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now be decided by the High Court on merits in accordance with law. It is only necessary to add that the act complained of was committed as far back as 1953 and it is desirable that the case should be dealt with as expeditiously as possible.

Appeal allowed.

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September 24.

S. M. JAKATI & ANOTHER

v.

S. M. BORKAR & OTHERS

(B. P. SINHA, JAFER IMAM and J. L. KAPUR JJ.)

*Hindu Law—Debts of father—Pious obligation of son—Partition, if affects such obligation—*Avyavaharika, *Meaning of—Sale of joint family property—"Right, title and interest of defaulter"—Bombay Land Revenue Code, 1879 (Bom. V of 1879), s. 155.*

J was the managing director of a Co-operative Bank getting a yearly remuneration of Rs. 1,000. The Bank went into liquidation and an examination of the affairs having showed that the monies of the Bank were not properly invested and that J was negligent in the discharge of his duties, a payment order for Rs. 15,100 was made by the Deputy Registrar of Co-operative Societies against him. On July 27, 1942, for the realisation of the amount, an item of property belonging to the joint family of J was attached by the Collector and brought to sale under s. 155 of the Bombay Land Revenue Code, and purchased at auction by the first respondent. This sale was held on February 2, 1943, and confirmed on June 23, 1943. In the meantime on January 15, 1943, one of the sons of J instituted a suit for partition and separate possession of his share in the joint family properties, and contended, inter alia, that the sale in favour of the first respondent was not binding on the joint family. The sale was challenged on the grounds (1) that the liability which J incurred was *avyavaharika* and therefore the interest of his sons could not be sold for the realisation of the debt, (2) that even if the debt was not *avyavaharika*, the institution of the suit for partition operated as severance of status between the members of the family and, therefore, the father's power of disposition over the son's share had come to an end and, consequently, at the auction sale the share of the sons did not pass to the auction purchaser, and (3) that what could legally be sold under s. 155

of the Bombay Land Revenue Code was the right, title and interest of the defaulter, i. e., the father alone, which could not include the share of the other members of the joint family. The evidence consisting of the notice for sale, the proclamation of sale and the sale certificate showed that the whole of the property was sold, and not the share of the father alone.

Held, that the liability which J incurred was not *avyavaharika* and that the sale of the joint family property, including the share of the sons, for the discharge of the debt, was valid.

Held, also, that, Colebrooke's translation of the term *avyavaharika* as "any debt for a cause repugnant to good morals", was the nearest approach to the true concept of the term as used in the *Smrithi* texts.

Hem Raj alias Babu Lal v. *Khem Chand*, (1943) L. R. 70 I. A. 171, relied on.

Per Imam and Kapur JJ.—(1) The liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make an alienation comes to an end. (2) Where the right, title and interest of a judgment-debtor are set up for sale, as to what passes to the auction purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for. (3) The words "right, title and interest" occurring in s. 155 of the Bombay Land Revenue Code have the same connotation as they had in the corresponding words used in the Code of Civil Procedure existing at the time the Bombay Land Revenue Code was enacted. (4) In execution proceedings it is not necessary to implead the sons or to bring another suit if severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property. (5) The liability of a father, who is a managing director and who draws a salary or a remuneration, incurred as a result of negligence in the discharge of his duties is not an *avyavaharika* debt as it cannot be termed as "repugnant to good morals".

Case Law discussed.

Panna Lal v. *Mst. Narajni*, [1952] S.C.R. 544 and *Sudhashwar Mukherjee* v. *Bhubneshwar Prasad Narain Singh*, [1954] S.C.R. 177, followed.

Khiarajmal v. *Daim*, (1904) L.R. 32 I.A. 23 and *Sat Narain* v. *Das*, (1936) L.R. 63 I.A. 384, distinguished.

Mulgund Co-operative Credit Society v. *Shidlingappa Ishwarappa*, A.I.R. 1941 Bom. 381, approved.

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 233 of 1954.

Appeal from the judgment and decree dated August 22, 1950, of the Bombay High Court in Appeal No. 80 of 1946 from original decree, arising out of the judgment and decree dated October 19, 1945, of the Court of Civil Judge, Senior Division, Dharwar, in Special Suit No. 64 of 1943.

A. V. Viswanatha Sastri and *M. S. K. Sastri*, for the appellants.

A. S. R. Chari, *Bawa Shivcharan Singh* and *Govindsaran Singh*, for respondents Nos. 2-4.

1958. September 24. The judgment of Imam and Kapur JJ. was delivered by Kapur J. Sinha J. agreed to the order proposed.

Kapur J.

KAPUR J.—This is an appeal against the judgment and decree of the High Court of Bombay varying the decree of the trial Court decreeing the plaintiff's suit for possession by partition of joint family property.

The facts of the case lie in a narrow compass. M. B. Jakati, defendant No. 1, was the Managing Director of Dharwar Urban Co-operative Bank Limited which went into liquidation, and in that capacity he was receiving a yearly remuneration of Rs. 1,000. As a result of certain proceedings taken against defendant No. 1, M. B. Jakati, by the liquidator of the Bank, a payment order for Rs. 15,100 was made by the Deputy Registrar of Co-operative Societies on April 21, 1942. In execution of this payment order a bungalow belonging to M. B. Jakati, defendant No. 1, was attached by the Collector under the Bombay Land Revenue Code on July 27, 1942. Notice for sale was issued on November 24, 1942, and the proclamation on December 24, 1942. The sale was fixed for February 2, 1943. On January 16, 1943, M. B. Jakati defendant No. 1 applied for postponing the sale which was rejected. The auction sale was held on February 2, 1943, and was confirmed on June 23, 1943,—the purchaser was S. N. Borkar, defendant No. 7, now respondent No. 1. On February 10, 1944, respondent No. 1 sold the property to defendants 8 to 10 who are respondents 2 to 4.

The following pedigree table will assist in understanding the case :

Madhavarao Balakrishan Jakati Deft. 1
= Bhimabai „ 2

Krishnaji Plff. 1	Shriniwas Plff. 1(a)	Shantibai daughter Deft. No. 3	Indumati daughter Deft. No. 4

On January 15, 1943, Krishnaji a son of defendant No. 1 brought a suit for partition of the joint family property and possession of his separate share alleging inter alia that the purchase by respondent No. 1 of the bungalow was not binding on the joint family as "it was not liable to be sold for the illegal and immoral acts on the part of defendant No. 1 which were characterised as misfeasance"; that the auction sale was under s. 155 of the Bombay Land Revenue Code under which only "the right, title and interest of the defaulter" could be sold and therefore the right, title and interest of only the father, defendant No. 1 was sold and not that of the other members. The plaintiff claimed 1/4 share of the property and also alleged that he was not on good terms with his father who had neglected his interest; that he was staying with his mother's sister and was not being maintained by his father and mother. On January 12, 1944, appellant No. 1 filed his written statement supporting the claim for partition and claiming his own share. He supported the claim of the then plaintiff that the sale in favour of respondent No. 1 was not binding on the joint family. Defendant No. 2, now appellant No. 2, the mother, also supported the plaintiff's claim and on the death of Krishnaji, she claimed his ¼ share as his heir. After the death of the original plaintiff Krishnaji, Shriniwas appellant No. 1 was substituted as plaintiff on June 28, 1944.

The suit was mainly contested by respondents 1 to 4. Respondent No. 1 pleaded that plaintiff's suit for partition was collusive having been brought at the instance of the defendant No. 1, M. B. Jakati, and it was not *bona fide*; that defendant No. 1 was made

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liable at the instance of the liquidator of the Dharwar Urban Co-operative Bank Ltd., for misfeasance because he acted negligently in the discharge of his duties as managing director of the Bank; that the debt was binding on the family as defendant No. 1, M. B. Jakati, had been receiving a yearly remuneration from the Bank and the properties were sold in payment of a debt binding on the family and therefore the sale in execution of the payment order could not be challenged as the sons were under a pious obligation under the Hindu law to discharge the debts of their father; that the sale could only be challenged on proof of the debt of defendant No. 1 being for an "immoral or illegal" purpose. These pleadings gave rise to several issues.

The learned Civil Judge held that the suit was collusive; that the liability which defendant No. 1 incurred was *avyavaharika* and was therefore not binding on the sons and thus appellant No. 1 would have $\frac{1}{3}$ share in the joint family property, defendant No. 1 $\frac{1}{3}$ and appellant No. 2 also $\frac{1}{3}$. He therefore declared the shares as above in the whole of the joint family property including the bungalow which is the only property in which the respondents are interested and which is in dispute in this appeal.

On appeal the High Court held that the debt was not *avyavaharika* as there was no evidence to support the finding of the trial Court, the order of the Deputy Registrar being in the nature of a judgment to which neither the sons nor the auction purchasers were parties and therefore it was not "evidence of anything except the historical fact that it was delivered". In regard to the question as to what interest passed to the auction purchaser on a sale under s. 155 of the Bombay Land Revenue Code, it held that the whole estate including the share of the sons was sold in execution of the payment order and therefore *qua* that property the sons had no interest left. The High Court varied the decree to this extent and the plaintiffs have come up in appeal to this Court by certificate of the High Court of Bombay.

The case of the appellants is (1) that the debt was *avyavaharika* and therefore in an auction sale the

interest of the sons and other members of the joint family did not pass to the auction-purchaser; (2) that even if the debt was not *avyavaharika* the institution of the suit for partition operated as severance of status between the members of the family and therefore the father's power of disposition over the son's share had come to an end and consequently in the auction sale the share of the sons did not pass to the auction-purchaser; and (3) that what could legally be sold under s. 155 of the Bombay Land Revenue Code was the right, title and interest of the defaulter i. e. of the father alone which could not include the share of the other members of the joint family.

The first question for decision is whether the debt of the father was *avyavaharika*. This term has been variously translated as being that which is not lawful or what is not just or what is not admissible under the law or under normal conditions. Colebrooke translated it as "a debt for a cause repugnant to good morals". There is another track of decision which has translated it as meaning "a debt which is not supported as valid by legal arguments". The Judicial Committee of the Privy Council in *Hem Raj alias Babu Lal* v. *Khem Chand* (1) held that the translation of the term as given by Colebrooke makes the nearest approach to the true conception of the term used in the *Smrithis* texts and may well be taken to represent its correct meaning and that it did not admit of a more precise definition.

In *Toshanpal Singh* v. *District Judge of Agra* (2) the Judicial Committee held that drawings of monies for unauthorised purposes, which amounted to criminal breach of trust under s. 405 of the Indian Penal Code, were not binding on the sons, but a civil debt arising on account of the receipt of monies by the father which were not accounted for could not be termed *avyavaharika*.

In the case now before us the appellants have attempted to prove that the debt fell within the term *avyavaharika* by relying upon the payment order and

(1) (1943) L.R. 70 I.A. 171, 176. (2) (1934) L.R. 61 I.A. 350.

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the findings given by the Deputy Registrar in the payment order where the liability was inter alia based on a breach of trust. Any opinion given in the order of the Deputy Registrar as to the nature of the liability of defendant No. 1, M. B. Jakati, cannot be used as evidence in the present case to determine whether the debt was *avyavaharika* or otherwise. The order is not admissible to prove the truth of the facts therein stated and except that it may be relevant to prove the existence of the judgment itself, it will not be admissible in evidence. Section 43 of the Indian Evidence Act, the principle of which is, that judgments excepting those upon questions of public and general interest, judgment in rem or when necessary to prove the existence of a judgment, order or decree, which may be a fact in issue, are irrelevant. It was then submitted that the pleadings of respondent No. 1 himself show that the debt was of an immoral or illegal nature. In his written statement, respondent No. 1 had pleaded that the liquidator of the Bank had charged defendant No. 1 with misfeasance because he was grossly negligent in the discharge of his duty and responsibility as managing director and that after a thorough enquiry the Deputy Registrar held misfeasance proved and ordered a contribution of Rs. 15,100 by him. As we have said above the translation given by Colebrooke of the term *avyavaharika* is the nearest approach to its true concept i. e. "any debt for a cause repugnant to good morals". The managing director of a Bank of the position of defendant No. 1 who should have been more vigilant in investing the monies of the Bank cannot be said to have incurred the liability for a cause "repugnant to good morals". We are unable to subscribe to the proposition that in the modern age with its complex institutions of Banks and Joint Stock Companies governed by many technicalities and complex system of laws the liability such as has arisen in the present case could be called *avyavaharika*. The debt was therefore binding on the sons.

The effect of severance of status brought about by the filing of the suit on January 25, 1943, has been

made the basis of the argument that only the share of the father could be seized in execution of the payment order made against him. This would necessitate an examination into the rights and liabilities of Hindu sons in a *Mitakshara* coparcenary family where the father is the *karta*. In Hindu law there are two mutually destructive principles, one the principle of independent coparcenary rights in the sons which is an incident of birth, giving to the sons vested right in the coparcenary property, and the other the pious duty of the sons to discharge their father's debts not tainted with immorality or illegality, which lays open the whole estate to be seized for the payment of such debts. According to the Hindu law givers this pious duty to pay off the ancestors' debts and to relieve him of the death torments consequent on non-payment was irrespective of their inheriting any property, but the courts rejected this liability arising irrespective of inheriting any property and gave to this religious duty a legal character. *Masit Ullah* v. *Damodar Prasad* (1). For the payment of his debts it is open to the father to alienate the whole coparcenary estate including the share of the sons and it is equally open to his creditors to proceed against it; but this is subject to the sons having a right to challenge the alienation or protest against a creditor proceeding against their shares on proof of illegal or immoral purpose of the debt. These propositions are well settled and are not within the realm of controversy. (*Panna Lal* v. *Mst. Naraini* (2); *Girdharee Lal* v. *Kantoo Lal* and *Mudhan Thakoor* v. *Kantoo Lal* (3); *Suraj Bansi Koer* v. *Sheo Prasad Singh* (4); *Brij Narain* v. *Mangla Prasad* (5). In the last mentioned case the Privy Council said:

"Nothing clearer could be said than what was said by Lord Hobhouse delivering the judgment of the Board in *Nanomi Babusin* v. *Modun Mohun* (6) already quoted: "Destructive as it may be of the principle of

(1) (1926) L.R. 53 I.A. 204. (2) [1952] S.C.R. 544, 552, 553, 556, 559.
(3) (1874) L.R. 1 I.A. 321, 333. (4) (1878) L.R. 6 I.A. 88, 101.
(5) (1923) L.R. 51 I.A. 129, 136. (6) (1885) L.R. 13 I.A. 1, 17, 18.

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independent coparcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is no conflict of authority".

There is no discrepancy of judicial opinion as to the pious duty of Hindu sons. In *Panna Lal* v. *Mst. Naraini* (1) this Court approved the following dictum of Suleman A. C. J. in *Bankeylal* v. *Durga Prasad* (2):

"The Hindu Law texts based the liability on the pious obligation itself and not on the father's power to sell the sons' share".

So great was the importance attached to the payment of debts that Hindu law givers gave the non-payment of a debt the status of sinfulness and such non-payment was wholly repugnant to Hindu concept of son's rights and liabilities. In *Bankeylal* v. *Durga Prasad* (2); Lal Gopal Mukherji J. said at p. 896:

"A perusal of text books of Smriti dealing with debts will show that under the Hindu Law the non-payment of a just debt was regarded as a very heinous sin."

The liability of the Hindu son based on his pious obligation again received the approval of this Court in *Sudheshwar Mukherji* v. *Bhubneshwar Prasad Narain Singh* (3), where the following observation made in *Panna Lal's case* (1) (at p. 184):

"The father's power of alienating the family property for payment of his just debts may be one of the consequences of the pious obligation which the Hindu law imposed upon the sons; or it may be one of the means of enforcing it, but it is certainly not the measure of the entire obligation"

was reiterated. And again at p. 183 Mukherjea J. (as he then was) said:

"It is a special liability created on purely religious

(1) [1952] S.C.R. 544, 552, 553, 556, 559.

(2) (1931) I.L.R. 53 All. 868, 896. (3) [1959] S.C.R. 177, 183, 184.

grounds and can be enforced only against the sons of the father and no other coparcener. The liability, therefore, has its basis entirely on the relationship between the father and the son ".

Therefore unless the son succeeds in proving that the decree was based on a debt which was for an immoral or illegal purpose the creditor's right of seizing in execution of his decree the whole coparcenary property including the son's share remains unaffected because except where the debt is for an illegal or immoral purpose it is open to the execution creditor to sell the whole estate in satisfaction of the judgment obtained against the father alone. *Sripat Singh* v. *Tagore* (1). The necessary corollary which flows from the pious obligation imposed on Hindu sons is that it is not ended by the partition of the family estate unless a provision has been made for the payment of the just debts of the father. This again is supported by the authority of this Court in *Pannalal's case* (2) where Mukherjea J. said at p. 559 :

"Thus, in our opinion, a son is liable, even after partition for the pre-partition debts of his father which are not immoral or illegal, and for the payment of which no arrangement was made at the date of the partition ".

The liability of the sons is thus unaffected by partition because the pious duty of the sons to pay the debt of the father, unless it is for an immoral or illegal purpose, continues till the debt is paid off and the pious obligation incumbent on the sons to see that their father's debts are paid, prevents the sons from asserting that the family estate so far as their interest is concerned is not liable to purge that debt. Therefore even though the father's power to discharge his debt by selling the share of his sons in the property may no longer exist as a result of partition the right of the judgment creditor to seize the erstwhile coparcenary property remains unaffected and undiminished because of the pious obligation of the sons. There does not seem to be any divergence of judicial opinion in regard

(1) (1916) L.R. 44 I.A. 1. (2) [1952] S.C.R. 544, 552, 553, 556, 559.

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to the Hindu son's liability to pay the debts of his father after partition, and by the mere device of entering into partition with their father, the sons cannot get rid of this pious obligation. It has received the approval of this Court in *Panna Lal* v. *Mst. Narain* (1) and *Sidheshwar Mukherji* v. *Bubneshwar Prasad Narain Singh* (2) where Mukherjea J. observed in the latter case at p. 184:

"It is settled law that even after partition the sons could be made liable for the pre-partition debts of the father if there was no proper arrangement for the payment of such debts at the time when the partition was effected, although the father could have no longer any right of alienation in regard to the separated share of the sons".

The question then arises how the liability of the sons is to be enforced. Another principle of Hindu law is that in a coparcenary family the decree obtained against the father is binding on the sons as they would be deemed to have been represented by the father in the suit: *Kishan Sarup* v. *Brijraj Singh* (3). As was pointed out in *Sidheshwar Mukherji's case* (2), the sons are not necessary parties to a money suit against the father who is the *karta*, but they may be joined as defendants. The result of the partition in a joint family is nothing more than a change in the mode of enjoyment and what was held jointly is by the partition held in severalty and therefore attachment of the whole coparcenary estate would not be affected by the change in the mode of enjoyment, because the liability of the share which the sons got on partition remains unaffected as also the attachment itself which is not ended by partition (S. 64 C. P. C. is a useful guide in such circumstances).

Dealing with the question as to how the interest of the sons in joint family property can be attached and sold, Mukherjea J. as he then was, observed at p. 185 in *Sidheshwar Mukherji's case* (2):

"Be that as it may, the money decree passed against the father certainly created a debt payable by

(1) [1952] S.C.R. 544, 552, 553, 556, 559.
(2) [1954] S.C.R. 177, 183, 184.
(3) (1929) I.L.R. 51 All. 932.

him. If the debt was not tainted with immorality, it was open to the creditor to realise the dues by attachment and sale of the sons' coparcenary interest in the joint property on the principles discussed above. As has been laid down by the Judicial Committee in a series of cases, of which the case of *Nanomi Babuasin* v. *Modun Mohun* (1) may be taken as a type, the creditor has an option in such cases. He can, if he likes, proceed against the father's interest alone but he can, if he so chooses, put up to sale the sons' interest also and it is a question of fact to be determined with reference to the circumstances of each individual case whether the smaller or the larger interest was actually sold in execution ".

But it was contended that a partition after the decree but before the auction sale limited the efficacy of the sale to the share of the father even though the sale in fact was of the whole estate, including the interest of the sons, because after the partition the father no longer possessed the right of alienation of the whole coparcenary estate to discharge his debts. But this contention ignores the doctrine of pious obligation of the sons. The right of the pre-partition creditor to seize the property of the erstwhile joint family in execution of his decree is not dependent upon the father's power to alienate the share of his sons but on the principle of pious obligation on the part of the sons to discharge the debt of the father. The pious obligation continues to exist even though the power of the father to alienate may come to an end as a result of partition. The consequence is that as between the sons' right to take a vested interest jointly with their father in their ancestral estate and the remedy of the father's creditor to seize the whole of the estate for payment of his debt not contracted for immoral or illegal purpose, the latter will prevail and the sons are precluded from setting up their right and this will apply even to the divided property which, under the doctrine of pious obligation continues to be liable for the debts of the father. Therefore where the joint ancestral property including the share of the sons has

(1) (1885) L.R. 13 I. A. 1, 17, 18.

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passed out of the family in execution of the decree on the father's debt the remedy of the sons would be to prove in appropriate proceedings taken by them the illegal or immoral purpose of the debt and in the absence of any such proof the sale will be screened from the sons' attack, because even after the partition their share remains liable. *Girdhareelal* v. *Kantoolal* (1), *Suraj Bansi Koer* v. *Sheo Prasad Narain Singh* (2), *Mussamat Nanomi Babuasin* v. *Modun Mohun* (3), *Chandra Deo Singh* v. *Mata Prasad* (4) which was approved by the Privy Council in *Sahu Ram Chander* v. *Bhup Singh* (5), *Pannalal* v. *Naraini* (6) and *Sidheshwar Mukherji's case* (7).

Our attention was drawn to two decisions, one by the High Court of Bombay in *Ganpatrao* v. *Bhimrao* (8) that in order to make the share of the sons liable after partition they should be brought on the record and the other of the Madras High Court in *Kameshwaramma* v. *Venkatasubba Row* (9) that the creditor has to bring another suit against the sons, obtain a decree against them limited to the shares allotted to them on partition and then attach and sell their share unless the partition was not *bona fide* in which case the decree could be executed against the joint family property. But the decision in these cases must be confined to their own facts. It is true that the right of the father to alienate for payment of personal debt is ended by the partition, but as we have said above, it does not affect the pious duty of the sons to discharge the debt of their father. Therefore where after attachment and a proper notice of sale the whole estate including the sons' share, which was attached, is sold and the purchaser buys it intending it to be the whole coparcenary estate, the presence of the sons *eo nomine* is not necessary because they still have the right to challenge the sale on showing the immoral or illegal purpose of the debt. In our opinion where the pious obligation exists and partition takes place after the decree and

(1) (1874) L. R. 1 I.A. 321, 333. (2) (1878) L.R. 6 I.A. 88, 101.
(3) (1885) L.R. 13 I.A. 1. (4) (1909) I.L.R. 31 All. 176, 196.
(5) (1916) L.R. 44 I.A. 1. (6) [1952] S.C.R. 544, 552, 553, 556, 559.
(7) [1951] S.C.R. 177, 183, 184. (8) I.L.R. 1950 Bom. 114.
(9) (1914) I.L.R. 38 Mad. 1120.

pending execution proceedings as in the present case, the sale of the whole estate in execution of the decree cannot be challenged except on proof by the sons of the immoral or illegal purpose of the debt and partition cannot relieve the sons of their pious obligation or their shares of their liability to be sold or be a means of reducing the efficacy of the attachment or impair the rights of the creditor.

Reliance is placed on the judgment in *Khiarajmal* v. *Daim* (1) where the Privy Council held that the sale cannot be treated as void on the ground of mere irregularity but the Court has no jurisdiction to sell the property of persons " not parties to the proceedings or properly represented on the record ". There two such persons were Alibux and Naurex. As against Alibux there was no decree. He was not a party to the suit and it was held by the Privy Council that his interest in the property " seems to have been ignored altogether ". He was not even mentioned as a debtor in the award on the basis of which the decree, which was executed was made. Similarly Naurez was not represented in either of the suits and therefore there was no decree against him and the sale of his property also was therefore without jurisdiction and null and void. This case cannot apply to sons in a joint Hindu family where a father represents the family and the decree is executable against the shares of the sons while the coparcenary continues and the liability of their shares continues after partition. *Sat Narain* v. *Das* (2) is equally inapplicable to the present case. There the Privy Council was dealing with the father's power of disposal of property before and after partition which power vests in the Official Assignee on his bankruptcy, the question of the right of the judgment-creditor to proceed in execution against the divided shares of sons which had been attached before partition was not a point in controversy. There was no decision on the powers of an executing court to proceed against the shares of the sons but the question related to voluntary alienations by a father for payment of his debts not incurred for an immoral or illegal purpose.

(1) (1904) L.R. 32 I.A. 23. (2) (1936) L.R. 63 I.A. 384.

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In cases where the sons do not challenge the liability of their interest in the execution of the decree against the father and the Court after attachment and proper notice of sale sells the whole estate and the auction-purchaser purchases and pays for the whole estate, the mere fact that the sons were *eo nomine* not brought on the record would not be sufficient to defeat the rights of the auction-purchaser or put an end to the pious obligation of the sons. As was pointed out by Lord Hobhouse in *Malkarjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa* (1):

"Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the facts; and that if he is to be held bound to enquire into the accuracy of the Court's conduct of its own business, no purchaser at a Court sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Court it ought to do."

In *Mussamat Nanomi Babuasin* v. *Modun Mohun* (2) Lord Hobhouse said at p. 18:

"But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the executing proceedings."

The question which assumes importance in an auction sale of this kind therefore is what did the court intend to sell and did sell and what did the auction purchaser purport to buy and did buy and what did he pay for. One track of decision of which *Shambu Nath Pandey* v. *Golab Singh* (3) is an instance, shows when the father's share alone passes. In that case the father alone was made a party to the proceedings. The mortgage, the suit of the creditor and the decree and the sale certificate all purported to affect the rights of the father and his interest alone. It was therefore held that whatever the nature of the debt, only the father's

(1) (1900) L.R. 27 I.A. 216, 225. (2) (1885) L.R. 13 I.A. 1.
(3) (1887) L.R. 14 I.A. 77.

right and interest was intended to pass to the auction-purchaser. In *Meenakshi Naidu* v. *Immudi Kanaka Rammaya Kounden* (1) which represents the other track of decision, the Privy Council held that upon the documents the court intended to sell and did sell the whole of the coparcenary interest and not any partial interest. The query in decided cases has been as to what was put up for sale and was sold and what the purchaser had reason to think he was buying in execution of the decree. *Mussamat Nanomi Babuasin* v. *Modun Mohun* (2) (supra), *Bhagbut Persad* v. *Mussamat Girja Koer* (3), *Meenakshi Naidu* v. *Immudi Rammaya Kounden* (1) and *Rai Babu Mahabir Persad* v. *Rai Markunda Nath Sahai* (4) and *Daulat Ram* v. *Mehr Chand* (5).

In the present case the payment order was made by the Deputy Registrar on April 21, 1942, and after the order had been sent to the Collector for recovery, the property was attached on April 24, 1942, and notice of sale was issued on November 24, 1942, and was published under ss. 165 and 166 of the Bombay Land Revenue Code. The proclamation of sale was dated December 12, 1942.

The property put up for sale was plot No. 36-D measuring 6 acres and one guntha and its value was specified as 13,000 rupees. There was a note added:

"No guarantee is given of the title of the said defendant or of the validity of any of the rights, charges or interests claimed by third parties".

The order confirming the sale also shows that the whole bungalow was sold. It was valued at Rs. 16,000 and there was a mortgage of Rs. 2,000 against it and what was sold and confirmed by this order was the whole bungalow. The sale certificate was in regard to the whole bungalow i. e. City Survey No. 67-D measuring 6 acres and one guntha the sale price being Rs. 13,025. There is little doubt therefore that what was put up for auction sale was the whole bungalow

(1) (1888) L.R. 16 I.A. 1. (2) (1885) L.R. 13 I.A. 1.
(3) (1888) L.R. 15 I.A. 99. (4) (1889) L.R. 17 I.A. 11, 16.
(5) (1889) L.R. 14 I.A. 187.

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and what the auction-purchaser purported to buy and paid for was also the whole bungalow and not any fractional share in it. It is a case where not only was the payment order passed before the partition but the attachment was made and the sale proclamation was issued before the suit for partition was filed and the sale took place of the whole property without any protest or challenge by the sons and without any notice to the Collector or the judgment-creditor of the filing of the suit for partition. In such a case respondent No. 1 is entitled to defend his title upon the grounds which would have justified the sale had the appellants been brought on record in execution proceedings. The binding nature of the decree passed on the father's debts not tainted with immorality or illegality, and the pious obligation imposed on the sons under the Mitakshara law would be sufficient to sustain the sale and defeat the sons' suit in the same way and on the same grounds as in the case of execution proceedings. *Nanomi Babuasin* v. *Modun Mohun* (1). Consequently whether the sons were made parties to the execution proceedings or brought a suit challenging the sale of their shares the points for decision are the same—the nature of the debts and liability of the sons under Hindu law, and these are the determining factors in both the cases i.e. the sons being parties to the execution proceedings or their suit challenging the sale of their shares.

The effect of attachment on the severance of status by the filing of a suit by one of the members of the coparcenary whose share was liable in execution of the decree has not been debated at the bar and how exactly it would affect the rights of the parties need not therefore be decided in this case. As a consequence it would not be necessary to discuss the pronouncements of the Privy Council in *Suraj Bansi Koer* v. *Sheo Prasad Singh* (2); *Moti Lal* v. *Karabuldin* (3); *Ragunath Das* v. *Sundar Das Khetri* (4); *Ananta Padmanabha Swami* v. *Official Receiver, Secunderabad* (5).

(1) (1885) L.R. 13 I.A. 1.
(2) (1878) L.R. 6 I.A. 88, 101.
(3) (1897) L. R. 24 I.A. 170.
(4) (1914) L.R. 41 I.A. 251.
(5) (1933) L.R. 69 I.A. 167, 174-5.

The argument based on the interpretation of the words 'right, title and interest of the defaulter' in s. 155 of the Bombay Land Revenue Code was that it was only the share of the defaulter himself which was and could be put up for auction sale. That the whole of the property was put up for sale, was sold and was purchased as such is shown by the documents to which reference has already been made viz., the notice of November 24, 1942, proclamation of sale of December 24, 1942, the order of confirmation of sale dated June 28, 1943, and the sale certificate issued by the Collector.

The Civil Procedure Code at the time of the enactment of the Bombay Land Revenue Code required that the property sold in execution should be described as "right, title and interest of the judgment debtor" and the same words have been used in s. 155 of the Bombay Land Revenue Code. It is a question of fact in each case as to what was sold in execution of the decree. In *Rai Babu Mahabir Prasad* v. *Markunda Nath Sahai* (1) Lord Hobhouse observed as follows at p. 16:

"It is a question of fact in each case, and in this case their Lordships think that the transactions of the 4th and 5th of January, 1875, and the description of the property in the sale certificate, are conclusive to shew that the entire corpus of the estate was sold."

Similarly in *Meenakshi Naidu* v. *Immudi Kanaka Rammaya Kounden* (2) the whole interest of the coparcenary was held to be sold taking into consideration the evidence which had been placed on the record. Lord FitzGerald at p. 5 pointed out the difference where only the father's interest was intended to pass:

"In *Hurdey Narain's case*" (*Hurdey Narain* v. *Rooder Perkash* (3)) "all the documents shewed that the Court intended to sell, and that it did sell nothing but the father's share—the share and interest that he would take on partition, and nothing beyond it—and this tribunal in that case puts it entirely upon the ground

(1) (1889) L.R. 17 I.A. 11, 16. (2) (1888) L.R. 16 I.A. 1.
(3) (1883) L.R. 11 I.A. 26, 29.

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that everything shewed that the thing sold was "whatever rights and interests, the said judgment debtor had in the property "and nothing else".

In *Sripat Singh* v. *Tagore* (1) the "right, title and interest of the judgment debtor" were sold and there also it was held to convey the whole coparcenary estate and it was remarked that it was of the utmost importance that the substance and not merely the technicality of the transaction should be regarded. What is to be seen is what was put up for sale what the court intended to sell and what the purchaser was intending to buy and what he purported to buy.

Counsel for the appellants relied on *Shambu Nath Panday* v. *Golab Singh* (2) where it was held that right and interest of the father meant personal interest but in that case as we have pointed out, the documents produced all showed that the father's interest alone was intended to pass.

In *Mulgund Co-operative Credit Society* v. *Shidlingappa Ishwarappa* (3) it was held that the sale under the Bombay Land Revenue Code has the same effect as the sale by the Civil Court. The language used in the Bombay Land Revenue Code and the then existing Civil Procedure Code is similar i.e. " the right, title and interest of the defaulter " in one case and " of the judgment debtor " in the other. This is supported by the observation of the Privy Council in *Rai Babu Mahabir Prasad* v. *Markunda Nath Sahai* (4) and as to what passed under the sale does not become any different merely because the sale is held under s. 155 of the Bombay Land Revenue Code rather than the Code of Civil Procedure. The effect in both cases is the same.

We hold therefore (1) that the liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make an

(1) (1916) L.R. 44 I.A. 1.
(2) (1887) L.R. 14 I.A. 77.
(3) A.I.R. 1941 Bom. 385.
(4) (1889) L.R. 17 I.A. 11, 16.

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alienation comes to an end. (2) Where the right, title and interest of a judgment-debtor are set up for sale as to what passes to the auction-purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for. (3) The words "right, title and interest" occurring in s. 155 of the Bombay Land Revenue Code have the same connotation as they had in the corresponding words used in the Code of Civil Procedure existing at the time the Bombay Land Revenue Code was enacted. (4) In execution proceedings it is not necessary to implead the sons or to bring another suit if severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property. (5) The liability of a father, who is a managing director and who draws a salary or a remuneration, incurred as a result of negligence in the discharge of his duties is not an *avyavaharika* debt as it cannot be termed as "repugnant to good morals".

In the result the appeal fails and is dismissed with costs.

Sinha J.

SINHA J.—I agree to the order proposed.

Appeal dismissed.

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September 30.

SRI BARU RAM

v.

SHRIMATI PRASANNI & OTHERS

(VENKATARAMA AIYAR, GAJENDRAGADKAR and A. K. SARKAR JJ.).

Election Petition—Corrupt practice—Procuring assistance of Government servant by appointing as polling agent—Proof—Nomination paper, rejection of—Failure to produce copy of electoral roll—If rejection improper—Representation of the People Act, 1951 (43 of 1951), ss. 2(c), 33, 36, 46 and 123(7).

The first respondent filed an election petition against the