
(1974) 10 BOM CK 0005

In the Bombay High Court

Case No : First Appeal No's. 160 and 173 of 1966

Vyankatesh Dhonddey Deshpande

APPELLANT

Vs

Sou, Kusm Dattatraya Kulkarni and Others

RESPONDENT

Date of Decision : 11-10-1974

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 155
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9
Land Improvement Loans Act, 1883 — Section 7

Citation : AIR 1976 Bom 190 : (1975) 77 BOMLR 671 : (1976) MhLj 373

Hon'ble Judges : Vaidya, J; Sapre, J

Bench : Division Bench

Advocate : M.A. Rane, for the Appellant; H.D. Gole and D.S. Marathe, for the Respondent

Judgement

Vaidya, J.—These two appeals involve an interesting question regarding the validity of an auction sale of the suit lands which originally belonged to the joint family of the respondents and Dattatray Govind Kulkarani, the husband of respondent No. 1 and the father of respondents 2 to 6, and which were allotted at a partition made prior to the auction sale which was held for recovering the Tagai loan advanced in respect of other land belonging to the family to the said Dattatray.

2. The allegations made by the respondent-plaintiffs can be briefly summarised as under:-

3. Plaintiff No. 1 is the wife and plaintiffs Nos. 2 to 6 are the sons of Dattatray Govind Kulkarani. Plaintiff No. 1 happens to be the second wife of Dattatray and plaintiffs Nos. 2 and 3, who were minors when the suit was filed, are her sons from Dattatray. Plaintiffs Nos. 4 to 6 are the sons of Dattatray from his first wife. A partition was effected by Dattatray with a view to avoid future disputes under a registered partition deed, Exh, 79, on July 6, 1956. Under the said partition deed, the father, Dattatray, took Survey No. 140/1, admeasuring 10 acres and 1

guntha and assessed at Rs. 27-9-0, in which the joint family has a one-fourth undivided share, and the remaining land, Survey No, 487, was allotted to the plaintiffs in equal shares and it is the shares in the Survey No, 487 which are the subject-matter of the suit filed by the plaintiffs. It was alleged that the shares were partitioned equally by metes and bounds and the respective shares were handed over to each of the plaintiffs at the time of the execution of the partition deed and since that time the ownership of each one had become independent and mutation was also effected in the names of the plaintiffs showing their respective shares in the suit land in the Record of Rights. The shares were also separately assessed to land revenue.

4. In the year 1949, Dattatray Govind Kulkarani had taken a Tagai loan by executing a bond prescribed under the Land Improvement Loans Act, 1883 with a view to increase his income. The application made by Dattatray for the loan is on the record at Ex. 128 and mentions lands, survey No. 167, pot Hissa No, 2, area 16 acres and 5 gunthas, assessed at Rs. 4-1-0, as the lands for improving which the loan was taken. The purpose is mentioned as for constructing wells. The security consisted of the said lands, which were described as completely owned by Dattatray. It was the case of the plaintiffs that the suit land, Survey No. 487 was not a security for the said loan. As the loan was not repaid by Dattatray, the Government put up for sale on April 6, 1957, without and legal authority, the suit land for recovery of the balance of the Tagai loan payable by Dattatray. The defendant being the highest bidder at the auction sale was put in possession of the suit land on May 20, 1960, despite the protest made in writing on behalf of all the plaintiffs at the time of handing over of the possession, which is at Ex. 156. It was, therefore, submitted in the plaint that having regard to the partition acted upon by Dattatray and the plaintiffs, the auction sale and all incidental acts were unjust, illegal, void and ultra vires and the possession of the defendant-appellant, against whom they filed the suit, was illegal. The plaintiffs, therefore, filed the suit, on April 19, 1961 praying for actual possession of the suit land bearing Surveys Nos. 487/1 to 487/6, which will be referred to for convenience hereafter as "Survey No. 487".

5. The defendant resisted the suit by filing his written statement, Ex. 17. His first contention was that as the plaintiffs had previously filed Special Suit No. 14 of 1958 against the defendant and the State of Bombay and had withdrawn it with liberty to file a fresh suit on the same cause of action on payment of costs, which was made a condition precedent, and as the plaintiffs had failed to deposit the costs of the State, the suit was not maintainable. It was also submitted that as the State of Maharashtra was not made a party to the present suit it was bad for non-joinder. On merits, it was contended that the family of the plaintiffs and Dattatray continued to be joint and Dattatray was and is the manager of the family, no partition, as alleged, having ever taken place. It was contended that Dattatray was indebted to the tune of Rs. 25,000/- to various creditors. He had taken the Tagai loan of Rs. 12,000/- from the Government in 1949 as the manager of the joint family for the construction of the well and band has in the

land. The Collector, therefore, started proceedings against him in 1954 for the recovery of the Tagai loan. Other creditors also filed suits for the recovery of their money/ With a view to defeat the recovery, Dattatray and the plaintiffs colluded with each other fraudulently and brought into existence a bogus partition deed which was never intended to be acted upon and continued to live together and the mess was common and they were in joint enjoyment of the property. It was also submitted that the partition deed itself showed that all the inferior lands or the lands mortgaged to the creditors were allotted to Dattatray and good and fertile lands were allotted to the plaintiffs. All this showed that the partition itself was bogus. It was further contended that the Tagai loan was obtained by Dattatray as the manager of the family for the benefit of the family and for legal necessity and the family derived benefit therefrom. In 1955, the charged lands were sold on a nominal bid of Re. 1/- and hence the Government had to sell the suit lands for recovering the balance of the amount. The defendant submitted that, in these circumstances, the auction sale in his favour was valid and binding on the plaintiffs. Plaintiff No. 1 as the wife and plaintiffs Nos. 2 to 6 as the sons of Dattatray were bound by the debt contracted by Dattatray. The sale effected to recover the debt, that is, the Tagai loan, was, therefore, binding on them.

6. The learned Civil Judge framed 11 issues and tried the issues with regard to the maintainability of the suit as preliminary issues and overruled the contentions of the defendant with regard to the non-joinder of the State of Maharashtra and the non-compliance with condition precedent to instituting the present suit. Thereafter, the remaining issues were tried. On behalf of the plaintiffs, plaintiff No. 1, Kusum Dattatray Kulkarani; one Bhalchandra Dattatray Prabhune, the Pleader of Wai, who had drafted the partition deed according to the instructions given by plaintiffs Nos. 1 and 4 and Dattatray Kulkarni; and Vithal Balkrishna Mandke, the Sarpanch of the Grampanchayat, Shirwal, and the brother of the scribe of an application made on May 20, 1960 to Kamgar Talathi, his brother being dead when he gave evidence in 1966, were examined. On behalf of the defendant, one Mallappa Chavan working as Cadastral Surveyor and the defendant himself were examined. The defendant also examined Babu Raut, who was a panch with regard to the giving of possession of the suit land to him; Balkrishna Teli of Shirwal, who claimed to know the plaintiffs and who said that the plaintiffs and Dattatray were staying together and messing together; and one Yeshwant Rajamane, who was working as Mahalkari at Khandala from May 1956 to December 1957 and who proved the sale warrant and the proclamation issued against Dattatray for the Tagai loan and the memos in the file and other orders passed in respect of the Tagai loan. The parties also led voluminous documentary evidence.

7. On a careful consideration of the oral and documentary evidence in the case, the learned Civil Judge, Senior Division, Satara, by his judgment and decree dated January 31, 1966 came to the conclusion that the sale of the suit land effected by the Collector was void ab initio and decreed the plaintiffs' suit for

possession with costs and future mesne profits. The judgment and decree are challenged by the defendant by filing First Appeal No, 160 of 1966.

8. As 10 acres and 37 gunthas of Survey No. 487 were acquired under the Land Acquisition Act for the Veer Dam project, reference was made u/s 30 of the Land Acquisition Act for determining the persons to whom the amount of compensation should be paid. The learned Civil Judge, in view of his aforesaid judgment, ordered the amount of compensation to be paid to plaintiff No. 1 or her pleader by a judgment of the same date. The said judgment is challenged by the auction-purchaser Vyankatesh Deshpande in First Appeal No. 173 of 1966.

9. The first question which arises in these appeals is whether the auction sale held on April 6, 1957 after the partition between the plaintiffs and Dattatray made on July 7, 1956 is valid. It is undisputed that the auction sale was held u/s 7 of the Land Improvement Loans Act, 1883, popularly called the Tagai Loans Act. The purpose of the Act was to consolidate and amend the law relating to loans of money by the Government for agricultural improvements. Section 4 of the Act lays down that subject to such rules as may be made u/s 10 of the Act, loans may be granted under the Act by such officer as may, from time to time, be empowered, for the purpose of making any improvement, to any person, having a right to make that improvement, or, with the consent of that person to any other person. The word "improvement" is defined in Section 4(2) of the Land Improvement Loans Act as meaning any work which adds to the letting value of land, including the construction of wells, tanks and other works, the preparation of land for irrigation, the drainage, reclamation from rivers or other waters, or protection from floods or from erosion or other damage by water, of land used for agricultural purpose or waste-land which is culturable, the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes, the renewal or reconstruction of any of the foregoing works, or alterations therein or additions thereto, and such other works as the State Government may declare to be improvements for the purposes of the Act. It is, therefore, manifest that Dattatray borrowed the loan for improvement as defined under that Act.

10-11. Section 5 of the Land Improvement Loans Act deals with mode of dealing with the applications for loans and requires the Officer to whom the application is made to follow a particular procedure with regard to objections to the loan being given. Section 6 lays down the period for repayment of the loans and says that it shall be made repayable by instalments in the form of an annuity or otherwise, within such period from the date of the actual advance of the loan, or, when the loan is advanced in instalments, from the date of the advance of the last instalment actually paid, as may, from time to time, be fixed by the rules made under the Act, and provides that the period so fixed shall not ordinarily exceed thirty-five years.

"7. (1) Subject to such rules as may be made u/s 10, all loans granted under this Act, all interest, if any, chargeable thereon, and costs, if any, incurred in making

the same, shall, when they become due, be recoverable by the following modes, namely:-

- (a) from the borrower - as if they were arrears of land-revenue due by him;
- (b) from his surety, if any, - as if they were arrears of land-revenue due by him;
- (c) out of the land for the benefit of which the loan has been granted - as if they were arrears of land-revenue due in respect of that land;
- (d) out of the property composed in the collateral security, if any, - according to the Procedure for the realization of land-revenue by the sale of immovable property other than the land on which that revenue is due:

Provided that no proceedings in respect of any land under clause (c) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgagees of, or persons having charges on, that interest, and, where the loan is granted u/s 4 with the consent of another person; the interest of that person, and of mortgagees of, or persons having charges on, that interest."

Sub-section (2) of that section provides for recovery of the amounts from sureties and owners of the property given as collateral security. Sub-section (3) confers a discretion on the Collector to determine the order in which he would resort to the various modes of recovery permitted by it.

12. It is clear from this section that the recovery which is provided u/s 7 is only against the borrower and his surety and out of the land for the benefit of which the loan has been granted. So far as the borrower is concerned, the mode prescribed is under the Land Revenue Code. The relevant provisions under which the auction sale was held are of the Bombay Land Revenue Code, 1879, Section 150 of which lays down the following processes:-

- "(a) by serving a written notice of demand on the defaulter u/s 152.
- (b) by forfeiture of the occupancy or alienated holding in respect of which the arrear is due u/s 153:
- (c) by distraint and sale of the defaulter's moveable property u/s 154;
- (d) by sale of the defaulter's Immovable property u/s 155;
- (e) by arrest and imprisonment of the defaulter under Sections 157 and 158;
- (f) in the case of alienated holding consisting of entire villages, or shares of villages, by attachment of the said villages or shares of villages under Sections 159 and 163."

13. It was contended by Mr. Rane for the appellant that the auction sale in the present case held on April 6, 1957 was u/s 155 of the Bombay Land Revenue Code, 1879, which runs as follows:-

"155. The Collector may also cause the right, title and interest of the defaulter in any immovable property other than the land on which the arrear is due to be sold."

It was contended by Mr. Rane that although in the original application for loan, Ex. 128, and the Tagai Loan Bond at Ext. 134 and Ex. 135, the borrower was mentioned as Dattatray and there was no mention of the family of Dattatray, the loan was for the family lands and the defaulter was not merely Dattatray but also the family; and hence the suit land, which originally belonged to the family, though subsequently allotted to the plaintiffs, was liable to be sold in auction u/s 155 of the Bombay Land Revenue Code.

14. We do not find any substance in the above contention of Mr. Rane. The loan which is advanced under the Land Improvement Loans Act, 1883 is a loan granted on an application in the prescribed form under an order passed u/s 5 of that Act. There is admittedly nothing in Ex. 128, the application made on February 7, 1949, or the bond Exs. 134 and 135, dated March 24, 1949, to indicate that the family was the borrower, or that all the other family properties were security for the loan, or that, in the event of default being committed by the borrower, Dattatray, the plaintiffs, who had interest and share in the family lands, including the suit land, would be liable to pay the Tagai loan. The form of application was prescribed under the Land Improvement Loans Rules, 1916 framed by the Governor in Council at Bombay u/s 10 of the Act. The form of application prescribed under the said Rules requires the applicant to state his name and residence; amount and object of loan and nature of the proposed improvement; village, Survey No., assessment and Jodi if alienated of land to be improved, with extracts of village Form No. VI or No. VII; applicant's rights in the land to be improved; and nature of security, whether personal or otherwise.

15. The form also prescribed the mode in which the Inquiry Officer should make entries with regard to the various points mentioned in that form. One of the points to be inquired is that, when the security offered is the land itself, the Inquiry Officer must find out the applicant's interest in it. In ex. 128, what we find is that the purpose is mentioned as building the wells in Survey Nos. 167/2 and 170/1; and besides these two lands, security is given of lands, Survey Nos. 165/1, 166/1, 2 and 172/1, in all 109 Bighas of land assessed at Rs. 36/-; and it is merely stated that all these lands are free from any encumbrances. There is nothing in it to show that Dattatray had described himself as the manager of the joint family, whose ancestral property they were. There is nothing in it to show that the Inquiry Officer had found out that the Plaintiffs had interest in the loan, or that the loan was being advanced for the benefit of the family, or that the wells were being constructed for the benefit of the family lands other than the lands in which the wells were being construed.

16. In Ex. 128, the opinion and recommendation of the Mamlatdar runs as follows:-

"The applicant is a big landlord and so far has spent more than Rs. 20,000/- for the better improvement of the land. He has dug another well also and constructed it, but now he requires some help to construct the two wells that he has recently dug. Merely 50 or 60 Bighas would be watered under this water. I, therefore, strongly recommend that Rs. 12,000/- should be paid to the applicant as Tagai."

The work of completing the wells was to be done within one year and the first instalment was to be paid on February 1, 1950, the instalment being of Rs. 1,000/- with interest. The repayment was, therefore, to be made within 12 years, that is, before 1962. There is nothing in the application or the bond executed by the borrower to suggest that the wells were for the benefit of the joint family of the plaintiffs and Dattatray, or for the benefit of the lands other than the lands mentioned in the application which, including the other secured lands, measured, as stated above, 109 Bighas.

17. The bond is also in the form prescribed under the Land Improvement Loans Rules, 1916, namely, form No. 1, which is in respect of a single borrower, and not in Form No. 2 which is in respect of a loan for more than one borrower. One of the conditions mentioned in the bond is that neither the borrower nor his executors, heirs, administrators or assigns shall transfer by way of mortgage, sale, gift, partition or otherwise any "land mortgaged as security for this loan". The loan bond, Ex. 134, as stated above, does not refer to the interest of members of the family or to any other family lands, and, in particular, the suit land. Under the bond, Dattatray was bound to repay the loan of Rs. 12,000/- in two instalments, one of Rs. 6,000/- on March 24, 1949 and another also of Rs. 6,000/-. There is nothing in the provisions of the Land Improvement Loans Act or the Rules to indicate that such a loan and such a bond will bind the sons and wife of a coparcener.

18. Mr. Rane submitted that as Dattatray was the manager of the family, it must be held that the borrower in the case was the family and the defaulter was also the family and any property of the family, which existed at the time of the loan and at the time of the auction sale u/s 155 of the Bombay Land Revenue Code, 1879, could be sold by the Collector u/s 7 of the Tagai Loans Act. It must be remembered that this Act is applicable to all communities in India and not merely to Hindus. There are many communities which do not have the system of joint family. If the Legislature intended to include in the word "borrower", where the borrower was a manager of the family, the "entire family", it should have said so in express terms.

19. Similarly, if the Legislature wanted to include in the word "defaulter", where the defaulter happened to be a manager of the joint family, "members of the joint family", then express terms should have been used to indicate that all the members of the joint family could be held responsible. Section 147 of the Bombay Land Revenue Code, 1879 runs as follows:-

"Any sum not so paid becomes there-upon an arrear of land revenue, and the persons responsible for it, whether under the provisions of S. 136 or of any other section, become defaulters."

Section 136 deals with liability for land revenue. "Any other section" referred to in Section 147 must mean a section of the Bombay Land Revenue Code, 1879 and not general principles of Hindu law relating to liability of members of a joint family in connection with debts incurred by the manager of the family.

20. It is, therefore, patent, in our view, that the auction sale of the suit land, which was on the date of the auction sale in the name of the plaintiffs and which was not a land in respect of which the Tagai loan was advanced or a land which was security for that loan, would be an auction sale u/s 7 of the Tagai Loans Act, 1883. The plaintiffs were not "borrowers" within the meaning of Section 7(1) of the Land Improvement Loans Act, 1883, which is relied upon by Mr. Rane, for supporting the sale. They were not also the "defaulters" within the meaning of Section 155 of the Bombay Land Revenue Code, 1879. On this ground alone, the plaintiffs' suit is entitled to succeed, though it seems that the attention of the lower Court was not properly drawn to the provisions of the said Act and the relevant provisions of the Bombay Land Revenue Code, 1879 in this connection.

21. Mr. Rane, however, submitted that the Tagai loan was a debt and the sons of Dattatray were bound to pay the debt in view of the pious obligation of the sons of a Hindu to pay all debts contracted by the father, except avyavaharika or illegal debts, and the Tagai loan having been obtained for improving the lands of the family at the time when the family was joint cannot be considered to be avyavaharika or illegal. In our opinion, it is not open to the Court to extend the principle of the pious liability of the sons under Hindu Law, which arises from obligation of religion and piety, to the debts contracted under the Tagai Loans Act, which applied to all citizens of India irrespective of their religion. In *Luhar Amrit Lal Nagji Vs. Doshi Jayantilal Jethalal and Others*, , the Supreme Court laid down at page 966 as follows:-

"The doctrine of pious obligation under which sons are held liable to discharge their father's debts is based solely on religious considerations; it is thought that if a person's debts are not paid and he dies in a state of indebtedness his soul may have to face evil consequences, and it is the duty of his sons to save him from such evil consequences. The basis of the doctrine is this spiritual and its slow object is to conger spiritual benefit on the father. It is not intended in any sense for the benefit of the creditor."

The Tagai Loans Act cannot be considered to be an Act which was contemplated by Hindu religion as laid down in the Sharmashastras and the customs and usages. It was essentially an agricultural economic legislation intended to benefit agriculturists irrespective of their religion and to improve agriculture in this country by proving cheap loans to agriculturists for the purposes mentioned in the Act which are referred to above.

22. The statutory provisions contained in the Land Improvement Loans Act must be interpreted exclusively on the basis of the object and scheme of the Act. We do not think that the law makers ever contemplated engrafting of the pious obligation of the sons under Hindu Law to the provisions of the Act. In effect, the argument of Mr. Rane requires us to read for the word "borrower and his sons" if the borrower is a Hindu. We do not think that such a course is open to the Court while interpreting the statutory liability and remedies in respect of that liability and remedies in respect of that liability existing independently of the religion of the borrower. The law makers were fully aware of the existence of the Hindu law and the Hindu joint families and if they wanted to make the sons liable for the father's Tagai loan, nothing was easier than to provide for it expressly. It is clear from the scheme of Section 7 that it is the borrower and the surety against whom the modes of recovery are prescribed as if the dues were arrears of land revenue. If the original borrower and surety are not available, the dues have to be recovered in the manner prescribed u/s 7(1) (c) and (d) out of the property for the benefit of which the land was granted or out of the property comprised in the collateral security. The proviso to Section 7(1) is intended to affect only the interest of the borrower and of mortgagees of, or persons having charges on, that interest or where the loan is granted u/s 4 with the consent of another person, the interest of that person. If the law makers wanted to make the sons of the borrower liable, they would have added that in the case of a Hindu borrower, his sons or all the members of his family would be liable to repay the debt and their interest would be affected. In the absence of such express provisions and particularly when the provisions are made with regard to other interests, it is not open to us to read for the word "borrower" the words "borrower and his sons", or "borrower and all the members of his joint family."

23. The scheme of the section was considered by this Court in *Lakshman Venkatesh Naik v. Secretary of State for India* 41 Bom LR 257 : AIR 1939 Bom 183. In that case, the appellant, who was the plaintiff, purchased Survey No. 399 of Mangoli from one Dastgir in 1926. Seven years before that, on May 19, 1919, Dastgir had taken a Tagavi loan of Rs. 2,000/- from Government for the purpose of weeding the land and for making the stone payment. Under the terms of the Tagavi bond, two other lands owned by Dastgir, Survey Nos. 383 and 412, were hypothecated for a loan. In the same year, in which Dastgir sold Survey No. 399 to the plaintiff, he also mortgaged the other two lands, Survey Nos. 383 and 412, to one P. A. Desai. Dastgir failed to repay the Tagavi loan in accordance with the terms of the bond, and the Prant Officer ordered that the arrears due from Dastgir should be recovered by sale of Survey No. 383, one of the Hypothecated lands mentioned in the Tagavi bond. Against that order, an application was made to the Collector, and the Collector, ordered that Survey No. 399, the land for the benefit of which the loan had been taken, should be forfeited and sold. The Mamlatdar of Bagewadi gave notice to the appellant-plaintiff informing him that unless he paid Rs. 1,089 and odd, the arrears of the Tagavi loan, which were due from Dastgir, Survey No. 399 would be forfeited and sold. The plaintiff having

failed in appeals before the Revenue Officer filed a suit for a declaration that Survey No. 399 was not liable to be forfeited and sold for the arrears of the Tagavi loan due from Dastgir, and for a permanent injunction restraining the defendant, the Secretary of State for India, from forfeiting and selling Survey No. 399. The suit was dismissed by the lower Court. In appeal, N. J. Wadia, J. confirmed the decree, holding that on a perusal of Section 7 of the Land Improvement Loans Act, it was the intention of the Legislature that the liability for the Tagavi loan should rest primarily on the land for the benefit of which the loan was taken, and observing as follows:-

"The appears from sub-clause (2) of Section 7 which provides that when any sum due on account of any such loan, interest or costs is paid to the Collector by a surety or an owner of property comprised in any collateral security, or is recovered under sub-section (1) by the Collector from a surety or out of any such property, the Collector shall, on the application of the surety of the owner of the property (as the case may be), recover that sum on his behalf from the borrower, or out of the land for the benefit of which the loan has been granted, in manner provided by sub-section (1), Sub-section (3) of the section gives the Collector absolute discretion to determine the order in which he should resort to the various modes of recovery permitted by the section, and the Collector in exercising his discretion in the way in which he did was not in any way acting unfairly. The land in the hands of the plaintiff is, therefore, in my opinion, liable to forfeiture and sale for the arrears of the Tagavi loan due from Dastgir."

24. The provisions were considered by Sir Beaumont, C. J. and Sen, J. in *Shivrao Shesgiri Kalbag v. The Secretary of State for India* 44 Bom LR 668 : AIR 1942 Bom 300. That was a first appeal arising out of a suit filed by the plaintiff against the Secretary of State for India for damages for the wrongful sale of the goods and cattle belonging to the plaintiff. The question at issue arose in this way. In 1929, the Collector of Kanara executed a lease in favour of the plaintiff for four years of certain lands on the terms that the plaintiff should bring the lands into cultivation during the terms. In order to bring the lands into cultivation, the plaintiff, on September 8, 1930, borrowed a sum of Rs. 2,500/- from Government under the provisions of the Land Improvement Loans Act of 1883, and the plaintiff's brother acted as his surety for the loan. On April 29, 1934, the Collector seized certain goods of the plaintiff, including wire fencing on the land, and removed these goods to his own custody. The plaintiff being in difficulties about repaying the loan applied in June 1934, to the Collector to be granted a permanent tenancy, which he could dispose of, and eventually the plaintiff secured a man named Harite, who agreed to take over the plaintiff's interest in the land and also to take over his obligation for the loan, and the plaintiff and Harite wrote to the Mahaljari of Mandgod, a letter dated July 26, 1934, signed by both of them, informing him that the plaintiff had relinquished all his rights over the lands in favour of Harite and Harite was willing to pay to Government the amount of Tagai taken by him for wire fencing and requesting that the Khata of the lands in both the villages standing in his name be cancelled and be made in

the name of Harite.

25. The Mahalkari made a report to the Collector of Manara for leave to accept Harite's offer. On August 6, 1934, the Collector returned the report to the Mahalkari saying that the loan would be better secured after the transfer to a solvent man and the lands would be transferred subject to the liability to pay the Tagai; and hence the Magalkari's terms were accepted. It was then clear that the Government, the plaintiff and Harite agreed to substitute Harite's liability for the plaintiff's liability and in consequence, the plaintiff's original liability was discharged, and it also followed from that that the Collector should have returned to the plaintiff the goods which he had seized in order to ensure the fulfilment of the plaintiff's contract. However, that was not done, Harite, on December 27, 1934, paid Rs. 1,000/- toward the Tagai loan, and the attachment on part of the plaintiff's goods was discharged. On January 21, 1935, the plaintiff applied to the Collector to raise the whole attachment. That was not done, subsequently, the other goods of the plaintiff were seized, including the suit goods. Hence, the plaintiff filed the suit. The learned Subordinate Judge held that the effect of the attachment was merely to make Harite a surety for the plaintiff and dismissed the plaintiff's suit.

26. The decree was reversed and it was held by this Court that the plaintiff was entitled to succeed. Beaumont, C. J. observed in the course of the judgment with respect to the argument that even though Harite became the principal debtor under the arrangement between the plaintiff, the Government and himself, the Collector was entitled to sell the foods u/s 7(1)(a) of the Land Improvement Loans Act, 1883, as follows:-

"That section provides that all loans granted under the Act shall be recoverable by the Collector from the borrower, as if they were arrears of land revenue due by him. But that plainly means, from the borrower as long as he remains in that position, that is to say, from the borrow for the time being. If the contract with the original borrower is discharged, and a new borrower is substituted, that provision applies to the new borrower. It is one of the complaints of the Government against the plaintiff that Harite never executed bond which made him a borrower under the Act. But that has nothing to do with the plaintiff. If my view is right that Exhibit 28 when accepted by Government, constituted a contract binding upon Harite, it is not the fault of the plaintiff if Government did not take the trouble to see that the contract was ried out."

It was held that the sale of the wire fencing, etc. after removal from the land could not be made by the Government u/s 7(1)(a), as once the Government removed them, they were not liable to seizure as part of the land u/s 7(1)(a).

27. These decisions, in our opinion, show that the right of the Government to recover the loans advanced under the Tagai Loans Act must be determined in accordance with the provisions of that Act. The modes of recovery and the persons from whom the recovery can be made also must be determined in

accordance with the provisions of that Act and not in accordance with the general principles of the Hindu Law. The plaintiffs, who were the wife and sons of Dattatray were not borrowers within the meaning of Section 7(1)(a). The suit land was not a land for the benefit of which the loan had been granted, as this land was not mentioned in the Tagai loan bond. The suit land did not belong to the borrower, Dattatray, and yet it was sold, as if Dattatray had some right, title and interest in the suit land, in the auction held on April 6, 1957. That, in our opinion, could not be done u/s 7(1). The auction sale was clearly ultra vires the powers of the Revenue Authorities u/s 7(1)(a) and the suit land was not a land for the benefit of which the loan had been granted within the meaning of Section 7(1)(c) and the Collector acted illegally in selling the suit land as the land of the borrower, Dattatray, after the land was allotted to the plaintiffs in the partition made on July 6, 1956.

28. Dharmashastras of Hindus never contemplated improvement loans being given by the Government of the day, which were usually monarchies, and therefore, a debt of the kind which is contemplated under the Tagai Loans Act could never have been under the contemplation of the writers like Brihaspati and Narada in whose texts the pious liability is imposed on the sons and others. We do not think that the Courts in modern India can extend the scope and ambit of Dharmashastras Rules so as to embrace liabilities under statutes, like the Tagai Loans Act and thereby supplement the statutory modes of recovery prescribed under the Act with Dharmashastra Rules. It is the function of the Legislature to express itself clearly and make such provisions if it intended to do so. In the absence of such clear provisions, the ordinary rule of interpretation of statute that a statute does not create provisions, the ordinary rule of interpretation of statute that a statute does not create new jurisdictions or enlarge existing ones, and express language is required if an Act is to be interpreted as having this effect, must apply. It is impossible to suppose that the Legislature, which must be presumed to know Hindu Law, could have intended under a general statute, like the Tagai Loans Act, as it were by a side-wind, to impose on sons of borrowers, who were free to separate from their father, a liability to repay the loan on the basis of the religion of the Hindus. The Tagai Loans Act was a secular Act applicable to Hindus, Muslims, Christians, Buddhists and all other citizens and it is not open to us to read into the Act the pious obligation of sons to pay the Tagai loan.

29. Similarly, the argument of Mr. Rane that because the Tagai loan was taken by Dattatray for constructing the wells in the lands belonging to the family, the family was benefited and, therefore, the plaintiffs would be liable as borrowers, cannot be accepted, because, as already stated, the recovery is to be made from the borrower, the surety and the secured lands and not from the members of his family who have been benefited by the loan. If the Legislature wanted to have that mode open for recovery, it should have said so. We are, therefore, of the opinion that the auction sale held in favour of the appellant was ultra vires Section 7 of the Land Improvement Loans Act, 1883.

30. Mr. Rane submitted that having regard to the conditions of modern existence in this country, it would be wrong to exclude from the purview of pious liability debts owed to the State, like the Tagai Loan. In support of his argument, he relied on the decision of a Division Bench of the Madras High Court in *M.R. Radhakrishnan and Another Vs. The Union of India (UOI) and Another*, , and the decision of the Full Bench of the Andhra Pradesh High Court in *J J. Devaraja Rao and Others Vs. Income Tax Officer, Anantapur and Another*, .

31. In the Madras case, the sons filed a suit for a declaration that their share of the joint family property was not liable for Income Tax arrears of their father. The sons submitted that the unpaid tax arrears were a debt which was an *avyavaharika* debt. No other contention was raised. *Rajamannar, C. J. and Ganapatia Pillai, J.*, with respect, rightly relied on the proviso to Section 46(2) of the Income Tax Act and Section 60 of Civil P. C. and dismissed the plaintiff's suit observing:-

"It cannot be disputed that in execution of a decree against the father the decree-holder can bring to sale the entire family property alleging that the sons are bound by the debt on the foot of which the decree had been obtained. Of course it will be open to the sons to intervene and object to the sale of their shares on the ground that the debt is not binding on them. All that the plaintiffs have done in the suit is that instead of intervening in the course of the sale by the Collector they have themselves brought the suit raising the question whether their shares are also liable to be sold to recover the tax assessed on their father. There is no substance in this contention."

They also held that the sons cannot escape the liability by saying that the arrears of Income Tax were *Avyavaharika* debts, observing as follows:-

"The appellant's learned Counsel did not develop the point; not did he cite any authority for the position that the word "*Sulka*" occurring in the *Smriti* texts would apply to arrears of Income Tax. We have no doubt that the plaintiffs cannot escape their liability to discharge the debt incurred by the second defendant, that is, the arrears of Income Tax, on the ground that the obligation to pay the tax is an *avyavaharika* debt."

It was not contended before them that the pious obligation of the sons cannot be read into the Income Tax Act. Moreover, the Income Tax Act, 1922 had a special machinery of recovery from the members of the joint family u/s 25-A and hence, with respect, the decision of the Madras High Court may be right. Besides, the tax which a State recovers is something different from a loan given by the Government to an agriculturist, like the Tagai loan. Even the monarchs during whose period the *Dharmashastras* were written were called Income Tax or any other tax, and it may be that the writers of the *Dharmashastras* contemplated that there was a pious obligation to pay the debts to those monarchs. What applies to a tax cannot be applied to a statutory recovery under the Tagai Loans Act, as in the present case.

32. The aforesaid decision of the Andhra Pradesh High Court also is a decision under the Income Tax Act of 1922, although the texts of Manu, Gautama, Yajnavalkya, Narada, Brihaspati and Vyasa or Usanas are all quoted in the said judgment, and it is observed at p. 429 as follows:-

"as observed already, these texts refer to the exceptions to the general rule that a son is liable to pay the debt of his father. As pointed out by the Privy Council in AIR 1943 142 (Privy Council) most of the debts which he need not pay, are of objectionable character, even if some type of taxes or duties were exempt from the doctrine of pious obligation for certain reasons which appealed to the ancient Smriti text writers: it is for the Court to decide the context of the present society whether any particular tax liability is of such a nature as could be treated as one tainted with illegality or immorality or opposed to right conduct as to bring it within the exceptions to the general rule that the sons is liable to pay the father's debt. We have no hesitation in holding that the liability to pay arrears of Income Tax cannot be regarded as one such. On the other hand, it appears to us that it is obligatory on the son that he should pay taxes which are legitimately due to the State by his father. Even from ancient times till the present day the liability to pay tax to the State is regarded as one of the foremost duties of the citizens. We cannot believe that the ancient law givers who laid so much stress upon the duty of the son to his father's debt would have exempted him from payment of the taxes legally due by the father to the State. It has been repeatedly held that the son is liable to pay the debts of the father incurred during the course of trade which he had lawfully carried on. It does not stand to reason that while the sons is liable to pay the debts of the father so incurred, he is not liable to pay the tax due in respect of the profits of that trade, or debts incurred by the father for the purpose of the payment of those taxes. In interpreting these "Smritis" which were rendered thousands of years ago it is not safe to merely take the dictionary meaning and apply it to the texts. In this connection it has to be remembered that these "Smritis" also deal with religious and moral law."

With very great respect to the Full Bench of the Andhra Pradesh High Court, it is unnecessary for us to deal with the wide aspects of the matter of pious obligation which they have referred to, as there are specific statutory provisions in the Income Tax Act itself determining the liability of the members of the joint family in S. 25-A of the 1922 Act and Section 171 of the Income Tax Act, 1961. It must be, however, noted that it was not argued before the Full Bench that the Pious obligation of the Hindu Law cannot be applicable to incomes of all and made special provisions with regard to recoveries from properties of joint families.

33. Mr. Rane was unable to cite any authority or any text of any Dharmashastra to show that a loan given by the State, like the Tagai loan, is on the same footing as a tax recoverable by the State. We are, therefore, of the opinion that the said Madras and Andhra Pradesh decisions cannot help us in interpreting the provisions of the Tagai Loans Act.

34. Even assuming that the doctrine of pious liability could be invoked by the Collector recovering the balance of the Tagai loan u/s 7 of the Tagai Loans Act and under the provisions of the Bombay Land Revenue Code for recovery of arrears of land revenue, we find that the auction sale held in this case illegal, as, admittedly, the plaintiffs were not made parties to the recovery proceedings and no notice at all was given to the plaintiffs before the suit land allotted to the share of the plaintiffs at the partition was put up for auction sale. The plaintiffs had protested in writing before the Revenue Officers by filling Ex. 156 on May 20, 1960. Those protests were not heeded before delivering possession of the suit land to the defendant. It is true that where the sons are joint with their father and debts have been contracted by the father in his capacity as manager and head of the family for family purposes, all the members of the joint family are bound to pay debts to the extent of their interest in the coparcenary property. The pious obligation of the sons to pay their father's debts lasts only so long as the liability of the father subsists. The text of Brihaspati, which said that he who having received a sum lent or the like does not repay it to the owner will be born here-after in his creditor's house, a slave, a servant, a woman, or a quadruped, has been modified by the Legislature by enacting the law of Limitation. If the debts are irrecoverable from the father under the Limitation Act, the son also ceases to be liable.

35. The question of the liability of son, however, after partition, for debt contracted by father before partition, was considered by the Supreme Court in Pannalal and Another Vs. Mst. Naraini and Others, . In that case, after a review of all the previous decisions and consideration of Brihaspati's text, the Supreme Court authoritatively laid down the law at page 559 (of SCR) = (at page 176 of AIR) as under:-

"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 question now is, how is this liability to be enforced by the creditor, either during the lifetime of the father or after his death? It has been held in a large number of cases - all of which recognise the liability of the son to pay the pre-partition debts of the father - that a decree against the father alone obtained after partition in respect of such debt cannot be executed against the property that is allotted to the son on partition. The concur in holding that a separate and independent suit must be instituted against the sons before their shares can be reached. The principles underlying these decisions seems to us to be quite sound. After a partition takes place, the father can no longer represent the family and a decree obtained against him alone, cannot be binding on the separates sons. In the second place, the power exercisable by the father of selling the interests of the sons for satisfaction of his personal debts comes to an end with partition. As the separated share of the sons cannot be said to belong to the father nor has he any disposing power over it or its profits which he can exercise for his benefit, the provision of Section 60 of the Civil P. C. would operate as a bar to the

attachment and sale of any such property in execution of a decree against the father. The position has been correctly stated by the Nagpur High Court Jainarayan v. Sonaji, AIR 1938 Nag 24 in the following passages:

"To say a son is under a pious obligation to pay certain debts is one thing; to say his property can be taken in execution is another. In our view, property can only be attached and sold in execution if it falls within the kind of property that can be attached and sold. What that is, is found by looking at Section 60. When one looks at Section 60 one finds that the property in question should either belong to the judgment-debtor or he should have a disposing power over it. After partition, the share that goes to the son does not belong to the father and the father has no disposing power over it. Therefore such property does not fall within Section 60 It by no means follows that a son cannot be made liable. He could be made liable for his father's debts if he had become a surety; he can be made liable under the pious obligation rule. In neither of the cases put, could his liability take the form of having his property seized in execution and sold without any prior proceedings brought against him, leaving him to raise the question whether his liability as surety or under the pious obligation rule precluded him from claiming in execution."":

(Underlining supplied)

36. Having regard to these principles, it is clear that the auction sale held in this case without recovery proceedings being started against the plaintiffs was patently illegal, even assuming that the plaintiffs or at least the sons, plaintiffs Nos. 2 to 6, were liable to pay the Tagai loan of their father. In any even, the doctrine of pious obligation does not include in its piety the wife plaintiff No. 1, and hence also the auction sale would be illegal.

37. Mr. Rane, however, submitted that the view which we have taken is contrary to the view taken by the Supreme Court in a later decision in S.M. Jakati and Another Vs. S.M. Borkar and Others, He relied on the five propositions contained in the last paragraph of the judgment and particularly, proposition No. 4. The propositions are as follows:-

"(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 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 Section 155 of the Bombay

Land Revenue Code have the same connotation as they had in the corresponding words used in the Civil P. C. 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".

38. But all these propositions must be understood in the context of the discussion in the judgment. While stating that there was no divergence of judicial opinion in regard 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, as held Pannalal and Another Vs. Mst. Naraini and Others, , the Supreme Court went on to observe:-

"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 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 Vs. Brij Raj Singh and Another . As was pointed out in Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, , 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 severally 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. (Section 64, Civil P. C., is a useful guide in such circumstances) In our opinion, where the pious obligation exists and partition takes place after the decree and 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."

(Underlining supplied).

Again, at page 696 (of Bom LR) = (at page 290 of AIR) it is observed:-

"There is little doubt, therefore, that what was put up for auction sale was the whole bungalow 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 Mitakashara 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, *Mussamut Nanomi Babuasin v. Modum Mohun* (1883) 13 Ind App 1 (PC). 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."

39. With respect, therefore, there is nothing in the *S.M. Jakati and Another Vs. S.M. Borkar and Others*, which would apply to the present case, where the partition was effected prior to the auction sale. The partition was effected on July 6, 1956 under a registered partition deed and the auction sale was held thereafter on April 6, 1957.

40. The learned Civil Judge has rightly relied on a Division Bench judgment of this Court in *Ganpatrao Vishwanathappa Vs. Bhimrao Sahibrao*, , where it was laid down that under Hindu Law a decree obtained against the father alone in a Mitakashara joint family cannot be executed against the sons' interest in the property after partition without making the sons parties to the execution proceedings. In that case, in execution of a money decree which the plaintiff had obtained against the father in a joint Hindu family governed by the Mitakashara, the joint family property was attached. Before the property was brought to sale, a partition was effected between the father and his sons. The property was subsequently sold in execution of the plaintiff's decree and it was purchased by the plaintiff himself. On the question whether the sons' interest in the property passed to the plaintiff, it was held that as the sons were not made parties to the execution proceedings, their interest in the property did not pass to the plaintiff. It was further laid down in that case that under Hindu Law where the intention to separate was clear whatever the motive with which the partition was effected, whether the intention was to defraud the creditors or merely to make it more difficult for the creditors to obtain the fruit of their decree in execution, the division of the status which it is within the will of the members of the joint Hindu family to bring about must be given full effect and as long as that is so, what will pass in the execution sale to which the sons took place after the partition is the interest of the father alone. *Ganpatrao's* case was referred to by the Supreme

Court in S.M. Jakati and Another Vs. S.M. Borkar and Others, and it was observed that the decision must be confined to its facts. It was not overruled by the Supreme Court. We are bound by this Division Bench judgment as we also agree with the very reasonable and equitable view taken by Bavdekar and Jahagirdat, JJ., particularly as the view is consistent with the view expressed in the Nagpur Bench judgment, which is affirmed by the Supreme Court in Pannalal and Another Vs. Mst. Naraini and Others,

41. Mr. Rane is, therefore, not right in his contention that there is something in the decision in S.M. Jakati and Another Vs. S.M. Borkar and Others, which helps him to contend that the auction sale of the suit land for the pre-partition Tagai loan, in pursuance of the orders for recovery of the loan passed before the partition, can be said to be valid even on the footing that the sons are bound to pay the Tagai loan on the basis of their pious obligation to pay their father's debt.

42. The argument of Mr. Rane is also inconsistent with the decision of Mudholkar, Ag. C. J., as he then was, in Padmavatibai and Others Vs. Manilal Nyahalchand Kasliwal Shrivagi and Others, . In that case, the defendant instituted a suit on a promissory note against N who formed a joint Hindu family with his son. During the pendency of the suit, a partition was effected between N and his son. After the defendant obtained a decree against N, he attached various properties which formerly belonged to the joint family, including properties allotted at the partition to the share of the son. In a suit by the son for a declaration that the properties allotted to his share at the partition were not liable to be attached and sold, Mudholkar, Ag. C. J., as he then was, held that the properties which were allotted to the share of the son at the partition could not be reached in execution of the decree obtained by the defendant, applying the ratio in Pannalal and Another Vs. Mst. Naraini and Others, . With respect we are in complete agreement with Mudholkar, Ag. C. J., as he then was.

43. Mr. Rane then submitted that the order for recovery was made in the present case long before the partition and the lands for the benefit of which the loan was taken were sold on May 26, 1955 and, therefore, the ratio which is applicable to the present case is the ratio in S.M. Jakati and Another Vs. S.M. Borkar and Others, But Jakati's case itself, as pointed out above, can be of no assistance as the propositions therein must be understood in the light of the discussion which is quoted above. Prior to the partition in the present case, there was no order for recovery against the properties allotted to the plaintiffs. The order was only for recovery of the Tagai loan from the lands for the benefit of which the loan was taken. Mr. Rane submitted that so far as the sale of those lands was concerned, it was held to be invalid in Suit No. 114 of 1957 decided on April 23, 1968 following the decision of the Supreme Court in Ramrao Jankiram Kadam Vs. State of Bombay, where it was laid down that a purchase by the Government for a pre-determined nominal price of rupee one of the defaulter's property, whatever its actual market value, is not a sale by public auction within Section 167 of the Bombay Land Revenue Code, 1879, and hence Dattatray has already recovered

possession of those lands and the Government has recovered its Tagai loan from the sale of the suit land and in these circumstances it would be unjust to deprive the appellant-defendant of the possession of the land which was given to him.

44. It is not possible to accept this argument, because it has no relevance to the legality of the auction sale. Whether we hold that the auction sale was held ultra vires Section 7 of the Tagai Loans Act or contrary to the principles laid down by the Supreme Court regarding the mode of enforcing the son's liability under the pious obligation, the auction sale must be held to be illegal as found by the learned Civil Judge in this case. It is true that the order for recovery of the Tagai loan was made in this case as per Ex. 95-D-1 On April 30, 1954, but that was an order to recover the Tagai loan for non-compliance with the conditions of the Tagai loan bond passed against the borrower, Dattatray. No order was passed against the plaintiffs or any of them. The basis on which the auction sale was held on April 6, 1957, namely, that the Government could sell the lands for the benefit of which the loan was given at a nominal bid of Re. 1/- being illegal, the auction sale also must be considered to be without any legal authority or validity. Further, on the date of the auction sale, Dattatray had no right, title or interest whatsoever in the suit land and hence the Revenue Authorities had no power to sell the suit land for recovering the loan from Dattatray. In view of matter, therefore, the auction sale in the present case must be held to be invalid.

45. It was next contended by Mr. Rane, relying on a ration card. Exhibit 125, date May 3, 1965, including the plaintiffs as well as Dattatray, and a free-ship application, Ex. 87, dated June 15, 1961, and the statement recorded by the Land Acquisition Officer as per Ex. 101, which showed that although the subdivisions had been entered in the Record of Rights in respect of the suit land, the suit land was not actually divided and the names of the plaintiffs had been entered as common, that notwithstanding the registered partition deed dated July 6, 1956, Ex. 79, there was in fact no partition between the plaintiffs and Dattatray. In support of his argument, he relied on the decision in Arwindlal Bhukandas Shah Vs. Khandu Jaina Patil, . It was a case arising under the provisions of the Bombay Tenancy and Agricultural Lands Act, where it was laid down that the Tenancy Court should find out whether the partition had really taken place or whether the members of the landlord's family had entered into only a sham partition which had not been acted upon. That case is distinguishable because the scheme of the provisions of the Bombay Tenancy and Agricultural Lands Act relating to partition of the lands of the landlords' family when the lands are in the possession of the tenants has no relevance to the question as to whether after partition the lands allotted to the sons can be sold in auction for the pre-partition debts of the father which were not secured by the lands allotted to the sons.

46. The rest of the arguments of Mr. Rane are inconsistent with the well settled law relating to the concept of partition stated in para. 322 of Mulla's Hindu Law, 14th Edition, 1974, as follows:-

"According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he - that particular member - has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property; in other words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. But whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint immediately the shares are defined, and thenceforth the parties hold the property as tenants-in-common."

Reference in this connection may be made to aforesaid decision in Ganpatrao Vishwanathappa Vs. Bhimrao Sahibrao, Reference may also be made in this connection to the decision of the Full bench of the Patna High Court in Atul Krishna Roy v. Lala Nandanji AIR 1935 Pat 275 .

47. In view of what appears to be the aforesaid settled principles of Hindu law relating to partition and its effect, the fact that the plaintiffs and Dattatray had a common ration card, Ex. 125, or that Dattatray applied for free-ship for one of the minor plaintiffs, Ex. 87, or the fact that the Land Acquisition Officer found that though the shares were indicated in the Record of Rights, they were shown as common or Samaik, does not render the partition between the plaintiffs and Dattatray unreal. The plaintiffs say that there was a partition. The unequivocal will of the members of the family to separate is expressed in a registered partition deed. In these circumstances, the argument of Mr. Rane that the partition was sham or that the partition was intended to defeat the creditors, including the Government, is wholly irrelevant.

48. It was next contended by Mr. Rane that as the main relief in the suit was based on setting aside the auction sale held by the Revenue Authorities, the Government of Maharashtra was a necessary party to the present suit. It is, however, well established that where the plaintiffs can obtain complete and effective reliefs from the Court in respect of the subject-matter in dispute against a party, it is not necessary to join any other party, it is not necessary to join any other party, whether it is Government or others. In the present case, as already stated above, the contention of the plaintiffs was that the auction sale of the suit land was ultra vires, illegal, unauthorised and void and, therefore, the possession of the defendant was also illegal. The plaintiffs were entitled to a complete and effective relief by obtaining possession of the land from the defendant. They sought no relief against the Government. They were bound to seek any relief against the Government. It is well established that where a Revenue Officer purports to do an act or pass an order which is invalid and without jurisdiction,

the purported order is a mere nullity; and it is not necessary for anybody, who objects to that order to apply to set it aside. He can rely on its invalidity when it is set up against him, although he has not taken steps to set it aside. Such an order does not give any right whatsoever, not even a right of appeal. (See *Abdullamiyan Abdulrehman Vs. The Government of Bombay*, and *Jethalal Nagji Shah Vs. Municipal Corporation for Greater Bombay*, Therefore, the contention that the plaintiffs' suit is based for non-joinder of the Government is without any substance.

49. Lastly, it was urged by Mr. Rane that the suit was barred by time, as it was not filed within one year from the date of the auction sale as required by Article 14 of the Limitation Act. A similar contention was raised before the learned Civil Judge and the learned Civil Judge rightly rejected the contention as the present suit is not a suit for setting aside any order of a Revenue Officer but for recovering possession of suit land. It is governed by Article 142 of the Limitation Act, 1908. The suit was filed on April 19, 1961 after the dispossession of the plaintiffs on May 20, 1960 and was very well within time.

50. Mr. Rane submitted that the auction sale cannot be said to be ultra vires or without jurisdiction and null and void, but it was only voidable. In this connection, Mr. Rane drew our attention to the pleadings and submitted that the word "ultra vires" was not used in the plaint. The plaint is in Marathi and we think that the word "anadhikrita" is equivalent to "ultra vires" and the plea was properly made in the plaint. For the reasons, which we have already stated, the auction sale was wholly void and patently ultra vires the Revenue Authorities. No other ground was urged by Mr. Rane in support of the appeal.

51. In the result, the decree passed by the learned Civil Judge on January 31, 1966 in Special Civil Suit No. 7 of 1961 is confirmed and First Appeal No. 160 of 1966 is dismissed with costs and the judgment and order passed by the learned Civil Judge, Senior Division, Satara, on the same day in Land Reference No. 53 of 1961 must be also, therefore, confirmed and First Appeal No. 173 of 1966 is dismissed with costs.

52. Appeal dismissed.