceedings by some of the debtors and, therefore, is expected to file his written statement of claim and to Have the liability of the applicant and non-applicant debtors determined.

If the proceedings are not stayed, there is a possibility that he may not even know of those Encumbered Estates Act proceedings, and, therefore, the provisions of Section 7 or any other section of the Encumbered Estates Act do not provide that the subsequent proceedings in that Court would be null and void. I am aware of certain cases in which such a view was expressed and would discuss, at the right place, that they are distinguishable and the point did not arise exactly in circumstances

similar to those of the present case.

16. The first proviso to Clause (d) allows the landlord's suit in respect of the liability of a firm, not being a joint family firm and not being a landlord itself, to proceed in respect of the whole debt against the property of the firm but provides that the amount recoverable from the applicant partner personally shall be determined in accordance with the provisions of Section 14. This envisages the possibility of the creditor obtaining a personal decree against the applicant partner under Section 14 with respect to the amount recoverable from him and also obtaining a decree for the entire debt against the property of the firm. Therefore, the notion that the maintainability of a suit by the creditor against the non-applicant debtors without his putting in a claim in the Encumbered Estates Act proceedings, and without getting their liability determined would create injustice, does not stand on any substantial grounds.

17. The third proviso to Clause (d) also contemplates the institution of a suit for the recovery of a debt against a surety and lays down this restriction on the amount of the decree to be passed that it should not exceed the amount either determined or which could have been determined in accordance with the provisions of Section 14 against the landlord. This means that at one and the same time there may be a decree against the landlord applicant with respect to the same debt and a decree against the surety with respect to the same debt

18. The fourth proviso lays down that the total amount which can be recovered from the landlord and the surety should not exceed the amount determined or which might have been determined by the Special Judge against the landlord and thus safeguards double payment to the creditor. This again shows that there is nothing inherently objectionable in the ordinary Civil Court dealing with the debt simultaneously with the Special Judge dealing with the same debt in determining the liability of the landlord applicant.

19. I may now deal with, the cases which have been referred to us by the parties in chronologicol order as far as possible.

20. In 'Babu Ram v. Manohar Lal', AIR 1938 All 6 (D), it was held that where there is a joint decree and therefore a joint judgment debt, the execution of that decree must be stayed, even if one of the judgment-debtor applies under Section 7 until the Special Judge has determined the amounts required to be determined by Section 9, Clause (5). I need not dispute this proposition, but I am not clear as to why the stay of that suit is to be upto the date of the determination of the amount by the Special Judge as by the time of the decision of this case on 24-8-1937, Clause (d) had not been introduced in Section 9(5) of the Encumbered Estates Act and there was no provision in that Act for the recommencement of such proceedings which had been stayed.

Why the proceedings against the non-applicant debtor were ordered to be stayed was because Section 7(1)(a) provided for the stay of all proceedings in respect of any public or private debt to which the landlord was subject and it was considered that the suit against the non-applicant debtor did remain a suit on the basis of a debt to which the landlord was subject. It could have been, and, to my mind, would have been more properly held that the proceedings against the non-applicant

debtors were not meant to be stayed under Section 7(1) (a) with respect to the debt recoverable from those persons alone as with respect to that proportionate debt the landlord was not subject. If such a view had been taken that would have avoided many points which were disputed and had to be decided by several Full Benches later on.

The stay of the proceedings should have been justified on the ground of expediency in view of the provisions of Section 9(5), Clauses (a) and (b) as it was open to the Special Judge in that case to apportion the debt. However, having held that the proceedings were to be stayed, the provisions of Section 9(5) (a) and (b) were considered and it was then observed :

> "It is quite clear that the creditor can realise only such amount on account of the joint debt as may be decreed by the Special Judge. As no such amount has been decreed by the Special Judge, the decree-holder cannot recover any such amount at all. The object of this provision is to protect the landlord who is one of the joint debtors and execution cannot proceed until the joint debt has been determined and it had also been determined for how much the person who has applied is liable and for how much those who have not applied are liable, for the decree-holder can realise only such amount as may be decreed by the Special Judge."

It is these observations which are repeated in practically every subsequent case. It is on the basis of this view that support was found for the view taken of the provisions of Section 7(1) (a). If a case like the present had been contemplated, and it had been considered along with the absence of a provision depriving the creditor of his claim against the non-applicant debtors, a different view might have appealed to the learned Judges who decided the case. Another consideration which the learned Judges mentioned in support of their view was the danger of the creditor getting the decree for the entire amount against the non-applicant debtor and thus shifting his burden on to the co-debtors who might not be able to recover their share from the landlord who was protected. In this consideration, they omitted to consider that the Act which benefited the landlord debtor was not necessarily intended to penalise the creditors except when they were negligent and failed to file a claim against the landlord debtor.

The learned Judges failed to consider that there was no provision in the Encumbered Estates Act on that date which, allowed for the revival of the stayed proceedings in a suit or execution case against non-applicant debtors after their liability had been determined by the Special Judge under Section 9(5)(a). If those proceedings could not be proceeded with in the absence of any specific provision to that effect, the result could be that the creditors' suit against non-applicant debtors could remain stayed indefinitely. Such cannot have been the intention of the legislature and, to my mind, the provisions of Section 7(1)(a) should have been interpreted in a different manner.

It is true that now Section 9(5)(C) and (d) provide for the revival of the proceedings, but as I have mentioned earlier, their introduction should not have any effect on the interpretation of Section 7 (1)(a) or Section 13 which exist in the original form. I may mention here that the interpretation of Section 9 (5)(a) and (b) did not directly arise for decision in this case where the provisions of Section 7(1)(a) alone were to be interpreted. I may also mention that at that time when this case was decided

the proceedings under the Encumbered Estates Act appear to have been pending and that it was possible for the creditor to go to the Special Judge for the determination of his claim and, therefore, the learned Judges had no occasion to contemplate the case of any other party being deprived of any particular right which the law did not intend to deprive him of.

21. The next case to be considered is -- 'Swadeshi Bima Co. Ltd. Agra v. Shiv Narain', AIR 1939 All 75 (E). The question that directly arose for decision before Mulla J. was whether a suit against a joint debtor was barred and he held, that it was not barred. In that case two persons executed a pronote. A suit was instituted against them on its basis. One of them had previously applied under Section 4 of the Encumbered Estates Act and had obtained an order from the Collector under Section 6 of the Act. The non-applicant debtor alone applied for the stay of the suit at first but later applied that the entire suit be dismissed. The Small Cause Court Judge agreed with this contention and dismissed the suit. Mulla, J. held that the Small Cause Court Judge was wrong. He observed:

> "it necessarily follows therefrom that the debts referred to in Section 7 (1) (b) cannot be the debts of a person who is not a landlord and who has made no application under Section 4 of the Act .....It is only when the debtor happens to be a landlord and he makes an application under Section 4, Encumbered Estates Act, that the provisions of that Act come into operation for the purpose of staying any proceeding that might be pending against him in any Civil Court at the date of his application and of preventing the institution of any fresh proceeding after the date of his application".

He observed, however, later that it might be open to be contended by the non-applicant debtor in cases of some joint debts that no suit could be instituted at all but that contention was not open in a case where the liability was joint and several. He further observed:

> "There is nothing, however, in any provision in the Encumbered Estates Act even to suggest that the plaintiff's right to bring a suit against Kanhi Singh is barred or limited in any way. It is to be noued that the apportionment of liability between joint debtors made by a Special Judge under Section 9, Clause (5) of the Act is not an executable decree. In fact, the Encumbered Estates Act provides only for a decree being passed in favour of a claimant against the landlord who makes an application under Section 4 of the Act. There is no provision in it for a decree in favour of the claimant against any person who is jointly liable with landlord to discharge the debt. If the plaintiff is not allowed to institute the suit, the necessary result would be that his claim against Kanhai Singh would be barred by time.
>
> There is no provision in the Encumbered Estates Act to save limitation for the claimant against the landlord in respect of any claim which he might further have against the joint detbor with the landlord, arising out of a joint and several liability. I am therefore definitely of the opinion that the suit instituted by the plaintiff was fully competent as against Kanhi Singh and it should not have been dismissed as against him."

The case further shows that a similar view had been taken in two other cases -- one decided by a single Judge and the other by a Bench.

22. In --'Ramdeo v. Sri Sadaitan Pande', AIR 1940 All 148 (FB) (F) the case before the Full Bench was that three brothers had executed a sarkhat in favour of the plaintiff firm. There had been separation between the three brothers and thereafter the two brothers, who were the executants, had applied under Section 4 of the Encumbered Estates Act and an order under Section 6 had been passed by the Collector. The two brothers admitted their liability for two-thirds of the debt. The non-applicant debtor was also made a party in the Encumbered Estates Act case and the creditor filed his claim. A suit was filed for one-third of the amount against one of the executants. The other two executants who had applied under Section 4 of the Encumbered Es-tates Act were impleaded as pro forma defendants. The suit was dismissed on the ground that it was barred by Section 7 (1) (b) of the Encumbered Estates Act.

23. The judgment of the Full Bench was delivered by Thom C. J. He started his judgment by reference to Section 9 (5) (b) and observed : "It would appear from Section 9, Sub-section (5) (b) that the remedy of the creditor against the non-applying debtor was by way of execution of a decree passed by the Special Judge." It was on account of such interpretation of Section 9 (5) (b) that he considered the wide expression of Section 7 (1) (b) a bar to a suit against the non-applicant debtor. He did not consider it at all necessary to decide the question as to whether under the Act before the amendment the creditor was entitled by a separate suit to recover what was due by a joint debtor who had not preferred an application under the Act remarking that that question was not free from difficulty. He referred to Clauses (c) and (d) of Section 9 (5) and observed :

> "Under the amended Act therefore the creditor must wait until the amount due by the joint debtor who had not made an application under the Encumbered Estates Act had been determined by the Special Judge. Thereafter he may apply to the Civil Court for a decree for that amount against the debtor."

These are observations similar to those made in AIR 1938 Ail 6 (D)', but Thom C. J. further remarked :

> "When the suit out of which this appeal arises was filed the law as to the procedure to be adopted by the creditor to recover the proportion of the debt due to him by the debtor who had not applied under the provisions of the Encumbered Estates Act was somewhat in doubt. The procedure to be followed is now made plain by the amendment above referred to."

The case is distinguishable as in this case all the creditors had filed a claim before the Special Judge; the non-applicant debtor was a party before the Special Judge, and the order passed by the High Court was that the suit be restored and stayed till the Special Judge determined the amount dua from the non-applicant debtor and be proceeded with thereafter as an application under Section 11 of Act 11 of 1939 which introduced Clauses (c) and (d) of Section 9 (5) of the Encumbered Estates Act.

24. It may also be noted that this Full Bench does not say that the claim of the creditor against the joint debtor becomes dead, or that he cannot sue or get a decree with, respect to the liability of the non-applicant debtor if he had not filed a claim against the applicant debtor and had not got the liability of the non-applicant debtors determined.

25. The next case is--'Firm Narain Das Bal-kishan Das v. Munshi Muniruddin', AIR 1940 All 203 (G) decided by Bennett and Verma JJ. The facts of the case were that three persons executed a pronote in favour of the plaintiff firm agreeing jointly and severally to be liable for the amount. Two of them applied under Section 4 of the Encumbered Estates Act and the Collector passed an order under Section 6 of the Act. Subsequent to it the plaintiff firm filed a suit in the Court of Small Causes against all the three debtors. He, however, disclosed the facts about the Encumbered Estates Act proceedings and prayed that the case should proceed against the non-applicant debtor alone. The Court discharged the applicant debtors from the suit and proceeded against the non-applicant debtor. This defendant then contested the suit on the ground of its non-maintainability against him.

The learned Small Cause Court Judge agreed with the contention and dismissed the suit. In revision the learned Judges held firstly that Section 9 (5) of the Encumbered Estates Act did not apply to that case as it contemplated only those cases in which the liability of the debtor was joint and not those cases in which it was joint as well as several.

They approved of the case 'AIR 1939 All 75 (E).' They further held that the failure of the creditor to put in a written statement of claim under Section 9 (1) and (3) of the Act was only that the claim which the plaintiff might have had against the applicant -debtors would be deemed to have been duly discharged and that such failure of the creditors could not put an end to the claim which he had against the non-applicant debtor; and thirdly they held that Section 7 (1) (b) of the Encumbered Estates Act did not prohibit the institution of a suit against a person who was not a landlord and had not made an application under Section 4 of the Act. The view expressed on the interpretation of Section 13 and Section 7 (1) (b) supports the view I have taken.

26. The next case is the Pull Bench case of --'The Punjab National Bank Ltd. v. Vishwa Nath Khanna', AIR 1941 All 363 (H) decided by Iqbal Ahmad C. J. and Yorke and Dar JJ. The facts of the case were that a decree for money was passed against two persons. It imposed a joint and several liability on them. The heirs of one of the judgment-debtors applied under Section 4 of the Encumbered Estates Act and in due course the Collector passed an order under Section 6. The debtor applicant applied for determination of the liability of the non-applicant debtors. The creditor and the co-debtor objected to it. The Special Judge overruled the objection and determined the liability of the non-applicant debtors. The creditor went up in appeal to the High Court.

The Court had to consider in this case whether the Special Judge had acted correctly in apportioning the liability. The Court held that he had acted correctly as Section 9 (5) applied to debts which were both joint and several and not only to such debts which were only joint and thus disagreed with the view expressed in 'AIR 1940 All 203 (G). Dar, J. who delivered the judgment, however, observed at page 364, Col, 2 :

> "As the statute stands today, it is quite clear that the words "joint debt" in Clause (5) (a) of Section 9 includes debts which are both joint and several because Clauses 5 (b), (c) and (d) of Section 9 enjoin that a creditor will not be able to follow his remedy against non-applicant debtors till the amount has been determined and apportioned by a Special Judge under Clause (5) (a) and, therefore, the right of a creditor to pursue his remedy separately in the case of a joint and several debt has been taken away by the statute and the jurisdiction to determine and apportion the liability in a case of joint debt against debtors who have applied and against debtors who have not applied now solely vests in the Special Judge dealing with the proceedings under the U. P. Encumbered Estates Act."

It is not made clear how the provisions of Sub-clauses (5) (b), (c) and (d) of Section 9 lead to the conclusion that the expression joint debt in Clause (5) (a) must include debts which are both joint and several. These clauses simply deal with the amount which the creditor can realise from a non-applicant debtor and the manner in which he can realise it. The question that the creditor can seek his remedy separately or not in the case of joint debts or joint and several debts against non-applicant debtors was not before the Full Bench for consideration and therefore the latter observations in the above quotation can be said to be mere 'obiter dicta'.

27. 'Girjesh Bahadur v. Bhagwati Prasad', AIR 1942 All 153 (I) is another Full Bench case decided by Iqbal Ahmad C. J. and Braund and Dar JJ. The question referred to the Full Bench was :

> "Is Section 7 (1) (b) Encumbered Estates Act limited in its operation to suits, proceedings etc. to be instituted against the landlord in respect of any debts incurred by him before the passing of the order under Section 6 of the Act or it applies to suits or proceedings etc. to be instituted by the landlord also?"

The Full Bench held that it applied to suits instituted by the landlord also and that it was not limited in its operation to suits, proceedings etc. to be instituted against the landlord. No occasion arose in this case to decide whether Section 7 (1) (b) applied to suits by creditors against non-applicant debtors with respect to their liability in reject of joint debt. This case therefore is distinguishable for the purposes of our case.

28. A number of cases decided by the Oudh Chief Court in 1942 were referred to. The first case for consideration is -- 'Har Charan Lal v. Sukha Nand ', AIR 1942 Oudh 248 (J), decided toy Bennett and Ghulam Hasan JJ. In this case one of the two judgment-debtors applied under Section 4 of the Encumbered Estates Act. In execution proceedings before the Sale Officer, it was contended that the proceedings be stayed. The Sale Officer held that proceedings for the sale at the property of the non-applicant judgment-debtor could continue. He sold his property. The Bench in discussing the question whether the provisions in Section 7 Encumbered Estates Act with respect to certain execution processes becoming null and void, applied only to the processes issued against the applicant's property, observed.

> "This question is connected with the question of the applicability of Sub-section (5) of Section 9, and in view of the provisions of that sub-section we are of opinion that the bar applies equally to the property of non-applicants. The reason is clear. Under Sub-section (5) the Special Judge has to determine the separate liability of the applicants and the non-applicants in respect of the joint debt, and since this involves a reduction in the total amount which may be claimed either from the applicant or the non-applicants, it would clearly not be open to an execution Court to execute a decree in its entirety against one or more of the joint debtors."

This appears to me to be a wrong approach to interpret the provisions of Section 7. These provisions should be interpreted in accordance with the language used in expressing them.

29. The next case is -- 'Jagdish Prasad v. Mt. Pran Kunwar', AIR 1942 Oudh 254 (K) decided by Bennett, J. The facts in this case were that a decree was passed against 58 judgment-debtors. One of them applied under Section 4 of the Encumbered Estates Act. The decree-holders applied for executing the decree against two non-applicant debtors. The proceedings were stayed in view of the Encumbered Estates Act proceedings. No reference to the debt was made in the application by the landlord applicant, and the creditor decree-holder had not filed any claim against him. The debt of the landlord applicant was not therefore before the Special Judge and it was not possible for him to determine the separate liability of the applicant and non-applicants under Clause (5) of Section 9. Bennett J. observed :

> "There does not appear to be any direct authority on the point whether it is open to a decree-holder to proceed in execution of a decree against non-applicants under the Act when the question of the liability of an applicant under the decree is not before the Special Judge. That possibility does not appear to be contemplated by the provisions of Clause (b) of Section 9. There can be no doubt that until the position in Section 13 of the Act is reached the debt of the applicant under Section 4 is not extinguished, and on this ground alone if there is still a possibility of the debt coming before the Special Judge, the order passed by the lower Court would appear to be justified."

It is clear that the facts of that case were very much similar to those of the present case except for the fact that the proceedings before the Special Judge in the present case are over while in that case they were pending when the question came up for decision. I do not think that it can he said that the possibility of the decree-holder not filing a claim before the Special Judge and, thus not bringing the liability of the applicant for determination before the Special Judge was not contemplated by the Encumbered Estates Act. The provisions of Section 13 of the Act clearly contemplate such a possibility and provide the penalty for the decree-holder's failure to put forward his claim.

30. Bennett J. then considered it undesirable that the decree-holder should be allowed to adopt the procedure which was not contemplated by the law as the creditor's not filing a claim against applicant debtor and then proceeding in a separate proceeding against the non-applicant debtor would be to make the latter liable for a larger sum than he would be liable for if the procedure

pro-vided by the Act was followed. There will not toe any danger about such a result if the decree holder's claim against non-applicant debtors be considered to be good only with respect to their proportionate liability in view of the liability of the applicant-debtor being for the Special Judge to determine if it be taken before him or of its being deemed as discharged in view of Section 13.

Bennett, J. distinguished the cases decided under the Bundelkhand Encumbered Estates Act and referred to by me above, on the ground that that Act did not contain provisions similar to those laid down in Section 9 (5). He then relied on the observations of the Pull Bench in 'AIR 1941 All 363 (H)' which I have stated above were 'obiter dicta'.

31. Bennett, J. also considered the difficulty of non-applicant debtors realising the applicant's share from him in a suit for contribution if they were made to pay the whole decretal amount and considered the possibility of the non-applicant being prejudiced. Lastly he said that Section 7 of the Act justified the stay of the execution proceedings as they were in respect of the debt to which the landlord was subject and observed :

> "He remains subject to this debt until his liability is extinguished under Section 13."

These observations would imply that after the applicant's liability had become extinguished the decree-holder could proceed against non-applicant debtors. Bennett, J. continues to observe :

> "The only answer to the argument is that the proceedings referred to in this section should be construed as meaning proceedings against the landlord and not against other persons in respect of the same debt."

He, however did not consider it necessary to decide that point and observed :

> "I found my view that execution of a decree in the regular Court against non-applicants must be stayed while proceedings under the Encumbered Estates Act are pending on the provision in the Act for the determination of the several liability of applicants and non-applicants."

He based his view of the interpretation of Section 3(5) upon the Pull Bench in -- 'AIR 1941 All 363 (H)'. He then made further observations to the effect :

> "No doubt the Special Judge cannot determine that liability until the debt is before him on a claim by the decree-holder; but that is no reason why the decree-holder should be allowed to ignore the provision of Clause (5) and execute his decree wholly against non-applicants. It is in my opinion incumbent upon him, as soon as one of the judgment-debtors has applied under the Act, to prefer his claim against him and have the liability of the applicant and non-applicants respectively determined by the Special Judge."

This is practically repeating the effect of Section 9(5) admitting the impossibility of the Special Judge determining the liability till the debt was before him on a claim by the decree-holder. The case does not go to the length of holding that the decree-holder loses his right to recover the amount due from non-applicant debtors on his failure to prove his claim against the applicant debtors and on the necessary failure in the circumstances of the Special Judge to determine the liability of the non-applicant debtors. As would be already clear, the emphasis in the case was on the interpretation of Section 9(5) by the Pull Bench and on the pendency of the proceedings before the Special Judge during which it was possible for the creditor to prefer a claim to have the apportionment of the liability between the applicant debtor and non-applicant debtors.

32. The third case is -- 'Shyam Lal v. Mustafa Husain', AIR 1942 Oudh 413 (L) which was decided by Bennett and Ghulam Hasan JJ. In that case a suit for rent had been instituted against certain persons two of whom had previously applied under the Encumbered Estates Act. These two defendants then applied for stay of the rent suit. The plaintiff applied for the withdrawal of the suit against them. The Assistant Collector rejected the plaintiff's prayer and dismissed the suit holding that it should not have been instituted in view of the provisions of the Encumbered Estates Act. The District Judge thought otherwise and remanded the suit for disposal according to law against the non-applicant defendants. The Bench relied on the two cases just mentioned, namely, those reported in -- 'AIR 1942 Oudh 248 (J)' and --'AIR 1942 Oudh 254 (K)' and observed :

> "It cannot be doubted that the provisions of Sub-section (5) of Section 9 of the Act contemplate that in the case of joint debtors where some of the debtors have applied and some of the debtors have not applied under the Act their separate liability shall be determined by the Special Judge and that the liability so determined takes the place of their previous joint and several liability. We think too that Section 7 Encumbered Estates Act, is a bar to the initiation or continuation of proceedings in the regular Courts against non-applicants in respect of a debt for which the applicant or applicants under the Act are also liable."

This case again did not hold that the creditor's right against non-applicant debtors failed absolutely if he does not go before the Special Judge. They also interpreted Section 7 in a wider sense in view of the provisions of Sub-section (5) of Section 9. The Encumbered Estates Act case was proceeding at the time and that also is a fact for distinguishing this case from the present case.

33. The last case is -- 'Mohammad Ahmad Ali Khan v. Sheo Shankar Singh, AIR 1942 Oudh 482 (M) decided by Agarwal J. The facts of the case show that during the pendency of execution proceedings one of the judgment-debtors filed an application under Section 4 of the Encumbered Estates Act. The decree-holder preferred a claim on the basis of a decree before the Special Judge but it was disallowed on the ground that it was filed too late. The non-applicant debtor contended in the execution case that the decree-holder's claim was extinguished and the decree could not be executed. Agarwal J. too in considering the rights of the decree-holder against the non-applicant judgment-debtor, referred to Section 9(5)(a) and (b) and held that the decree-holder could have proceeded against the non-applicant debtors with respeat to the amount found due from them by the Special Judge and as there was no such amount determined he could not execute his decree

against the non-applicant debtors.

This case, which is practically at par with the present case, does not hold that the creditor's claim against the non-applicant debtor gets extinguished but simply interprets the provisions of Section 9(5) in a way as to bar the remedy open to him to realise the amount. I am of opinion that remedial provisions in respect of a class only should not be interpreted in such a manner, unless the language of the provision is compelling so as to take away substantive rights of parties which the law has not positively denied them. I am therefore not inclined to agree with the view expressed. in this case.

34. The next case is -- 'Manmohan Das v. Mt. Radha Rani', AIR 1944 All 288 (N) which was decided by Mathur and Sinha JJ. The facts were that one of the co-judgment-debtors applied under Section 4 of the Encumbered Estates Act. The creditors did not put in any claim before the Special Judge. It was contended by the non-applicant debtor that the failure of the creditors to lodge claims before the Special Judge involved the extinction of the entire claim and at least to the extent of the liability of the debtor applicant in view of Section 13 of the Encumbered Estates Act. The Encumbered Estates Act proceedings were quashed under Section 20 of the Act. Subsequently, the Civil Judge repelled the objection of the judgment-debtor and granted the application for execution. The main contention before the Court was the same, that is, that the failure on the part of the creditors to prefer their claim extinguished the claim in its entirety and the appellant relied on the language of Section 13. Their Lordships said "the answer to this argument is furnished by the proceedings which Pt. Krishna Kant Malaviya had taken under Section 20 of the Act and which had the effect of quashing all proceedings taken under it".

> Their Lordships considered Sections 13 and 9(5) of the Encumbered Estates Act, rulings under the Bundelkhand Encumbered Estates Act and the Full Bench decisions reported in -- 'AIR 1941 All 363 (H)' and -- 'AIR 1940 All 148 (F)'. I shall deal with this discussion later. After having discussed this question, they observed :
>
> "We have dwelt upon this aspect of the matter at some length although in our opinion Section 20 is a complete answer even to this argument."

What their Lordships meant was that in view of the quashing of the Encumbered Estates Act proceedings nothing in the Encumbered Estates Act could affect the proceedings in the Civil Court as the result of the quashing of the proceedings was that no proceedings could be deemed to have taken place under that Act. It follows, therefore, that the discussion about the other points was purely academic. I further find that the learned Judges did not give any clear-cut decision on the points involved. They just expressed certain views in discussing the alternative question. The first observation made was :

> "The Encumbered Estates Act is a remedial statute and has been provided for the amelioration of the lot of the landlord. It will be putting a strain upon both the purpose and the language of the Act to hold that the redress provided by it should be extended not only to the landlord but also to people who do not fall within the scope of the Act or people who never sought any relief under it."

In this connection they referred to the case-reported in -- 'Ashraf v. Saith Mal', AIR 1938 All 47 (O) and then observed :

> "This clearly means that the claim is extinguished only to the extent of the liability of the applicant."

Then they referred to the alternative contention of the appellant to the same effect that if there had been no total extinction of the claim there had at least been a partial extinction of the liability of the applicant under Section 4. They then observed that there was nothing in the Bundelkhand Encumbered Estates Act, corresponding to Section 9(5) (a), U. P. Encumbered Estates Act & then referred to the Full Bench case of --'AIR 1941 All 363 (H)' & also to the importance given by the Legislature to the provisions of Section 9(5) as it had made it obligatory on the Court to make non-applicant joint debtors parties to the proceedings and hear their objections if any. In this connection they referred to the case reported in -- 'AIR 1940 All 148 (P)', and finally they observed :

> "If the intention of the Legislature is, as it must be held to be, to make the Act self-contained, the determination of the debt must be made by the Special Judge in proceedings under the Encumbered Estates Act. If there was no such apportionment or determination by the Special Judge, the Civil Judge has no jurisdiction to enter upon an inquiry in that direction."

With respect, it appears to me that the learned Judges were inclined to interpret Section 13, both on account of the language used in the section and the purpose of the Act to the effect that it was the liability of the applicant debtor alone which gets extinguished on account of the failure of the creditor's claim and that they then laid down, as they were bound to lay down in view of the observation of the Pull Bench, the matter being of academic interest only, that if there was no such apportionment or determination by the Special Judge the Civil Judge had no jurisdiction to enter upon an inquiry in that direction. This case, therefore, does not in any way go against our interpretation of Section 13.

35. The next case is -- 'Salamat Ullah v. Mt. Maharaj Kuar', AIR 1949 All 770 (P) decided by Misra and Chandiramani, JJ. In this case decree sought to be executed was obtained against the judgment-debtors during the pendency of the Encumbered Estates Act proceedings which had been instituted, by some of them prior to the institution of the suit. The Court passing the decree did not know of the pendency of Encumbered Estates Act proceedings.

The question before the Court was whether Section 7 of the Encumbered Estates Act took away the jurisdiction of the civil court, in respect of a private debt incurred before the institution of the

proceedings under the Encumbered Estates Act. It was held that in view of the provisions of Section 7(1) (a) providing that all the proceedings pending at the date of an order under Section 6 of the Act shall be stayed, it was clear that suits in respect of private debts, incurred before the passing of the order under Section 6, could not be proceeded with, that they could not result in a decree and that if there was a violation of the statutory prohibition against the trial of the suit, the resulting decree obviously could not be regarded as a valid decree which could be enforced by execution. I do not agree with the view that in the circumstances no valid decree could be passed by the civil court.

36. A court in which the execution proceeding or a suit is pending cannot be expected to stay the proceedings unless it knows of the Collector's order. These proceedings must continue in the absence of an order of the court staying them. The expression "shall be stayed" means, to my mind, that the court must pass an order staying the proceedings then pending and does not mean that without such an order of stay, they be deemed to have been stayed and that, any further action in the proceeding will be null and void.

It was for the debtor-applicant to inform the court that the Collector had passed the order under Section 6 of the Encumbered Estates Act. On such information the Court is bound to stay the proceedings and as a result of such stay order the process issued becomes null and void. If no such stay order is passed due to ignorance about the Collector passing an order under Section 6, on the application of any party and the proceedings continue, those proceedings taken by a proper court cannot become null and void in the absence of any clear provision of law to that effect. Section 7(1) (a) does not say that further action in such a proceeding will be null and void.

I therefore do not agree with the view that Section 7(1)(a) provides that the suit cannot be proceeded with after the Collector has passed an order under Section 6 even if the court was not informed about it and that the decree passed in such circumstances will be null and void. Further their Lordships observed :

> "We may add that the decree-holder does not claim to have obtained from the Court of the Special Judge any decree in respect of the maintenance allowance which formed the subject-matter of the decree under execution and by operation of Section 13 of the Act the debt must be taken to be wiped off".

This may mean that the debt would be wiped off. There is, however, no discussion in regard to the language of Section 13 or of any kind which could indicate the reason for this view.

37. Reference is then made to the decided cases reported in -- 'AIR 1941 All 363 (H)'; -- 'Mt. Khatoon Begam v. Saghir Husain Khan', AIR 1945 All 321 (FB) (Q) and -- 'Tirbhawan Datt v. Pashupat Pratap .Singh', AIR 1947 Oudh 201 (R) and it is observed:

> "The rule there laid down is that in a case in which there had been no determination as to the sum payable by the non-applicants, there can be no execution against the non-applicant debtors."

This case, therefore, does not take us far. It simply summed up what these cases had held. I have already referred to the Pull Bench case of Allahabad -- 'AIR 1941 All 363 (H)'.

38. 'AIR 1947 Oudh 201 (R)', relied on -- 'AIR 1942 Oudh 248 (J)'; and -- 'AIR 1942 Oudh 482 (M)', which also I have referred to. Further in that case the creditor had filed a claim before the Special Judge and the joint debtors were impleaded there. The joint debtors admitted their liability but the Special Judge did not accept their admission and decreed the entire amount against the landlord applicant. The decree-holder appealed to the District Judge with respect to costs and did not implead the non-applicant joint debtors.

The applicant debtor raised the question of apportionment there and the appellate Court then remitted an issue to the Special Judge for a finding as to how much of the costs claimed were due from the applicant and what sum from the non-applicants. The Special Judge held that the decree-holder was entitled" to recover the whole amount from the applicants as their liability was joint and several.

39. Execution in the Civil Court, however, remained stayed all the time till the decree-holder applied for its revival. The non-applicant judgment-debtors objected to the proceedings on the ground that no part of their liability having been apportioned against them by the Special Judge proceedings in execution could not be taken against them in respect of the decree. The Civil Judge rejected this contention and that was repeated before the Bench. After discussing Section 9(3) (b) it was observed:

> "The words of this sub-clause are perfectly clear and prohibit the recovery from the non-applicant debtors of anything in excess of the amount, determined by the Special Judge to be due from them."

The learned Judges further observed :

> "The Civil Judge has quite ignored the fact that, by a special law laid down in Section 9(5), Encumbered Estates Act, the general law relating to execution of decrees has been modified and that it is only in accordance with, and to the extent provided by, the special law that decrees may now be executed in this Province. In this view execution cannot proceed not because the decree has ceased to exist but because there is no sum of money in respect of which execution can proceed."

I do not find anything in the provisions of Section 9(5) of the Act which would show that its provisions supersede the provisions with respect to the execution of decrees against non-applicant debtors. To my mind these provisions just supplement the existing provisions and are applicable only when the amount due from, non-applicant debtor has been determined by the Special Judge in the exercise of his jurisdiction to determine the amount of debt for which the applicant is liable and for which the non-applicants are liable this jurisdiction he gets only after the creditor puts in a claim before him. It may be mentioned here that Clauses (c) and (d) of the Act just provide a quicker remedy for the creditor to realise the amount due from non-applicant debtors but do not bar him, if

he be so pleased, from instituting a regular suit if no decree has been obtained from the Civil Court or to apply for execution on the basis of the amount determined to be due to him from the non-applicant debtors by the Special Judge.

I, therefore, do not agree with the view that the provisions of 3. 9(5) modify the general law relating to execution of decrees. I may also note that, the concluding observation makes it clear that the decree-holders' claim against the non-applicant debtors does not get extinguished but simply is incapable of being realised on account of the failure of apportionment by the Special Judge.

40. I do not find anything useful in -- 'AIR. 1945 All 321 (Q)', referred to in -- 'AIR 1949 All 770 (P)', on the point under discussion.

41. In -- 'Sheodan Singh v. Ramesh Singh', AIR 1950 All 53 (S), the point for decision was whether an applicant debtor from whom the entire debt had been realised by the creditor could sue the non-applicant debtor for contribution. It was held that nothing in the Encumbered Estates Act barred such a suit. When holding so, Wanchoo J. delivering the judgment of the Bench, went on to point out that there was a provision in the Encumbered Estates Act which, in effect, barred a creditor from filing a suit and obtaining a decree against a co-debtor, if he fails to get the debt apportioned between the debtor, who has applied, and the co-debtor, and then referred to Section 9(5)(b) of the Encumbered Estates Act. These observations are 'obiter dicta'.

42. In the Full Bench case of -- 'Khurshed All Khan v. Ram Saran Das', AIR 1950 All 378 (T) one of the three joint debtors applied under Section 4 of the Encumbered Estates Act. The creditor's suit against the other two was stayed. The creditor filed a claim before the Special Judge after he had passed decrees under 6. 14 and prayed for the revival of the suit and for the determination of the liability of the non-applicant debtors. The Special Judge rejected the application. The District Judge allowed the appeal. It was against his order that a revision was filed in the High Court. The revision was allowed by the Pull Bench as no appeal lay to the District Judge against the order of the Special Judge and, therefore, the order of the District Judge was bad. It was, however, observed in this case at p. 380 :

> "If the liability of the landlord applicant is not in question then the Special Judge does not seem to be really concerned with the other debtors who are not before him. It is only because the other debtors are joint debtors with the landlord applicant that the apportionment becomes necessary."

This observation in the judgment of Malik C. J. I supports my view that the jurisdiction of the Spe-cial Judge to apportion the liability arises when I he has to determine the liability of the debtor ap-plicant and which must be the case only when the creditor puts in a claim.

43. The expression used in Section 9(5)(b) about the creditor having a right to recover from the non-applicant debtor only such amount on account of the joint debt as may be determined by the Special Judge to be due by them has led to an observation in some cases and also to arguments to the effect that the original right of the creditor on 4 the basis of the original debt gives place to a new

right which is created by the Special Judge's determination of the liability of the non-applicant debtor. The word "right" in Section 9(5)(b) does not to my mind really mean the substantive right which arises in favour of the creditor on account of the joint debtor's binding themselves to pay the debt when it is borrowed but refers to a sort of procedural right for the recovery of the debt. A new substantive right would have come into existence only if the original right had been taken away by any provision of the law. As already mentioned there is nothing in the Encumbered Estates Act which takes away that right. Therefore no new right could have been created.

The word "right" in Section 9(5)(b) therefore just means that in view of the determination, his original right gets limited to the right to recover the apportioned amount from the non-applicant debtors. If no such amount is determined, the original right continues and the creditor can sue the non-applicant debtor for such portion of the joint debt for which he be liable after taking into consideration the liability of the applicant debtor which is either discharged by virtue of Section 13, Encumbered Estates Act or is to be dealt with by the Special Judge. Section 18 of the Encumbered Estates Act runs :

> "Subject to the right of appeal or revision conferred in Chapter 6, the effect of a decree of the Special Judge under Sub-section (7) of Section 14 shall be to extinguish the previously existing rights, if any, of the claimant, together with all rights, if any, of mortgage or lien by which the same are secured and, where any decree is given by the Special Judge to substitute for those rights a right to recover the amount of the decree in the manner and to the extent hereinafter prescribed."

This language makes it clear that a decree passed under Section 14(7) extinguishes the previously existing rights, if any, of the claimant, and that a decree given by the Special Judge substitutes for those rights a right to recover the amount of the decree in the manner and to the extent therein prescribed.

I refer to this provision simply to show that when the existing right is extinguished and a new right created in its place, this Act in very clear terms provides for the same. This strengthens my general observation above that in the absence of any positive enactment depriving a person, of a certain right in him such deprivation of the right is not to be construed from provisions which do not deal with it but deal with the mode of enforcing those rights; in other words, the provisions of Section 9(5) of the Encumbered Estates Act cannot be used for holding that the creditor's right to recover the amount due from non-applicant debtors gets extinguished on his failure to file a claim under Section 10 against the landlord applicant in view of Section 13 of the Encumbered Estates Act.

44. Lastly, reference may be made to Section 44 of the Encumbered Estates Act. Section 44 Sub-section (1) provides for the cessation of the disabilities of the landlord in certain contingencies terminating the proceedings under the Encumbered Estates Act. Sub-section (2) provides for similar cessation of the landlord's disabilities when the application under Section 4 is dismissed or when the proceedings under the Act are quashed. Sub-section (3) provides for ignoring the interval between the date of decree to be executed and the date of declaration under Sub-section (1) of the order referred to in Sub-section (2) when applying for execution of the decree stayed under Sub-sections

(2) and (3) of Section 7. Nothing is said in Section 44 as to what will happen to the proceedings stayed under Section 7(1)(a) or (b).

Of course the proceedings stayed in suits against the landlord applicant alone might be considered as stayed indefinitely or might be subsequently ordered by the Court on learning of the result of the Encumbered Estates Act proceedings to be filed and the absence of any provision dealing with the final disposal of stayed proceedings would not have made any difference to them but it would affect the proceedings against non-applicant debtors.

The suits or execution proceedings against non-applicant debtors would have remained stayed indefinitely as neither Section 44 nor any other section of the Encumbered Estates Act as originally enacted in 1934 provided for the vacation of the stay order and for proceeding further with the proceeding which had been stayed. Such a situation could not have been contemplated when Section 7, Section 13 and Section 44 were enacted and, therefore, the correct interpretation of Section 7(1)(a) and (b) and Section 13 appears to me to be that their provisions govern only a suit and the proceedings against the landlord applicant alone and the claim due from the landlord applicant alone either on the basis of the entire debt taken by him or on the basis of a proportionate share in a Joint debt due from him and others.

It was in 1939 that Clause (d) was added in Section 9(5) of this Act and provided for further action in stayed proceedings. This later provision should not affect the interpretation of Sections 7, 13 and 44 which are as originally enacted.

45. Lastly, I may refer to the argument for the respondent that even though the Encumbered Estates Act does not intend to deal with providing any relief to the non-applicant debtors such a relief to them, if it be held that Section 13 of the Encumbered Estates Act extinguishes the entire debt due to the creditor from all the joint-debtors, will be incidental and such incidental reliefs are not unknown to law, and have been the result of certain provisions in other Acts. To my mind the relief which the non-applicant debtor gets by such an interpretation of Section 13 will not be the indirect result of a provision giving relief to the applicant debtor alone whose relief was the purpose and object of the Encumbered Estates Act, but would toe the case of direct relief provided by Section 13 if its language is construed that way.

Incidental relief, which the non-applicant debtors get is a relief to the extent of his escaping the liability of the proportionate share due from the applicant debtor in a joint debt and specially in a joint and several debt. The latter kind of incidental relief is not denied to the non-applicant debtor. In this view of the matter I need not refer to the various provisions referred to by the learned counsel for the respondent in the course of his arguments.

46. In view of the above, I am of opinion that Section 13 leads to the extinction of the creditor's claim to the extent of the liability of the applicant debtor and does not lead to the extinction of the debt to the extent of the liability of the non-applicant joint debtor, I am further of opinion that Section 9 (5) (a) applies to those cases alone in which the creditor files a claim under Section 10 against the applicant debtor in respect of the joint debt and that the result of the Special Judge's

apportioning the liability of the non-applicant debtor is simply this that in view of Clause (b) of Section 9(5) the creditor can recover the amount so determined from the non-applicant joint debtors.

I am further of opinion that Clauses (c) and (d) of Section 9(5) of the Encumbered Estates Act simply provide the alternative and the easier remedy to the creditor in getting relief against the non-applicant debtors and do not in any way affect the ordinary relief and procedure which the creditor could take to recover the amount due from the non-applicant judgment-debtors under the general law.

I, therefore, hold that the Court below was I wrong in dismissing the application for the pre-jparation of the final decree. I, therefore, would allow this appeal with costs, set aside the order of the Court below and order that the Court should proceed with the preparation of the final decree with respect to the amount due from the non-applicant joint debtors treating the proportionate amount due from the applicant debtor to have been discharged in view of the failure of the creditor to claim that amount against the applicant debtors in the proceedings under the Encumbered Estates Act.

Agarwala, J.

47. I agree and have nothing to add.

B.D. Mukerji, J.

48. I agree and have nothing to add.