

**(1958) 10 AHC CK 0003**  
**In the Allahabad High Court**  
**Case No : F.A.F.O. No. 62 of 1953**

Inder Gopal and Others

APPELLANT

Vs

Bhim Raj Harlalka and Others

RESPONDENT

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**Date of Decision :** 15-10-1958

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1(3), 11

**Citation :** AIR 1959 All 530

**Hon'ble Judges :** H.P. Asthana, J;A.P. Srivastava, J

**Bench :** Division Bench

**Advocate :** G.P. Bhargava and N.D. Ojha, for the Appellant; D. Sanyal, for the Respondent

**Final Decision :** Dismissed

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## Judgement

H.P. Asthana, J.—This is an appeal against the judgment and decree of the learned Civil Judge, Agra, disallowing the objection of the appellants under Order XXI, Rule 58, C.P.C. and Section 47 C. P. C., that their share in the joint family ancestral property was not liable to attachment and sale in execution of a simple money decree which had been obtained by the respondent against their fathers Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan.

2. It appears that the decree-holder Messrs. Bhimraj Harlalka filed a Suit No. 3263 of 1947 in the High Court of Judicature at Bombay for the recovery of a certain sum of money on the basis of accounts against Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan, and Indar Gopal, Vijay Gopal and Raj Gopal sons of Madan Gopal Chandrabhan, and Amar Nath, son, of Jagannath Prasad Chandrabhan. Learned counsel for the plaintiff stated during the pendency of the case after the evidence of the plaintiff's witnesses had been recorded, that he restricted his claim only against the defendants 1 and 5, namely, Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan and that he did not wish to ask for a decree against the remaining defendants. On the basis of this statement the High Court passed a decree against the defendants 1

and 5 only and dismissed the suit against the remaining defendants.

Thereafter, an application for the execution of the decree was made in the Court of the Civil Judge, Agra, for the realisation of the decretal amount by attachment and sale not only of the interest of the judgment-debtors Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan but also of the interest of the present appellants and Raj Gopal, i.e. the entire joint family property belonging to them. Two objections were filed, one under Order 21, Rule 58 C. P. C. by Raj Gopal and the other u/s 47 C. P. C. by Vijay Gopal, Indar Gopal and Amar Nath. It was contended that the debt on the basis of which the simple money decree had been passed against Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan never existed and, in the alternative, it was of a gambling nature and was tainted with immorality.

They did not produce any evidence in support of their contention. It was also contended there that as the suit against the objectors had been dismissed their share in the joint family property could not be attached and sold in execution of the simple money decree against Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan. The learned Civil Judge did not accept the contention on behalf of the objectors that they were not liable for the payment of the decretal amount to the extent of their share in the joint family ancestral property. He, therefore, dismissed both the objections and it is against that order that the present appeal has been filed.

3. It may be mentioned here that the appeal was filed as First Appeal from order only by three of the objectors, namely, Indar Gopal, Vijay Gopal and Amar Nath. At the time of the hearing of the appeal it was discovered that no First Appeal from Order lay and when this defect was pointed out to the learned counsel for the appellants they made a request that the appeal might be treated as Execution First Appeal from the decree of the lower court and we accordingly accepted this request and directed that the appeal may be treated as Execution First Appeal.

4. It was contended on behalf of the appellants that in view of the fact that they were parties to the original suit and that the suit had been dismissed against them their share in the joint family property could not be attached and sold in execution of a simple money decree which had been obtained against the judgment-debtors. It was further contended that in view of the provisions contained in Order XXIII, Rule 1 (3), C. P. C. the decree-holder was precluded from instituting any fresh suit in respect of such subject matter or such part of the claim which had been abandoned by him in the previous suit or which had been withdrawn by him in the earlier suit, and in view of the fact that he could not file a fresh suit in respect of such claim he could also not proceed in execution with respect to that claim which had been withdrawn or against the defendants against whom such claim had been withdrawn.

5. We shall first proceed to consider as to how far the contention on behalf of the

appellants that merely because the suit had been dismissed against the appellants the decree-holder was precluded from executing the decree to the extent of their interest in the joint family property, is correct. Learned counsel for the appellants has relied on several decisions in support of his contention that once a Suit has been dismissed against the sons it is not open to the decree-holder to proceed against them in execution of the decree which has been obtained against the father alone.

6.. The first case relied on by him is of Prahlad Das Vs. Dasarathi Satpathi and Others, It was held in this case that where the creditor impleaded the sons of a Hindu debtor as parties to the suit along with their father, the sons being parties to the suit the father could not be said to have represented them in the suit, and if in such a suit the court rightly or wrongly refused to pass a decree against the sons and passed a decree against the father only, the decree could not be said to have been obtained against the father both in his individual capacity and also as representing the sons, and such a decree against the father not being a decree against the sons could not be executed against them not because they were not under a pious obligation to pay the debt of their father which was neither illegal nor immoral, but because the procedure of enforcing their liability having been adopted the court refused to enforce it.

7. The next case is of Kesho Ram v. Mst. Ram Dulari AIR 1942 Avadh 9. This was a suit on the basis of a mortgage against the father and his sons who formed a joint Hindu family. The suit was brought on the allegation that the mortgage in question had been executed for legal necessity. It was found that legal necessity had not been proved. . The suit was consequently dismissed against the sons and a personal decree was passed against the father who was the executant of the mortgage in question. The decree-holder made an application for the execution of the decree by the attachment and sale of the shares of the sons also against whom the suit had been dismissed in order to realise the decree.

The sons filed an objection that their share in the joint family property, in view of the fact that the suit had been dismissed against them, could not be taken in execution of the decree. Their contention was upheld and it was decided, that their share in the joint family property could not be attached in execution of the decree and that the decree-holder was barred from doing so on the principle of constructive res judicata and the provisions of Order 2, Rule 2, C. P. C.

8. The next case is of Panchaiti Akhara Maha Nirvani Vs. Bindeshri Prasad and Others, . In this case the plaintiff had brought a suit on the basis of a mortgage against the mortgagor and his sons who constituted a joint Hindu family. The sons contested the suit on several grounds, one of which was that the mortgage in question had not been duly attested. This contention was accepted and the suit was dismissed against the sons. A personal decree was, however, passed against the father who was the executant of the mortgage. The plaintiff decree-holder proceeded to execute the decree against the interest of the sons also in the joint family property in spite of the fact that the suit had been dismissed

against them. Execution against the shares of the sons was sought on the ground of their pious obligation to discharge their father's debts. It was held in this case that where the suit had been dismissed against the sons the decree which had been obtained against the father could not be executed against the sons' shares in the joint family fund.

9. Against these decisions learned counsel for the respondent has relied on several Madras decisions, and also on *Panchaiti Akhara Maha Nirvani Vs. Bindeshri Prasad and Others*, which is one of the cases which have been relied on by the learned counsel for the appellants. In *Periaswami Vs. Vaidhilingan Pillai and Others*, the plaintiff had brought a suit against the father and his minor sons and had claimed a decree against the joint family property also so far as their interests in the property were concerned. He subsequently withdrew his claim against the sons.

The question that arose for determination was whether the result of such withdrawal attracted the provisions of Section 11 C. P. C. and whether the plaintiff was subsequently barred to proceed against the interest of the sons in execution on the ground of the pious obligation of the sons for the payment of the debt of their father which was not tainted with illegality or immorality. It was held that the result of the withdrawal of the suit against his sons did not operate as a bar for the decree-holder to execute the decree against the interest of the sons, though it entailed the statutory penalty enacted in Order 23, Rule 1, C. P. C. which was that no fresh suit could be instituted against the defendants on the same cause of action.

10. In *Prahlad Das Vs. Dasarathi Satpathi and Others*, the creditor brought a suit against the father and his sons on the basis of a mortgage. The suit was dismissed against the sons and a simple money decree was passed against the father. The decree-holder sought to execute this decree against the interest of the sons also in the joint family property. It was held that the decree could not be executed against the sons not because they were not under a pious obligation to pay the debt of their father which was not illegal or immoral but because of the procedure of enforcement of their liability having been adopted and the court having refused to enforce it.

11. The next case is of *Desayi Venkatranga Reddi and Others Vs. Paraku Chinna Sithamma and Another*, In this case Patanjali Sastri, J. referring to the earlier Madras cases reported in *Periaswami Vs. Vaidhilingan Pillai and Others*, and *Reddi Krishnan Naidu and Others Vs. Chintala Somi Naidu and Others*, pointed out the difference between cases where the suit is dismissed against the sons on merits and where it is dismissed because it is withdrawn by the plaintiff because he does not wish to proceed against the sons.

He was of the opinion, in accordance with the above decisions, that where the suit was dismissed against the sons on merits and their share in the property was not held liable, their share could not be attached and sold in execution of a

simple money decree which had been obtained against the father alone; but where the suit was dismissed against them because the plaintiff did not wish to proceed against them for some reason or other and, therefore, wanted to withdraw his claim against them, the above consequence would not follow and it would be open to the decree-holder to proceed in execution against their share in the joint family property, and by virtue of their pious obligation for the payment of the debt of their father in case such debt was not tainted with immorality or illegality they would be liable for the decree.

12. After a consideration of the above cases it appears that a distinction has been drawn between a case where the claim is dismissed against the sons on the ground that the plaintiff does not wish to proceed against them for some reason or other and makes an application to withdraw the case against them and a case where the suit is dismissed against the sons on merits after adjudication. It has been the consistent view in all these cases that where the suit is dismissed against the sons after adjudication on merits the principle of Section 11 C. P. C. would apply and execution of the decree against them for attachment and sale of their shares in the joint family property in order to satisfy the decree against "their father would not be maintainable, but where no such adjudication has been made and the claim is dismissed against the sons merely on the ground that the plaintiff does not wish to proceed against them and withdraws his claim against them, no such consequence would follow and it would be open to the plaintiff decree-holder to proceed in execution against them on the ground of their pious obligation, and it would then be open to the sons to show that their share in the joint family property would not be liable because the debt was tainted with immorality or illegality.

13. I am not inclined to accept the contention! on behalf of the appellants that merely because the suit had been dismissed against the sons it was necessarily a dismissal on merits after adjudication. I have examined the decree passed by the High Court of Bombay and from its perusal it is clear that the suit was dismissed against the sons merely on the statement of the plaintiff's counsel after the evidence of the witnesses that he did not wish to proceed against them and wanted to withdraw his claim against them, and there was really no adjudication on merits. In fact there was no occasion for entering into the question on merits when the plaintiffs counsel made the statement that he did not wish to proceed with the claim against the sons and that he might be permitted to withdraw it.

The court had no other option but to allow the plaintiffs application for the withdrawal of his claim against the sons and the only consequence of this withdrawal and the dismissal of the suit on its basis will be that the plaintiff will be precluded from filing a fresh suit against the sons on the same cause of action. In view of the fact that the dismissal of the suit against the appellants was not on merits but was made merely on the oral statement the learned counsel for the plaintiffs that he wanted to withdraw the suit against them, I do not think that the bar of Section 11 C. P. C. will be applicable to the execution

proceedings or that the plaintiff will be deprived from executing the simple money decree obtained against their father on the basis of the debt.

The case, however, would have been different if the suit were dismissed against the sons on adjudication that they were not liable for the payment of the debt either because it had not been proved or because it had not been taken for family necessity or family benefit. It is not necessary that the suit should have been dismissed on the same grounds which could have arisen for determination at the time of the execution of the decree. In other words, it is not necessary that the suit should have been dismissed against the sons on the ground that the debt was tainted with illegality or immorality.

If the question of the liability of the sons for the payment of the debt arose in the suit and had to be decided by the court in that suit then the plaintiff should have taken all those grounds in the suit on which he considered the debt binding on the sons, and if he did not take some of the grounds on which the debt would be binding on the sons and the finding was given in favour of the sons on the grounds taken by the plaintiff in the suit, then according to Explanation 4 to Section 11 C. P. C. any matter which might and ought to have been made a ground of defence or attack in the former suit should be deemed to have been a matter directly and Sub-stantially in issue in such suit and shall be deemed to have been decided.

In view of this provision any finding in the former suit that the sons were not bound for the payment of the debt would operate as constructive res judicata in the execution proceedings and the decree could not be executed against them. I, however, do not think that this principle would be applicable where the suit is dismissed against the sons on the ground that the plaintiff had withdrawn it against them. It is immaterial at what stage the suit is withdrawn against them. It cannot be disputed that there is no occasion in the circumstances, for any finding by the court on the question of liability of the sons and the effect of the withdrawal of the suit against them would be that they were no parties to the suit. The principle of constructive res judicata would be applicable only in those cases where the suit is dismissed against the sons after adjudication with regard to their liability.

14. As regards the contention that the plaintiff was debarred from proceeding in execution against the appellants by virtue of the provisions contained in Order 23, Rule 1 (3), C. P. C., I am of the opinion that it has no force. So far as this Rule is concerned it only prevents the plaintiff from filing a fresh suit in respect of the same cause of action which had been withdrawn by him at an earlier stage. It does not debar the plaintiff from putting his decree into execution against the sons if he is entitled to do so under some other provision of the law. It is well settled that according to the Hindu Law the sons will be bound for the payment of the debt of their father if the debt was not tainted with immorality and illegality, irrespective of the fact whether the father is alive or dead. In this view of the matter I am of the opinion that this contention too has no force.

15. It was next contended that the lower court had not decided whether the debt which was sought to be enforced against the appellants was tainted with immorality or illegality and, as such, it was not justified in dismissing the objections. It appears from an examination of the record of the execution case which is before us that a statement was made by the counsel for the appellants that he did not wish to produce any oral evidence in support of their objections. In view of this fact the lower court was quite justified in dismissing the objection of the appellants.

16. A request has been made before us on behalf of the appellants that the case may be sent back to the court below and an opportunity should be allowed to them to produce evidence in support of their contention raised in the objections filed in the lower court. I find that the appellants had an opportunity in the lower court to produce such evidence and they did not avail of such opportunity. On the contrary, they clearly made statements in the lower court that they did not wish to produce any oral evidence in support of their objections. In the circumstances there is no satisfactory reason to allow this request and give them further opportunity to produce evidence in support of the objections.

17. The result is that the appeal fails and is dismissed with costs.

A.P. Srivastava, J.

18. I agree with the conclusion arrived at by my learned brother but would like to add a few words of my own. The interesting question which has been raised in this appeal relates to the manner in which the pious obligation of a son to pay his father's debts can be enforced and how far the obligation can be affected by the principle of *res judicata*. It is now beyond controversy that a Hindu son is under a pious obligation, to pay his father's debts and in enforcement of that obligation the creditor of the father can proceed not only against the interest of the father in the joint family properties but also against the interest of the son. Whether the father is alive or dead is immaterial. The only way in which the son can escape this liability is by showing that either the debt did not exist at all or that it was *avyeoharik* i.e. it was tainted with illegality or immorality. It is but just that an opportunity be given to the son at some stage to have his say in this respect.

19. It appears to me that the cases in which this pious obligation can be sought to be enforced against the son can fall in four categories:

(1) Cases in which the creditor obtains a decree against the father alone but seeks to enforce it against the entire family property including the share of son.

(2) Cases in which the suit is filed against the son alone either in the lifetime of the father or after his death.

(3) Cases in which a suit for the recovery of the debt is filed against the father as well as the son and a decree is obtained against both.

(4) Cases in which a suit for the recovery of the debt is filed against the father

and son both but is decreed against the father alone and is dismissed against the son.

20. So far as cases falling in the first category are concerned it is not disputed that after obtaining a decree against the father the creditor can in execution proceed against the entire joint family property including the share of the son and it is in the execution department that the son will have a right to prove either that the debt was fictitious or, if it was real, that it was tainted with illegality or immorality. If he fails in establishing these facts his share too will be held liable.

21. A suit against the son alone in the life-time of the father, will obviously not be maintainable because till the liability is established against the father there can be no liability against the son. A suit against the son after the death of the father will certainly lie and in that suit it will be open to the son to prove that the debt was not due at all or that it could not be recovered from him on account of being tainted with illegality or immorality. If, however, in such a suit a decree is passed against the son it can obviously be enforced against him in execution.

22. In the third category of cases in which a suit is filed and decree is obtained against the father as well as the son, the creditor will clearly be entitled to proceed against son also in execution and if the son wants to escape liability he can do so only by contesting the suit itself and in showing that the debt is not a real one or that the liability for it cannot be enforced against him on account of its nature.

23. It is the last category of cases which may lead to some difficulty. In this category fall cases in which the suit is against the father as well as the son but is decreed against the father but is dismissed against the son. In such cases it appears to me that the mere fact that the suit has been dismissed against the son does not necessarily debar the creditor from proceeding with the execution against the entire joint family property including the share of the son. In, this class of cases the nature of the dismissal and the circumstances" in which the order of dismissal was passed will have to be looked into.

If it is found that the dismissal was based on some technical ground like the withdrawal of the claim against the son either in the trial court or the appellate court or on the ground that the son was an unnecessary party, then in spite of the dismissal it will be open to the creditor of the father to enforce the pious obligation of the son against him in the execution department. In such a case the position of the son will be the same as if he had not been impleaded in the suit at all and the decree had been obtained against the father alone.

If on the other hand, the suit is one in which the order of dismissal against the son is passed after the question of his pious liability has been considered either directly or constructively, there is obviously an end of the matter so far as the liability of the son's share for the debt is concerned. In such a case because it has been decided that the interest of the son in the joint family property is not

liable, the creditor cannot proceed on the basis of the decree he has obtained against the father alone against the interest of the son in the joint family property.

24. In, the present case the suit had been filed both against the fathers and the sons. It was decreed against the fathers but dismissed against the sons. The real question which arises is whether the order of dismissal in favour of the sons was an order passed on merits or was an order based on the withdrawal of the claim against the sons by the plaintiff's counsel. My learned brother has stated the circumstances in which the suit was dismissed against the appellants and was decreed only against Madan Gopal Chandrabhan and Jagannath Prasad Chandrabhan. From those circumstances it appears to be clear that the present case cannot be considered to be one in which the liability of the sons was considered either directly or constructively.

It was not considered at all. The sons were contesting the suit and denying their liability but the occasion for consideration of their pleas did not arise as the plaintiff's counsel made a statement confining his claim to the fathers alone. The suit was, therefore, decreed against the fathers but dismissed against the sons. This being the case the suit must be treated as one filed against the fathers alone, The creditor could, therefore, proceed against the sons in the execution department. If the sons wanted to escape liability they could in that department raise the plea that the debt was not a real debt or that it was debt tainted with immorality or illegality and was on that account not realisable from their shares in the joint family property.

In the present case an objection of this nature was actually filed on behalf of the appellants, but because no evidence was produced by them in support of the pleas there was no material before the court on the basis of which it could have accepted those contentions of the appellants, Apparently the appellants confined their objections only to the ground that because the suit had been dismissed against them it was not open to the decree-holder to proceed against them in execution. This plea was bound to fail in view of the fact that the dismissal against them was not on merits but was based on the withdrawal of the claim.

25. The cases on which the learned counsel for the appellants relied, viz Prahlad Das Vs. Dasarathi Satpathi and Others, Bijai Raj Singh v. Ram Padarath AIR 1936 Avadh 139 and AIR 1942 9 (Oudh) are all cases in which the liability of the sons had been decided in the suit itself either directly or constructively. The sons had been impleaded as parties in all these suits. In all these cases it was: open to the creditors to claim a decree against the shares of the sons in the joint family property, even if the sons were not personally liable, on the basis of their pious obligation to pay their fathers' debts. No such claim was made and the suits were dismissed against the sons. None of these cases appears to be a case in which the suit was dismissed on the basis of withdrawal of the claim against the sons or any such technical ground.

They are, therefore, not of much help to the appellants. The cases relied upon on behalf of the respondent, viz. Periaswami Vs. Vaidhilingan Pillai and Others, and Shiam Lal v. Ganeshi Lal ILR 28 All 288 are on the other hand cases in which claim against the sons was withdrawn at some stage and the suit was dismissed on that ground. These cases are, therefore, more to the point as compared to the cases relied upon on behalf of the appellants.

26. The case reported in Panchaiti Akhara Maha Nirvani Vs. Bindeshri Prasad and Others, has been relied upon by learned counsel for both the parties. The judgment of the original suit in which the decree which was under execution in that case was passed has been reported in Bindeshri Prasad and Others Vs. Panchayati Akhara Maha Nirbani Goshain, . A perusal of that judgment will show that in that case the suit must be held to have been dismissed! against the sons constructively on merits. It was open in that case to the creditor to claim a decree against the shares of the sons in the joint family property but no such claim was made and the suit was allowed to be dismissed against the sons. It must in the circumstances be presumed that the question of the liability of the sons for the debt had been raised and decided against the creditor.

It was, therefore, held when the sons objected to the decree being executed against them that it was not open to the decree-holder to proceed against the shares of the sons in execution. While disposing of the son's objection the learned Judges referred to the cases in which the dismissal of the suit against the sons was based on withdrawal. They expressed their approval of those decisions but distinguished them from the case with which they were dealing. Strictly speaking this case in Panchaiti Akhara Maha Nirvani Vs. Bindeshri Prasad and Others, favours the respondent more than the appellants.

27. In my opinion, therefore, in the present case it was open to the decree-holder to proceed against the interest of the sons also in execution of the decree which he had obtained against the father and the only way in which the sons could escape liability was by proving that the debt was not a real debt or that it was tainted with immorality. As they did not make any attempt to prove this and produced no evidence in support of this plea, their objection could not succeed.

28. The appellants had an opportunity of producing evidence and satisfying the court that the debt was not binding on them on account of its nature. They did not avail of that opportunity. I do not think they are entitled to any fresh opportunity of producing evidence on the same point.

29. I, therefore, agree that the appeal must fail.

By The Court

30. The appeal is dismissed with costs. Let the record be sent to the court below at an early date for disposal.