
(1954) 12 KL CK 0005
In the High Court Of Kerala
Case No : A.S. No. 221 of 1952

Anantha Pai Ganesha Pai

APPELLANT

Vs

Kesava Pai and others

RESPONDENT

Date of Decision : 20-12-1954

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : AIR 1954 Ker 249

Hon'ble Judges : Koshi, C.J; Kumara Pillai, J

Bench : Division Bench

Advocate : T.M. Mahalinga Iyer and P.A. Krishna Iyer, for the Appellant; T.S. Venkiteswara Iyer, C.S. Ananthakrishna Iyer and K. Balakrishna Menon for Respondent Nos. 2 and 3 and A. Madhava Prabhu for Respondent Nos. 7 to 16, for the Respondent

Final Decision : Dismissed

Judgement

Kumara Pillai, J.—This is an appeal against the preliminary decree, in a suit for partition. The parties are Gowada Saraswatha Brahmins governed by the Hind Mithakshara Law. Plaintiffs 1 be 3 are brothers. Their father was defendant 2. He died during the pendency of the suit in the lower Court. Defendant 18 is the widow of defendant 2 and the mother of the plaintiffs.

2. There are 4 items of properties in the plaint schedule. Items 1 and 2 are garden lands held on verumpattom from the Cochin Thirumala Devaswom, and items 3 and 4 are garden lands held on kanom from the same devaswom. According to the allegations in the amended plaint, plaint items 1 and 2 are the ancestral properties of the joint family of defendant 2 and the plaintiffs and plaint items 3 and 4 are properties purchased with the Sale proceeds of another ancestral property belonging to the said joint family. All the plaint items thus belong to the joint family of defendant 2 and the plaintiffs, and defendant 2 and plaintiffs 1 to 3 have equal rights in them. On 1-8-1102 defendant, 1 took an, usufructuary mortgage, Ex. XXI, for these properties from defendant 2 alone and

obtained possession of them. Exhibit XXI is not supported by consideration and family necessity, and plaintiffs were also not parties to it. It does not, therefore, bind the plaintiffs or their shares in the plaintiff properties. With a view to obtain the properties for himself, defendant 1 advanced a further sum of Rs. 300 to defendant 2 for immoral purposes and took from him a pro-note on 11-8-1103, and on that pronote he obtained a decree, Ex. N, against defendant 2 in O.S. No. 496 of 1104 of the Cochin Munsiff's Court and attached and purchased the plaintiff properties in execution of that decree and also got delivery of them in pursuance of the court sale. The shares of the plaintiffs in the plaintiff properties were not liable to be attached and sold in execution of the decree in O.S. No. 496 of 1104, and, in fact their shares have not also been sold in execution. The decree and execution proceedings, including the court sale, do not, therefore affect the plaintiffs or their shares in the plaintiff properties. On the above allegation's, plaintiffs prayed for partition and recovery of possession of 3/4 share in the plaintiff properties. They also sought for a declaration that the mortgage, Ex. XXI, and the decree and execution proceedings in O.S. No. 496 of 1104 were not binding on them and their shares in the plaintiff properties. It was further prayed that, in the event of Ex. XXI being held to be binding on the plaintiffs and their shares in the plaintiff properties, they might be allowed to redeem that mortgage also so far as their shares were concerned. Plaintiff's stated that, if they had to redeem Ex. XXI, they were ready to pay the value of the improvements effected by defendant 1 and those claiming under him, and sought to set off against the value of improvements payable by them the damages due to them on account of the alleged dismantling and removal by defendant 1 of a building worth Rs. 15,000 from plaintiff item 4. Mesne profits, past and future, at the rate of Rs. 450/- per year, were also claimed.

3. It may also be mentioned here that after executing Ex. XXI, defendant 2 took back the properties on a lease from defendant 1 and that what was sold in execution in O.S. No. 496 of 1104 is described in the sale certificate in that case, Ex. S, as the

Remaining rights belonging to the judgment debtor after the charge for the mortgage amount of Rs. 8,000 due to the decree-holder under the mortgage of 1-8-1102 (Ex. XXI) and for Rs. 444 due to him on account of arrears of rent under the lease back of the same date and Interest thereon.

4. Defendant 1 and defendant 3, who has purchased item 1 from defendant 1, contested the suit. Their main contentions were that the plaintiff properties belonged to defendant 2 alone and the members of his joint family had no right at all to those properties, that Ex. XXI and the pronote of 11-8-1103 were taken bona fide and for good consideration, that the plaintiffs had no right to question the validity of those documents and the lease back or of the decree and court sale in O.S. No. 496 of 1104, that, even if it were to be found that the plaintiffs were also entitled to the plaintiff properties, Ex. XXI and the court sale in O.S. No. 496 of 1104 would bind the plaintiffs and other members of their joint family

since the mortgage and pronote were executed for discharging family-debts and the plaintiffs were also bound to discharge Exs. XXI and N on account of their pious obligation as the sons of defendant 2, that the debts were not incurred for any immoral or illegal purposes, that in any event defendants 1 and 3 had perfected title by adverse possession since they had been openly holding the properties under the court sale for over twelve years, that the ages of the plaintiffs given in the plaint were incorrect and that the suit was also barred by limitation.

Defendant 1 further denied the allegation that he had dismantled and removed a building from plaint item 4, and defendant 3 claimed that he was a bona fide purchaser of item 1 for valuable consideration and that the plaintiffs were not therefore entitled to get any relief in respect of that item. He also stated that he was entitled to get Rs. 25,000 as value of the improvement effected by him in item 1, and prayed that, in the event of a decree being given to the plaintiffs for partition, an equitable relief might be allowed to him directing the division to be so made as to exclude item 1, as far as possible, from the plots to be allotted to the plaintiffs.

Defendant 1 too claimed value of improvements in respect of the properties which are in his possession. During the course of the suit defendant 3 died, and his legal representatives, defendants 6 to 17, filed a separate written statement reiterating the Contentions raised in his written statement.

5. The lower Court found that the plaint properties belonged to the Joint family of defendant 2 and the plaintiffs and that the mortgage, Ex. XXI, was fully supported by consideration and family necessity and was binding on the plaintiffs and their shares in the plaint properties. With regard to the decree in O.S. No. 496 of 1104, the lower Court found that the amount under the pronote was not borrowed for any immoral or illegal purposes of defendant 2, and that Ex. E was, therefore, binding on the plaintiffs on account of their pious obligation as the sons of defendant 2 to discharge his debts.

Nevertheless, it held that the execution sale in that suit was not binding on the plaintiffs, since what was actually sold thereby was only the share of defendant 1 and did not include the interests of his sons. The lower court also found that the ages of the plaintiffs given in the plaint were correct, that the suit was not barred by adverse possession or limitation, and that defendant 3 could not be said to be a bona fide purchaser who had bought the property without notice of the plaintiffs' rights. As a result of these finding's the lower Court passed a preliminary decree for partition, leaving open the issues relating to value of improvements, damages for waste and claim for mesne profits. The preliminary decree reads as follows:

(a) It is declared that the execution sale proceedings in O.S. No. 496 of 1104 on the file of the Cochin Munsiff's Court are not binding on the plaintiffs and three-fourth of the equity of redemption over the plaint properties;

- (b) It is also declared that Ex. XXI usufructuary mortgage is binding on the plaintiffs and the plaint properties;
- (c) It is further declared that the plaintiffs are the owners of three-fourth of the suit properties and that they are entitled to a partition of the same by metes and bounds;
- (d) The plaintiffs are entitled to redeem the said three-fourth share in the plaint properties on depositing Rs. 6,750 and the value of improvements;
- (e) The value of improvements, waste committed in the plaint properties, if any and mesne profits will be determined at the time of final decree;
- (f) Past mesne profits for the plaintiffs are disallowed; but they are entitled to three-fourth of the future mesne profits from the (Sate of the deposit of redemption price of Rs. 6,750 and the value of improvements, if any, in the properties due to the defendants;
- (g) The amounts towards waste and mesne profit if any due to the plaintiffs will be set off towards the amounts due to the defendants;
- (h) The plaintiffs will pay the court-fee doe to the Sirkar and the State will have first charge over the three-fourth share of the equity of redemption over the plaint schedule properties decrees to the plaintiffs, under this decree, under O. 33 R. 10, Civil P.C.; and
- (i) Parties will suffer their respective costs.

The plaintiffs will apply for the Issue of a commission for dividing the properties by (sic) and bounds within two months from the date of this decree.

6. Defendant 1 has filed this appeal against the above decree, and his main contention in this Court is that the Court below has gone wrong in declaring that the execution sale in O.S. No. 196 of 1104 is not binding on the plaintiffs and their shares in the plaint properties and in allowing partition on the basis of that declaration. Defendant 3 also has filed a memorandum of objections, supporting defendant 1 and praying that the equitable relief asked for by him in the lower Court might be allowed in the event of the decree for partition being confirmed by this Court.

Neither of them has challenged before as the correctness of the lower Court's findings that the plaint properties belonged to the joint family of defendant 2 and the plaintiffs. Likewise the plaintiffs-respondents' counsel has not objected to the findings that the mortgage, Ex. XXI is supported by consideration and family necessity and that the debt under the pronote who not incurred by defendant 2 for any immoral or illegal purposes.

7. Since the debt under the pronote was, not incurred for any immoral or illegal purposes it cannot be disputed that, on account of their pious obligation as the sons of defendant a plaintiffs were bound to discharge the decree, to O.S. No.

496 of 1104, Ex. N. and that in execution of that decree, it was open to defendant 1 to attach and sell the whole of the plaintiff properties including the shares or interests of the plaintiffs, even though the plaintiffs, themselves were not parties to the suit, in - "Shripat Singh v. Prodvot Kumar". AIR 1916 PC 220 (A) the Privy Council has observed:

The property in question was joint property, governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution-creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone.

This decision has been followed in - Sarju Prasad v. Ramsaran, AIR 1931 All. 541 (B) wherein also it has been held:

Where the debt is not incurred for illegal or immoral purposes, the executing creditor is entitled to sell the whole of the estate in satisfaction of the judgment obtained against the father alone.

In - K. Swaminatha Iyer and Another Vs. K.G. Krishnaswami Iyer and Others, , Patanjali Sastri J. who subsequently became the Chief Justice of India, has said:

It is not by reason of the father having represented the son in the suit that the son's interest is bound and passed at the execution sale but by reason of his pious obligation to pay his father's personal debt and the correlative power of the latter to sell family property including the sons's share for the discharge of such debts, a power which the Court in execution exercises for the benefit of the judgment creditor,.....

It is not the form of the decree or the frame of the suit but the nature of the debt that determines the son's liability. If it is neither illegal nor immoral, then all that the son can claim for the protection of his interest is an opportunity to show that the debt for which the decree was passed was not binding on him.

At the time of the execution sale in O.S. No. 496 of 1104 the plaintiff properties were subject to the mortgage, Ex. XXI, which has been found to be supported by consideration and family necessity and binding on the plaintiffs and their shares in the plaintiff properties. The appellant's case is that, subject to the above mortgage and his right under the lease back the whole of the plaintiff properties, including the shares of the plaintiffs as well as the share of defendant 2, who was the judgment-debtor in O.S. No. 496 of 1104, was attached and sold in execution of the decree in that suit.

The respondents' case is that, although it was open to the decree-holder in O.S. No. 496 of 1104 to attach and sell the whole of the equity of redemption of the plaintiff properties in execution of the decree he has in fact sold only the right which defendant 2, the judgment-debtor in that suit, had in the equity of redemption and not the rights of the present plaintiffs. In paragraph 4(a) of the

amended plaint (page 3 of the paper-book) plaintiffs alleged specifically that their shares in the plaint properties had not been sold in execution.

The main question to decide in this appeal is, therefore whether it was only the interest of defendant 2 in the plaint properties that was sold in execution of the decree in O.S. No. 496 of 1104 or whether the interests of his sons also were sold and purchased by the decree-holder.

8. The principles on which this question should be decided, as gatherable from the decisions of the Privy Council and other reported cases, have been summarised as follows at pages 420 and 421 of Mayne's Hindu Law, 1950 Edition:

The question whether the execution sale passes only the father's interest in the property sold or the whole property including the son's interest depends upon the form of the execution proceedings including the sale proclamation and sale certificate as well as upon the proceedings in suit in which the decree was made. While the absence of the sons in the execution proceedings may be a material consideration there is no rule that the coparcenary interest will not pass by an execution sale where the suit was against the father alone.

The question in each case will be whether the purchaser bargained and paid for the entirety of the interest. It is not a question of what the Court could have done or what it ought to have done but what it did and what was put up for sale and what was purchased. This is in each case a mixed question of law and fact as to what the Court intended to sell at public auction, and what the purchaser expected to buy.

The Court cannot, sell more than the law allows, but if it appears as a fact that the Court intended to sell less than it might have sold or even less than it ought to have sold, and this was known to the, purchasers, no more will pass than what was in fact offered for sale. Where the son intervenes in execution and falls to get a definite decision in his favour that it is only the father's share that should be sold, the inference is that the entirety of the estate passes to the purchaser at the Court sale. It is the substance and not the mere technicalities of the transaction that should be regarded.

Exhibit XXI was executed by defendant 2 on 1-8-1102. From Ex. E and the evidence of P.W. 3 it is clear that plaintiff 1 was born before the execution of Ex. XXI and that defendant 2 had at least one son alive at the time of the execution of that document. In Ex. XXI there was however no mention of this son or of the fact that the properties belonged to the joint family.

It was stated therein that the plaint properties belonged to defendant 2 by virtue of two lease deeds and a sale deed. The promissory note on which defendant 1 obtained the decree in O.S. No. 496 of 1104 was also executed by defendant alone, and his sons were not parties to that suit. It has not been shown that this promissory note was supported by consideration binding on the joint family of

defendant 2 and the plaintiffs.

But for the pious obligation of the plaintiffs to discharge the debts of their father, their shares of the joint family properties would not be liable at all for the amount under the pro-note or the decree amount in O.S. No. 496 of 1104. In the execution proceedings in O.S. No. 496 of 1104 also the plaintiffs were not impleaded. Exhibit S, the sale certificate in O.S. No. 496 of 1104, shows that what was sold in execution of the decree in that suit was the balance right which the defendant had after the execution of Ex. XXI and the lease back.

(Portion in Malayalam here omitted.)

These facts and circumstances would show that Ex. XXI was taken by defendant 1 on the basis that the plaint properties were the separate properties of defendant 2 and not on the basis that they were joint family properties and that he also believed at the time of the execution sale in O.S. No. 496 of 1104 that the plaint properties were the separate properties of defendant 2. No doubt defendant 1 has now deposed as D.W. 1 that in taking Ex. XXI and the promissory note he dealt with defendant 2 as the manager of the joint family.

This evidence is belied not only by the facts and circumstances mentioned above but also by his admission in the witness box that he had not enquired either at the time of Ex. XXI at any other time whether defendant 2 had any sons. (See page 6 of his deposition). To a question asked in his cross-examination as to why Ex. XXI was taken without mentioning anything about the children of defendant 2 he replied.

It is not my business to enquire whether Krishna Pai (defendant 2) has children. I have never enquired how many children Krishna Pai has. I do not know how many sons or daughters he has.

There is therefore considerable force in the contention of the plaintiffs' counsel that what was intended to be sold in execution in O.S. No. 496 of 1104 and purchased by defendant 1 could not have been the rights of the joint family consisting of defendant 2.

That what was actually sold in execution in O.S. No. 493 of 1104 and purchased by defendant 1 was only the rights of defendant 2 and did not include the coparcenary rights of his sons, in further clear, from defendant 1's contention even in this suit itself that the plaint properties belonged to defendant 2 alone and that the members of his joint family had no right to those properties at any time. Paragraph (1) of his written statement: (Portion in Malayalam here omitted).

Almost in identical terms defendant 3 also has put forward the same contention in para. 3 of his written statement. On account of this contention, a specific issue also had to be raised in the suit as to whether the plaint properties were the joint family properties of the plaintiffs, and defendant 2 (See issue 1). When such was his case defendant 1 could never have intended to cause the sale of the rights of

the joint family in execution of the decree in O.S. No. 496 of 1104 or intended to purchase the rights of the joint family.

He could only have intended to cause the sale of the interest of defendant 2, and if, in fact, defendant 2 had only a fractional right and not the full rights in the properties defendant 1 could obtain by the Court sale and purchase only that fractional right and not the full rights. To use the words of Mayne.

If it appears as a fact that the Court intended to sell less than it might have sold or even less than it ought to have sold and this was known to the purchasers, no more will pass than what was in fact offered for sale.

Although it was open to defendant 1 to cause the sale of the entire joint family rights, including the coparcenary rights of the sons of defendant 2, in execution of the decree in O.S. No. 496 of 1104, from the circumstances of the case it is clear that what was actually sold and intended to be sold in that suit was only the rights of defendant 2 and not the rights of the joint family in the properties.

9. In support of the contention that, although the Court sale Ex. S, was only of the rights of defendant 2, defendant 1 has thereby obtained not only the rights of defendant 2 but also the coparcenary rights of the plaintiffs in the plaint properties, reliance was placed by the appellant's counsel on the decisions in "Nanomi Babuasin v. Modaun Mohun," 13 Cal 21 (PC) (D); "Mahabir Parshad v. Moheswar Nath," 17 Cal 584 (PC) (E), AIR 1916 PC 220 (A); Sarju Prasad and Another Vs. Ramsaran Lal and Others and K. Swaminatha Iyer and Another Vs. K.G. Krishnaswami Iyer and Others, .

These decisions do not, however, lend any support to the appellant, and they are helpful only to the plaintiffs. No doubt the Privy Council has said in 13 Cal 21 (PC) (D),

If his (father's) debt was of a nature to support a sale of the entirety, he might legally have sold it without suit,, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale.

But immediately after the above passage, their Lordships have also added:

If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone, the absence of the sons from the proceedings may be one material consideration. 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 execution proceedings.

Therefore, one of the primary considerations, according to the decision in

"Nanomi Babuasin v. Modhun Mohun (D)", is whether the purchaser has bargained and paid for the entirety. This is further emphasised in the penultimate paragraph of their Lordships' judgment which reads:

There remains only the question whether anything more than the father's coparcenary interest was bargained for, paid for, and taken possession of by the purchaser. On this point, their Lordships are clearly of opinion that the High Court have decided rightly. Indeed the Subordinate Judge did not decide otherwise, so far as the facts go.

As before mentioned, he held that only the coparcenary interest passed, because of the effect he ascribed to - "Deendayal v. Jugdeep Narain Singh", 3 Cal 198 (PC) (F). But he was clear that the language of the execution and sale proceedings was such that the purchaser must have thought that he was buying the entirety. It is equally clear that all the parties thought the same.

From this passage it is clear that their Lordships were of the opinion that, in a case in which the decree was obtained against the father alone and it was only his right, title, and interest that was proclaimed and sold in execution, the coparcenary rights of the sons also would be obtained by the purchaser only if there are circumstances to show that the parties intended to have a sale and purchase of the joint family rights and not merely the father's rights.

When, as in the present case, the decree-holder-auction-purchaser is denying that the properties belonged to the joint family at all and the decree was obtained and execution taken out on the footing that the properties belonged to the father alone, it is impossible to hold that, when the decree-holder caused the right, title and interest of the father to be sold in execution and purchased the same himself, he did so believing that thereby he was buying the coparcenary rights of the sons also.

17 Cal 584 (E), is also a case decided by the Privy Council. Although it was held in that case that the description of the property in the sale certificate as the right, title, and interest of the judgment-debtor was consistent with the sale of every interest which the judgment-debtor might have sold, including the sale of the sons' right also, for discharging his debts not incurred for immoral or illegal purposes, their Lordships have observed therein also that it is a question of fact in each case. Their Lordships say at page 589 of the report:

The Procedure Code at that time required that the property sold in execution should be described as the right, title and interest of the judgment-debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor, nothing is sold but his interest as a co-sharer. It is a question of fact in each case; and in this case their Lordships think that the transactions of 4th and 5th January 1875, and the description of the property in the gale certificate, are conclusive to show that the entire corpus was sold.

It was therefore only by taking into consideration the circumstances under which the Court sold the property in execution that their Lordships decided in - "Mahabir Parshad v. Moheswar Nath (E)", the question of fact whether by the sale of the right, title and interest of the judgment-debtor in the suit, the coparcenary rights of his sons also were obtained by the auction-purchaser.

Similarly it was because it was seen from the circumstances of the case that the parties considered at the time of the sale that the entire estate, and not merely the right of the father, was being sold that it was decided in AIR 1916 PC 220 (A), also that by the sale of the right, title, and interest of the judgment-debtor the coparcenary rights of his sons also were conveyed to the auction-purchaser. That also was a case decided by the Privy Council. The opening sentences in the judgment in that case read:

The point to be decided in this case is extremely simple, and it is this what was the extent of the estate that passed on the sale, under a decree of the court of 13-8-1904 of the "right, title and interest" of a judgment-debtor of certain property. There is no doubt whatever that all the parties considered that the entire estate had been sold under the order.

Then, the judgment deals with the facts on which was based their Lordships' conclusion that all the parties considered that the entire estate and not merely the father's right, title and interest had been sold. " Sarju Prasad and Another Vs. Ramsaran Lal and Others , has merely followed the Privy Council decision in " AIR 1916 PC 320 (A)", referred to above, and all that has been laid down therein is only that the mere fact that in the proclamation of sale only the right, title and interest of the judgment-debtor are ordered to be sold would not prevent the whole interest from passing.

There is nothing in that decision which militates against the rule that the question whether the whole interest has passed or not in such a case is a question of fact to be decided upon the circumstances of each case. K. Swaminatha Iyer and Another Vs. K.G. Krishnaswami Iyer and Others, , also is no authority for holding that, in every case in which the right, title and interest of a judgment-debtor has been sold in execution of a decree obtained against the father alone, the coparcenary rights of the sons also pass to the auction-purchaser.

That was a case in which a joint family property was sold in execution of a decree obtained against the father alone on a promissory note executed by him. It was contended on behalf of the sons that the sale was not binding on their shares and could be deemed to have passed to the auction-purchaser only the rights of the father in as much as they were not parties to the suit and no one could be made liable on a negotiable instrument unless his name clearly appeared as the name of the person liable thereon. The passages in the judgment of Patanjali Sastri, J. relied upon by the appellant's counsel occur in the portion of the judgment dealing with this contention, and reads:

It is true that no one could be made liable on a negotiable instrument unless his name clearly appears as the name of the person liable thereon, - "Sadasukh Jankidas v. Sir Kishen Pershad", AIR 1918 PC 146 (F1), and it is also true that a distinction has to be made for some purposes between liability on the Instrument and liability for the consideration thereof as for instance, in the case of an indorsee who is limited only to his remedy on the note - S. Maruthamuthu Naicker Vs. P. Kadir Badsha Rowther and Others, , or for the purpose of applying the presumption under S. 118, Negotiable Instruments Act, "A. Narayana Rao v. G. Venkatapayya" Vide AIR 1937 Mad 182 (H). The distinction also becomes relevant where the representative capacity of the executant as the manager pf the family comes into question. It has been held that where a suit is instituted on a promissory note it is "prima facie" a personal claim and the defendant alone is liable to satisfy the decree unless it directs that it is to be paid out of family property, although the debt was in fact incurred for family necessity:

- Chippagiri Nagireddi Vs. Venkadari Somappa, . But the distinction can have no meaning where the suit is brought by the payee against the maker and the decree is sought to be enforced against the judgment-debtor's sons to the extent of his interest in the family property. For, it is not by reason of the father having represented the son in the suit that the son's interest is bound and passes at the execution sale but by reason of his pious obligation to pay his father's personal debt and the correlative power of the latter to sell family property including the son's share for the discharge of such debts, a power which the Court in execution exercises for the benefit of the judgment-creditor.

This was recognised in the last mentioned case where the Court emphasised that it was not concerned with the application of the pious obligation rule in execution proceedings because the manager of the family there was not the father. It is not the form of the decree or the frame of the suit but the nature of the debt that determines the son's liability. If it is neither illegal nor immoral then all that the son can claim for the protection of his interest is an opportunity to show that the debt for which the decree was passed was not binding on him.

There is nothing, in that passage to warrant the proposition that in every case in which the right, title, and interest of a judgment-debtor is sold in execution of a decree obtained against the father alone, the sale should be taken to include a sale of the coparcenary rights of the sons also. The sons do not appear to have disputed in that case the fact that their coparcenary shares were also included in the court sale. From the judgment it would appear that there was no dispute in that case as regards the fact that the entire joint family rights had been sold in execution and that what the sons wanted was not an adjudication as to whether the court sale was in respect of the entire joint family rights or not, but a cancellation of the sale in respect of their shares and a declaration that it can be deemed to have passed to the auction-purchaser only the rights of the father. It has not been said in - "Swaminatha v. Krishnawami", (C), that the Court is debarred, on account of the pious obligation of the sons to discharge their

father's liability, from considering the question whether the court sale was, in fact, only a sale of the father's rights alone or a sale of the joint family rights, including the coparcenary rights of the sons. There was not necessity in that case to consider the question whether, in fact, the Court intended to sell the entire joint family rights or only the rights of the father.

At no time had either the decree-holder or the auction-purchaser or the father therein claimed the properties sold to be the separate property of the father and denied the right of the joint family to it. The sons themselves had proceeded on the footing that the sale included their coparcenary rights also.

10. In the present case, defendant 1 took the mortgage, Ex. XXI, from defendant 2 on the footing that the properties were the separate properties of defendant 2, the sale in execution of the decree in O.S. No. 496 of 1104 was only in regard to the remaining rights which defendant 2 had after the execution of Ex. XXI and the lease back, the contention of defendants 1 and 3 even in this suit was that the properties belonged to defendant 2 alone and the members of his joint family had no right at all to them, and the case of the plaintiffs was that their shares had not been sold in execution of the decree in O.S. No. 495 of 1104. As pointed out by Mayne, it was open to the Court to have sold less than what it might have sold. The Privy Council has held in - "Mahabir Prasad v. Moheswar Nath", (E), that it is a question of fact in each case as to what exactly has been sold. These propositions of law have, not been dissented from in - "Swaminatha v. Krishnaswami (C)". While holding that to make the interests of the sons liable to be sold in execution, the sons need not be necessary parties in the money suit which, was instituted by the creditor against the father or to the execution proceedings, the Supreme Court has said in - Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, :

He (the decree-holder) can if he likes, proceed against the father's interest alone but he can if he so chooses, put up to sale the son's 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.

When the sale has been made denying the existence of the larger interest, one fails to understand how it can be contended that the larger interest is also included in the sale of the smaller interest when it is subsequently found that the denial of the larger interest has not been true. The Bombay High Court has held in - "Maruti Sankaram v. Babaji", 15 Bom 87, (K) that, in the absence of special circumstances showing an intention to put up the entire interest of the family in the property sold in execution of a money decree against a father, only the interest of the father passed to the auction purchaser. The uniform trend of the decisions of the Privy Council and of the other High Courts in which the question has come up for consideration as to whether a sale in execution of the right, title, and interest of the judgment-debtor in a case in which a decree has been obtained against the father alone would include a sale of the coparcenary rights

of his sons also, or convey to him their coparcenary right also, is that it is a question for fact to be determined with reference to the facts and circumstances of each individual case.

On the facts and circumstances of the present case, it is absolutely clear that the decree-holder, who has been denying that the joint family had any right to the properties, had no intention to put up the joint family rights for sale when he caused the right, title and interest of the judgment-debtor to be proclaimed for sale and purchased the same himself. Judged in the (sic) of the decision referred to above, there can. be no doubt that what defendant 1 has obtained by the court sale under Ex. S can only be the rights which defendant 2 had in the plaint properties and not the rights of the joint family in those properties.

The sale and purchase made on the express understanding that the properties were the separate properties of defendant 2 and that his joint family had no right to them cannot be taken to include a sale and purchase of the rights of the joint family also when it is discovered subsequent to the sale that the properties belong to the joint family and not, to defendant 2 alone. Such a sale can convey only the rights of the father and not the rights of the sons.

11. The only other point urged by the appellant relates to adverse possession and limitations. The plaintiffs have not brought the suit for setting aside the court sale. Their case was that their shares had not been sold in execution, and they only wanted a partition of their shares. It has also been found by the Court that their shares have not, in fact, been sold in execution. Plaintiffs were not, therefore, bound to sue for cancellation of the court sale, Ex. S, and in this view Art. 9 , Limitation Act has no application to the case.

The claim that defendants 1 and 3 have perfected title by adverse possession is also equally without substance. Exhibit E and the evidence of P.W. 3 prove that plaintiff 1 was born on 20-5-1101. He attained majority only on 20-5-1119, and the suit was filed on 27-3-1122, within three years of the attainment of majority by him. Plaintiffs 2 and 3 are admittedly the younger brothers of plaintiff 1. So the suit filed within three years of the attainment of majority by plaintiff 1 is saved from limitation by Ss. 6, Limitation Act.

12. It follows from the above, that the appeal fails and has to be dismissed.

13. On behalf of the legal representatives of defendant 3 it was urged that, in the event of our dismissing the appeal, a direction should be given to effect the partition in such a manner as not to include item 1, as far as possible, in the plots or properties to be allotted to the plaintiff on account of their shares. The contention that defendant 3 purchased item 1 without notice of the rights of the plaintiffs was not urged at the time of hearing. In view of the fact that costly improvements have been effected in item 1 subsequent to the sale taken by defendant 3 from defendant 1 we see no objection in allowing this equitable relief.

14. In the result, subject to the direction that the partition allowed by the decree

of the lower Court should be made in such a manner as not to include, as far as possible, plaint A schedule item 1 in the properties or plots to be allotted to the plaintiffs on account of their (sic) the decree of the Court below is confirmed and the appeal is dismissed with costs. Except to the extent of the above direction the memorandum of objections is also dismissed but without costs.