SUPREME COURT

CIVIL APPELLATE JURISDICTION

Before Saiyid Fazl Ali, B. K. Mukherjea and Vivian Bose, JJ.

Civil Appeal No. 57 of 1951

PANNA LAL AND ANOTHER,— *Appellants,*

versus

MST. NARAINI, DECEASED, REPRESENTED BY HARI PARSHAD AND 3 OTHERS AND MST. BASSO,—*Respondents.*

1952

March 7th

Hindu Law—Debts—Liability of son to pay debts of his father—Whether property obtained on partition with the father liable for pre-partition debts in respect of which a decree was passed after the partition against the sons as legal representatives of the father—Method of enforcing liability, whether by a separate suit or in execution proceedings—Code of Civil Procedure (Act V of 1908), Sections 47, 52, 53 and 60—Scope of—Statutory right—Whether can be contracted out without express words.

B. D., the father as manager of joint Hindu family, incurred a debt on the security of certain property of the joint family. Some time later there was partition between the father and the sons and the hypothecated property fell

to the share of the sons who took possession thereof. The creditor filed a suit for a decree against the father and the mortgaged property. The claim to the mortgaged property was later given up and only a personal decree was prayed for. The father died during the pendency of the suit and his sons and widow were brought on the record as his legal representatives. By compromise a simple money decree was passed in favour of the creditor against the estate of B. D., in the possession of his legal representatives. In execution of the decree certain shops which had been obtained by the sons on partition with their father were got attached. The sons objected to the attachment and pleaded that the attached shops being their separate and exclusive properties could not be made liable for the satisfaction of the decree which had to be realized from the estate of B. D. It was held by the Subordinate Judge that the separate properties of the sons obtained by them on partition were liable for the pre-partition debt of their father if it was not immoral and the decree could be executed against such properties under section 53, Civil Procedure Code. On appeal the High Court affirmed the decision of the Subordinate Judge.

In appeal to the Supreme Court it was contended :

(1) That the decree, according to its terms, could be executed only against the properties of B. D., in the hands of his legal representatives which he left at the time of his death and not against the properties of the appellants obtained by them on partition with their father during his lifetime ;

(2) That the decree having been passed after partition the separate properties obtained by the appellants on partition, were not liable for its satisfaction under Hindu Law ; and

(3) That in case any pious obligation of the sons was sought to be enforced, it could be enforced by a separate suit and not in execution proceedings.

Held, that as the decree fulfils the conditions of section 52 (*1*), Civil Procedure Code, it would attract all the incidents which attach by law to a decree of that character. Consequently the decree-holder would be entitled to call in aid the provisions of section 53 of the Code ; and if any property in the hands of the sons other than what they received by inheritance from their father, is liable under the Hindu Law to pay the father's debts, such property could be reached by the decree-holder in execution of the decree by virtue of the provisions of section 53, Civil Procedure Code.

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Held further, that a son being liable, even after the 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 property obtained by him on partition is liable for the satisfaction of such debts.

Held further, that a decree against the father alone during his life-time cannot possibly be executed against his sons as his legal representatives. The decree against the father after the partition could not be taken to be a decree against the sons and no attachment and sale of the sons' separated shares would be permissible under section 60, Civil Procedure Code, but the position is quite different when the sons are made legal representatives in the suit and the decree is obtained against them as legal representatives. Such a decree can be executed against the sons under section 53, Civil Procedure Code, and the liability of the sons and their separated share of the property will have to be decided by the executing court under section 47, Civil Procedure Code.

Held further, that section 53 of the Civil Procedure Code being only a rule of procedure cannot create or take away any substantive right. It is only when the liability of the sons to pay the debts of their father in certain circumstances exists under the Hindu Law, is the operation of the section attracted and not otherwise. The provisions of this section cannot be extended to a case when the father is still alive.

Held further, that it is certainly possible for the parties to agree among themselves that the decree should be executed only against a particular property and no other; but when any statutory right is sought to be contracted out, it is necessary that express words of exclusion must be used. Exclusion cannot be inferred merely from the fact that the compromise made no reference to such right.

Subramanaya v. *Sabapathi* (1), *Annabat* v. *Shivappa* (2), *Bankey Lal* v. *Durga Prasad* (3), *Jawahar Singh* v. *Parduman* (4), *Raghunandan* v. *Matiram* (5), and *Atul Krishna* v. *Lala Nandanji* (6), relied upon; *Krishnaswami* v. *Ramaswami* (7), *V. P. Venkanna* v. *V. S. Deekshatulu* (8), and dissentient Judgment of Ayyangar, J., in *Subramanaya* v. *Sabapathi* (1), not approved.

(1) 51 Mad. 361 (F.B.).
(2) 52 Bom. 376.
(3) 53 All. 868 (F.B.).
(4) 14 Lah. 399.
(5) 6 Luck. 497.
(6) 14 Pat. 732 (F.B.).
(7) 22 Mad. 519.
(8) 41 Mad. 136.

On appeal from the judgment, dated the 18th May 1948, of the High Court of Judicature for the State of Punjab at Simla (Khosla and Teja Singh, JJ.) in Letters Patent Appeal No. 189 of 1946, arising out of judgment, dated the 11th February 1946, of the Court of the Senior Sub-Judge, Ambala.

GOPI NATH KUNZRU, for Appellants.

RANG BEHARI LAL, for Respondents.

JUDGMENT

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MUKHERJEA, J. This appeal is on behalf of the judgment-debtor in a proceeding for execution of a money decree and it is directed against the judgment of a Letters Patent Bench of the Punjab High Court, dated 18th of May, 1948, by which the learned Judges affirmed, in appeal, a decision of a single judge of that court, dated 29th October 1946. The original order against which the appeal was taken to the High Court was made by the Senior Subordinate Judge, Ambala, in Execution Case No. 18 of 1945, dismissing the objections preferred by the appellants under section 47 of the Civil Procedure Code.

To appreciate the contentions that have been raised in this appeal, it would be necessary to give a short narrative of the material events in their chronological order. On September 30, 1925, Baldev Das, the father of the appellants, who was at that time the manager of a joint Hindu family, consisting of himself and his sons, executed a mortgage bond in favour of Mst Naraini, the original respondent No. 1, and another person named Talok Chand, by which certain movable properties belonging to the joint family were hypothecated to secure a loan of Rs 16,000. On April 16, 1928, the appellants along with a minor brother of theirs named Sumer Chand filed a suit—being Suit No. 23 of 1928—in the Court of the Subordinate Judge of Shahjahanpur against their father Baldev Das for partition of the joint family properties. The suit culminated in a final decree for partition on 20th July 1928, and the joint family properties were divided by metes and bounds and separate possession was taken by the father and the sons. On 29th September 1934, Mst Naraini filed a suit in the Court of

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the Senior Subordinate Judge, Ambala, against Baldev Das for recovery of a sum of Rs 12,500 only on the basis of the mortage bond referred to above. It was stated in the plaint that the money was borrowed by the defendant as manager of a joint Hindu family and the plaintiff prayed for a decree against the mortgaged property as well as against the joint family. On 18th December 1934, the appellants made an application before the Subordinate Judge under Order 1, Rule 10, and Order 34, Rule 1, Civil Procedure Code, praying that they might be added as parties, defendants to the suit and the points in issue arising therein might be decided in their presence. It was asserted in the petition that Baldev Das was not the manager of a joint family and that the family properties had been partitioned by a decree of the court, as a result of which the properties alleged to be the subject-matter of the mortgage were allotted to the share of the petitioners. In reply to this petition, the plaintiff's counsel stated in court on 7th February 1935, that his client would give up the claim for a mortgage decree against the properties in suit and would be satisfied only with a money decree against Baldev Das personally. The plaint was amended accordingly, deleting all reference to the joint family and abandoning the claim against the mortgaged property. Upon this the appellants withdrew their application for being made parties to the suit and reserved their right to take proper legal action if and when necessary. On April 17, 1935, Baldev Das died and on 2nd September following the appellants as well as their mother, who figures as respondent No. 5 in this appeal, were brought on the record as legal representatives of Baldev Das. On October 9, 1935, the appellants filed a written statement in which a number of pleas were taken in answer to the plaintiff's claim and it was asserted in paragraph 10 of the written statement that Baldev Das dealt in *Badni* or speculative transactions and if any money was due to the plaintiff at all in connection with such transactions, the debt was illegal and immoral and not binding on the family property. On the same day the court recorded an order to the effect that as

the plaintiff had given up her claim for a mortgage decree, the legal representatives of the deceased could not be allowed to raise pleas relating to the validity or otherwise of the mortgage. On 20th November 1935, the parties arrived at a compromise and on the basis of the same, a simple money decree was passed in favour of the plaintiff for the full amount claimed in the suit together with half costs amounting to Rs 425 annas odd against the estate of Baldev Das in the hands of his legal representatives. After certain attempts at execution of this decree which did not prove successful, the present application for execution was filed by the decree-holder on March 13, 1945, in the court of the Senior Subordinate Judge, Ambala, and in accordance with the prayer contained therein, the court directed the attachment of certain immovable properties consisting of a number of shops in possession of the appellants and situated at a place called Abdullapur. On April 23, 1945, the appellants filed objections under section 47, Civil Procedure Code, and they opposed the attachment of the properties substantially on the ground that these properties did not belong to Baldev Das, but were the separate and exclusive properties of the objectors which they obtained on partition with their father long before the decree was passed. It was asserted that these properties could not be made liable for the satisfaction of the decretal dues which had to be realised under the terms of the decree itself from the estate left by Baldev Das.

After hearing the parties and the evidence adduced by them the Subordinate Judge came to the conclusion that there was in fact a partition between Baldev Das and his sons in the year 1928 and as a result of the same, the properties, which were attached at the instance of the decree-holder, were allotted to the share of the sons. The decree sought to be executed was obtained after the partition, but it was in respect of a debt which was contracted by the father prior to it. It was held in these circumstances that the separate share of the sons which they obtained on partition was liable under the Hindu Law for

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the pre-partition debt of their father if it was not immoral, and under section 53 of the Civil Procedure Code the decree-holder was entitled to execute the decree against such properties. As no point was raised by the objectors in their petition alleging that the debt covered by the decree was tainted with immorality, the objections under section 47, C. P. Code, were dismissed. The objectors thereupon took an appeal to the High Court of East Punjab which was heard by Rahman, J., sitting singly. The learned Judge dismissed the appeal and affimed the decision of the Subordinate Judge. A further appeal taken to a Division Bench under the Letters Patent was also dismissed and it is the propriety of the judgment of the Letters Patent Bench that has been challenged before us in this appeal.

Mr Kunzru appearing for the appellants put forward a three-fold contention in support of the appeal. He contended in the first place that under the terms of the compromise decree the decree holder could proceed only against the properties of Baldev Das in the hands of his legal representatives and no property belonging to the appellants could be made liable for the satisfaction of the decree. The second contention put forward is that as the decree in the present case was obtained after partition of the joint family property between the father and his sons, the separate property of the sons obtained on partition was not liable under Hindu Law for the debt of the father. It is urged last of all that in any event if there was any pious obligation on the part of the sons to pay the father's debt incurred before partition, such obligation could be enforced against the sons, only in a properly constituted suit and not by way of execution of a decree obtained in a suit which was brought against the father alone during his lifetime and to which the sons were made parties only as legal representatives after the father's death.

As regards the first point, the determination of the question raised by Mr Kunzru depends upon the

construction to be put upon the terms of the compromise decree. The operative portion of the decree as drawn up by the court stands as follows :

> "It is ordered that the parties having compromised, a decree in accordance with the terms of the compromise be and the same is hereby passed in favour of the plaintiff against the estate of Baldev Das, deceased, in possession of his legal representatives. It is also ordered that the defendants do also pay Rs 425-7-0, half costs of the suit."

There was no petition of compromise filed by the parties and made part of the decree, but there are on the record two statements, one made by Pannalal, the appellant No. 1, on behalf of himself and his mother and the other by Lala Haraprasad, the special agent of the plaintiff, setting out terms of the compromise. The terms are worded much in the same manner as in the decree itself and are to the effect that decree for the amount in suit together with half costs would be awarded against the property of Baldev Das, deceased. It is argued by Mr Kunzru that the expression "estate of Baldev Das, deceased" occurring in the decree must mean and refer to the property belonging to Baldev Das at the date of his death and could not include any property which the sons obtained on partition with their father during the father's lifetime and in respect of which the latter possessed no interest at the time of his death. Stress is laid by the learned counsel in this connection on the fact that when the appellants were brought on the record as legal representatives of their deceased father in the mortgage suit they specifically asserted in their written statement that there was a partition between them and their father long before the date of the suit as a result of which the hypothecated properties were alloted to them. Upon that the plaintiff definitely abandoned her claim to a mortgage decree or to any relief against the joint family and agreed finally to have a money decree executable against the personal assets of Baldev Das in the hands of his heirs. In these circumstances, it is urged that if it was the intention

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of the parties that the decree-holder would be entitled to proceed against the separate property of the sons, nothing could have been easier than to insert a provision to that effect in the compromise decree. There is undoubtedly apparent force in this contention but there is another aspect of the question which requires consideration. The terms of the decree that was passed in this suit, though based on the consent of the parties, are precisely the same as are contemplated by section 52(1) of the Civil Procedure Code. It was a decree for money passed against the legal representatives of a deceased debtor and it provided expressly that the decretal amount was to be realised out of the estate of the deceased in the hands of the legal representatives. It is argued on behalf of the respondent, and we think rightly, that as the decree fulfils the conditions of section 52(1) of the Civil Procedure Code, it would attract all the incidents which attach by law to a decree of that character. Consequently the decree-holder would be entitled to call in aid the provision of section 53 of the Code; and if any property in the hands of the sons, other than what they received by inheritance from their father, is liable under the Hindu Law to pay the father's debts, such property could be reached by the decree-holder in execution of the decree by virtue of the provisions of section 53 of the C. P. Code. Whether the property which the sons obtained on partition during the lifetime of the father is liable for a debt covered by a decree passed after partition and whether section 53 has at all any application to a case of this character are questions which we have to determine in connection with the second and the third points raised by appellants. Section 53, Civil Procedure Code, it is admitted, being only a rule of procedure cannot create or take away any substantive right. It is only when the liability of the sons to pay the debts of their father in certain circumstances exists under the Hindu Law, is the operation of the section attracted and not otherwise. The only other question that can possibly arise by reason of the decree being compromise decree is, whether the parties themselves have, by agreement, excluded the operation of section 53,

Civil Procedure Code. It is certainly possible for the parties to agree among themselves that the decree should be executed only against a particular property and no other, but when any statutory right is sought to be contracted out, it is necessary that express words of exclusion must be used. Exclusion cannot be inferred merely from the fact that the compromise made no reference to such right. As nothing was said in the compromise decree in the present case about the right of the decree-holder to avail herself of other provisions of the Code which might be available to her in law, we cannot say that the plaintiff has by agreement expressly given up those rights. The first point, therefore, by itself is of no assistance to the appellants.

We now come to the other two points raised by Mr Kunzru and as they are inter-connected they can conveniently be taken up together. These points involve consideration of the somewhat vexed question relating to the liability of a son under the Hindu Law other than that of the Dayabhag school to pay the debts of his father, provided they are not tainted with immorality. In the opinion of the Hindu Smriti writers, debt is not merely a legal obligation, but non-payment of debt is a sin, the consequences of which follow the debtor even after his death. A text (1), which is attributed to Brihaspathi, lays down:

> "He who having received a sum lent or the like does not repay it to the owner, will be born hereafter in the creditor's house a slave, a servant, a woman or a quadruped."

There are other texts which say that a person in debt goes to hell. Hindu Law givers therefore imposed a pious duty on the descendants of a man including his son, grandson and great grandson to pay off the debts of their ancestor and relieve him of the after-death torments consequent on non-payment. In the original texts a difference has been made in regard to the obligation resting upon sons, grandsons and great grandsons in this respect. The son is bound to

(1) *Vide* Colebrooke's Digest I, 228.

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discharge the ancestral debt as if it was his own, together with interest and irrespective of any assets that he might have received. The liability of the grandson is much the same except that he has not to pay any interest; but in regard to the great grandson the liability arises only if he received assets from his ancestor. It is now settled by judicial decisions that there is no difference as between son, grandson and great grandson so far as the obligation to pay the debts of the ancestor is concerned; but none of them has any personal liability in the matter irrespective of receiving any assets (1). The position, therefore, is that the son is not personally liable for the debt of his father even if the debt was not incurred for an immoral purpose and the obligation is limited to the assets received by him in his share of the joint family property or to his interest in such property and it does not attach to his self-acquisitions. The duty being religious or moral, it ceases to exist if the debt is tainted with immorality or vice. According to the text writers, this obligation arises normally on the death of the father; but even during the father's lifetime the son is obliged to pay his father's debts in certain exceptional circumstances, e.g. when the father is afflicted with disease or has become insane or too old or has been away from his country for a long time or has suffered civil death by becoming an anchorite (2). It can now be taken to be fairly well settled that the pious liability of the son to pay the debts of his father exists whether the father is alive or dead (3). Thus it is open to the father, during his lifetime, to effect a transfer of any joint family property including the interests of his sons in the same to pay off an antecedent debt not incurred for family necessity or benefit, provided it is not tainted with immorality. It is equally open to the creditor to obtain a decree against the father and in execution of the same put up to sale not merely the father's but also the son's interest in the joint estate. The creditor can make the sons parties to such suit and

(1) *Vide* Masitullah *v.* Damodar Prasad, 53 I.A. 204.
(3) *Vide* Mayne's Hindu Law, 11th edition, p. 408.
(2) *Vide* Brij Narain *v.* Mangla Prasad, 51 I.A. 129.

obtain an adjudication from the court that the debt was a proper debt payable by the sons. But even if the sons are not made parties, they cannot resist the sale unless they succeed in establishing that the debts were contracted for immoral purposes. These propositions can be said to be well recognised and reasonable beyond the region of controversy (1). All of them, however, have reference to the period when the estate remains joint and there is existence of coparcenership between the father and the son. There is no question that so long as the family remains undivided the father is entitled to alienate, for satisfying his own personal debts not tainted with immorality, the whole of the ancestral estate. A creditor is also entitled to proceed against the entire estate for recovery of a debt taken by the father. The position is somewhat altered when there is a disruption of the joint family by a partition between the father and the sons. The question then arises, whether the sons remain liable for the debt of the father even after the family is divided; and can the creditor proceed against the shares that the sons obtain on partition for realization of his dues either by way of a suit or in execution of a decree obtained against the father alone? It must be admitted that the law on the subject as developed by judicial decisions has not been always consistent or uniform and the pronouncements of some of the Judges betray a lack of agreement in their approach to the various questions involved in working out the law.

As regards debts contracted by the father after partition, there is no dispute that the sons are not liable for such debts. The share which the father receives on partition and which after his death comes to his sons, may certainly, at the hands of the latter, be available to the creditors of the father, but the shares allotted on partition to the sons can never be made liable for the post-partition debts of the father (2).

(1) *Vide* Girdharee Lall v. Kantoo Lall, 1 I.A. 321; Maddan Thakoor v. Kantoo Lall, 1 I.A. 333; Suraj Bunsi v. Sheo Prasad, 6 I.A. 88; Brij Narain v. Mangla Prasad, 51 I.A. 129.

(2) *Vide* Mayne's Hindu Law, 11th Edition, 430.

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The question that is material for our present purpose is, whether the sons can be made liable for an unsecured debt of the father incurred before partition, in respect to which the creditor filed his suit and obtained decree after the partition took place. On this point admittedly there is divergence of judicial opinion, though the majority of decided cases are in favour of the view that the separated share of a son remains liable even after partition for the prepartition debts of the father which are not illegal or immoral (1). The reason given in support of this view by different Judges are not the same and on the other side there are pronouncements of certain learned Judges, though few in number, expressing the view that once a partition takes place, the obligation of the sons to discharge the debts of their father comes to an end(2).

The minority view proceeds upon the footing that the pious obligation of the son is only to his father and corresponding to this obligation of the son the father has a right to alienate the entire joint property including the son's interest therein for satisfaction of an antecedent debt not contracted for immoral purposes. What the creditor can do is to avail himself of this right of the father and work it out either by suit or execution proceedings; in other words, the remedy of a father's simple contract creditor during the father's lifetime rests entirely on the right of the father himself to alienate the entire family property for satisfaction of his personal debts. The father loses this right as soon as partition takes place and after that, the creditor cannot occupy a better position or be allowed to assert rights which the father himself could not possess.

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(1) *Vide* Subramanya *v.* Sabapathi, 51 Mad. 361 (F.B.);
Annabat *v.* Shivappa, 52 Bom. 376;
Jawahar Singh *v.* Parduman, 14 Lah. 399;
Atul Krishna *v.* Lala Nandanji, 14 Pat. 732 (F.B.);
Bankey Lal *v.* Durga Prasad, 53 All 868 (F.B.);
Raghunandan *v.* Matiram, 6 Luck. 497 (F.B.).

(2) *Vide* Krishnaswami *v.* Ramaswami, 22 Mad. 519;
V. P. Venkanna *v.* V. S. Deekshatulu, 41 Mad. 130;
Vide also the dissentient judgment of Ayyangar, J., in Subramanya *v.* Sabapathi, 51 Mad. 361 (F.B.).

The reasoning in support of the other view which has been accepted in the majority of the decided cases is thus expressed by Waller, J., in his judgment in the Madras Full Bench case (1).

> "On principle, I can see no reason why a partition should exempt a son's share from liability for a pre-partition debt for which it was liable before partition. The creditor advances money to the father on the credit of the joint family property. Why should he be deprived of all but a fraction of his *security* by a transaction to which he was not a party and of which he was not aware? And what becomes of the son's pious obligation? It was binding as regards the particular debt before partition; does it cease to apply to that debt simply because there has been a partition"?

The first part of the observation of the learned Judges does not impress us very much. An unsecured creditor, who has lent money to the father, does not acquire any lien or charge over the family property, and no question of his security being diminished at all arises. In spite of his having borrowed money the father remains entitled to alienate the property and a mere expectation of the creditor, however reasonable it may be, cannot be guaranteed by law so long as he does not take steps necessary in law to give him adequate protection. The extent of the pious obligation referred to in the latter part of the observation of the learned Judge certainly requires careful consideration. We do not think that it is quite correct to say that the creditor's claim is based entirely upon the father's power of dealing with the son's interest in the joint estate. The father's right of alienating the family property for payment of his just debts may be one of the consequences of the pious obligation which the Hindu Law imposes upon the sons or one of the means of enforcing it, but it is certainly not the measure of the entire obligation. As we have said already, according

(1) *Vide* Subramanya *v.* Sabapathi, 51 Mad. 361 at 369 (F.B.).

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to the strict Hindu theory, the obligation of the sons to pay the father's debts normally arises when the father is dead, disabled or unheard of for a long time. No question of alienation of the family property by the father arises in these events; although it is precisely under these circumstances that the son is obliged to discharge the debts of his father. As was said by Sulaiman, A. C. J., in the case of *Bankey Lal* v. *Durga Prasad* (1):

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

It is thus necessary to see what exactly is the extent of the obligation which is recognised by the Hindu texts writers in regard to the payment by the son of the pre-partition debts of his father. Almost all the relevant texts on this point are to be found collected in the judgment of Sulaiman, A. C. J., and Mukerji, J., in the Allahabad Full Bench case referred to above. A text of Narada recites (2):

> "What is left after the discharge of the father's obligation and after the payment of the father's debts shall be divided by the brothers so that the father may not remain a debtor."

Katyan also says (3):

> "The sons shall pay off the debts and the gifts promised by the father and divide the remaining among themselves."

There is a further passage in Manu (4):

> "After due division of the paternal estate if any debt or estate of the father be found out let the brothers equally divide the same among themselves."

According to Yagnavalka (5):

> "The sons should divide the wealth and the debts equally."

(1) 53 All. 868 at 876 (F.B.).
(2) Narada, 13, 32.
(3) Hindu Law in its Sources by Dr. Ganga Naht Jha, Vol I, p. 202, quotation No. 211.
(4) Chap. 9, *v.* 218.
(5) J. C. Ghosh's Hindu Law, Vol. II, page 342.

It is true that the partition contemplated in these passages is one after the death of the father, but whenever the partition might take place, the view of the Hindu law givers undoubtedly is that the binding debts on the family property would have to be satisfied or provided for before the coparceners can divide the property. In *Sat Narain* v. *Das* (1), Judicial Committee pointed out that when the family estate is divided, it is necessary to take account of both the assets and the debts for which the undivided estate is liable. It was argued in that case on behalf of the appellants that the pious obligation of the sons was an obligation not to object to the alienation of the joint estate by the father for his antecedent debts unless they were immoral or illegal, but these debts were not a liability on the joint estate for which provision was required to be made before partition. This contention did not find favour with the Judicial Committee and in their opinion, as they expressed in the judgment, the right thing to do was to make provision for discharge of such liability when there was partition of the joint estate. If there is no such provision, " the debts are to be paid severally by all the sons according to their shares of inheritance ", as enjoined by Vishnu (2). In our opinion, this is the proper view to take regarding the liability of the sons under Hindu Law for the pre-partition debts of the father. The sons are liable to pay these debts even after partition unless there was an arrangement for payment of these debts, at the time when the partition took place. This is substantially the view taken by the Allahabad High Court in the Full Bench case referred to above and it seems to us to be perfectly in accord with the principles of equity and justice.

The question now comes as to what is meant by an arrangement for payment of debts. The expressions " *bona fide* " and " *mala fide* " partition seem to have been frequently used in this connection in

(1) 63 I.A. 384.

(2) Vishnu, Chap. 6, verse 36.

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various decided cases. The use of such expressions far from being useful does not unoften lead to error and confusion. If by *mala fide* partition is meant a partition the object of which is to delay and defeat the creditors who have claims upon the joint family property, obviously this would be a fraudulent transaction not binding in law and it would be open to the creditors to avoid it by appropriate means. So also a mere colourable partition not meant to operate between the parties can be ignored and the creditor can enforce his remedies as if the parties still continued to be joint. But a partition need not be *mala fide* in the sense that the dominant intention of the parties was to defeat the claims of the creditors; if it makes no arrangement or provision for the payment of the just debts payable out of the joint family property, the liability of the sons for payment of the pre-partition debts of the father will still remain. We desire only to point out that an arrangement for payment of debts does not necessarily imply that a separate fund should be set apart for payment of these debts before the net assets are divided, or that some additional property must be given to the father over and above his legitimate share sufficient to meet the demands of his creditors. Whether there is a proper arrangement for payment of the debts or not, would have to be decided on the facts and circumstances of each individual case. We can conceive of cases where the property allotted to the father in his own legitimate share was considered more than enough for his own necessities and he undertook to pay off all his personal debts and release the sons from their obligation in respect thereof. That may also be considered to be a proper arrangement for payment of the creditors in the circumstances of a particular case. After all the primary liability to pay his debts is upon the father himself and the sons should not be made liable if the property in the hands of the father is more than adequate for the purpose. If the arrangement made at the time of partition is reasonable and proper, an unsecured creditor cannot have any reason to complain. The fact that he is no party to such arrangement is in our

opinion, immaterial. Of course, if the transaction is fraudulent or is not meant to be operative, it could be ignored or set aside; but otherwise it is the duty of unsecured creditor to be on his guard lest any family property over which he has no charge or lien is diminished for purposes of realization of his dues.

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 (1)—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. They 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 seem 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 separated 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 Procedure Code would operate as a bar to the attachment and sale of any such property in execution of a decree against the father. The position

(1) Vide Kameswararmma *v.* Venkatasubba, 38 Mad. 1120; Subramanaya *v.* Sabapathi. 51 Mad. 361; Thirumala Muthu *v.* Subramania, A.I.R. 1937 Mad. 458; Surajmal *v.* Motiram, 1939 Bom. 658; Atul Krishna *v.* Lala Nandanji, 14 Pat. 732; Govindram *v.* Nathulal, I.L.R. 1938 Nag. 10.

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has been correctly stated by the Nagpur High Court (1) 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."

It is not disputed that the provision of section 53 of the Civil Procedure Code cannot be extended to a case when the father is still alive.

We now come to the last and the most controversial point in the case, namely, whether a decree passed against the separated sons as legal representatives of a deceased debtor in respect of a debt incurred before partition can be executed against the shares obtained by such sons at the partition? As has been said already the shares of the separated sons

(1) Jainarayan v. Sonaji, A.I.R. 1938 Nag. 24 at 29.

in the family property may be made liable for pre-partition debts, provided they are not tainted with immorality and no arrangement for payment of such debts was made at the time of the partition. The question, however, is whether this can be done in execution proceedings or a separate suit has to be brought for this purpose. Mr Kunzru argues that what could not be done during the lifetime of the father in execution of a decree against him cannot possibly be done after his death simply because the father died during the pendency of the suit and the sons were made parties defendants not in their own right but as representatives of their deceased father. It is pointed out that the appellants in the present case were not allowed to raise any plea which could not have been raised by their father and they never had any opportunity to show that they were under Hindu Law not liable for these debts. It is undoubtedly true that no liability can be enforced against the sons unless they are given an opportunity to show that they are not liable for debts under Hindu Law; but this opportunity can certainly be given to them in execution proceedings as well. A decree against a father alone during his lifetime cannot possibly be executed against his sons as his legal representatives. As we have said already, the decree against the father after the partition could not be taken to be a decree against the sons and no attachment and sale of the sons' separated shares would be permissible under section 60, Civil Procedure Code. The position, however, would be materially different if the sons are made parties to the suit as legal representatives of their father and a decree is passed against them limited to the assets of the deceased defendant in their hands. A proceeding for execution of such a decree would attract the operation of section 47 of the Civil Procedure Code under which all questions relating to execution, discharge and satisfaction of the decree between the parties to the suit in which the decree was passed or their representatives would have to be decided in execution proceedings and not by a separate suit. Section 52 (1), Civil Procedure Code, provides that when a decree is against the legal

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representatives of a dead person and is one for recovery of money out of the properties of the deceased, it may be executed by attachment and sale of any such property. Then comes section 53 which lays down that " for purposes of section 50 and section 52 property in the hands of a son or other descendants which is liable under Hindu Law for payment of the debt of a deceased ancestor in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative." It is to be noted that before the Civil Procedure Code of 1908 came into force, there was a conflict of opinion as to whether the liability of a Hindu son to pay his father's debts could or could not be enforced in execution proceedings. Under the Hindu Law an undivided son or other descendant who succeeds to the joint property on the death of his father or other ancestor does so by right of survivorship and not as heir. In the old Code the term " legal representative " was not defined and the question arose as to whether the son could be regarded as a legal representative of his father in regard to properties which he got by survivorship on the father's death and whether a decree against the father could be enforced in excution against the son or a separate suit would have to be instituted for that purpose. It was held by the Madras and the Allahabad High Courts that the liability could not be enforced in execution proceedings, whereas the Calcutta and the Bombay High Courts held otherwise. Section 53 in a sense gives legislative sanction to the view taken by the Calcutta and the Bombay High Courts. One reason for introducing this section may have been or undoubtedly was to enable the decree-holder to proceed in execution against the property that vested in the son by survivorship after the death of the father against whom the decree was obtained; but the section has been worded in such a comprehensive manner that it is wide enough to include all cases where a son is in possession of ancestral property which is liable under the Hindu Law to pay the debts of his father; and either the decree has been made

against the son as legal representative of the father or the original decree being against the father, it is put into execution against the son as his legal representative under section 50 of the Civil Procedure Code. In both these sets of circumstances the son is deemed by a fiction of law to be the legal representative of the deceased debtor in respect of the property which is in his hands and which is liable under the Hindu Law to pay the debts of the father, although as a matter of fact he obtained the property not as a legal representative of the father at all.

As we have said already, section 53 of the Civil Procedure Code being a rule of procedure does not and cannot alter any principle of substantive law and it does not enlarge or curtail in any manner the obligation which exists under Hindu Law regarding the liability of the son to pay his father's debts. It, however, lays down the procedure to be followed in cases coming under this section and if the son is bound under Hindu Law to pay the father's debts from any ancestral property in his hands--and the section is not limited to property obtained by survivorship alone—the remedy of the decree-holder against such property lies in the execution proceedings and not by way of a separate suit. The son would certainly be at liberty to show that the property in his hands is for certain reasons not liable to pay the debts of his father and all these questions would have to be decided by the executing court under section 47, Civil Procedure Code. This seems to us to be the true scope and the meaning of section 53, Civil Procedure Code. In our opinion the correct view on this point was taken by Wort, J., in his dissenting judgment in the Full Bench case of *Atul Krishna* v. *Lala Nandanji* (1) decided by the Patna High Court. The majority decision in that case upon which stress is laid by Mr Kunzru overlooks the point that section 47, Civil Procedure Code, could have no application when the decree against the father is sought to be executed against the sons during his lifetime and consequently the liability of the latter must have to be established in an independent proceeding.

(1) 14 Pat. 732.

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In cases coming under sections 50 and 52 of the Civil Procedure Code on the other hand the decree would be capable of being executed against the sons as legal representatives of their father and it would only be a matter of procedure whether or not these questions should be allowed to be raised by the sons in execution proceedings under section 47, Civil Procedure Code.

It remains only to consider what order should be passed in this case having regard to the principles of law discussed above. The High Court, in our opinion, was quite right in holding that the question of liability of the property obtained by the appellants in their share on partition with their father, for the decretal dues is to be determined in the execution proceeding itself and not by a separate suit. It is not disputed before us that the debt which is covered by the decree in the present case is a pre-partition debt. The sons, therefore, would be liable to pay the decretal amount, provided the debt was not immoral or illegal and no arrangement was made for payment of this debt at the time when the partition took place. Neither of these questions has been investigated by the courts below. As regards the immorality of the debts, it is observed by the High Court that the point was not specifically taken in the objections of the appellants under section 47, Civil Procedure Code. The validity of the partition again was challenged in a way by the decree-holder in his reply to the objections of the appellants, but the courts below did not advert to the real point that requires consideration in such cases. The partition was not held to be invalid as being a fraud on the debtor but the question was not adverted to or considered whether it made any proper arrangement for payment of the just debts of the father. In our opinion, the case should be reheard by the trial judge and both the points referred to above should be properly investigated. The appellants did raise a point regarding their non-liability for the decretal debt, in the suit itself when they were brought on the record as legal representatives after the death of their father. The court, however, did not allow them to raise or substantiate this plea

inasmuch as they were held incompetent to put forward any defence which the father himself could not have taken. Having regard to the conflicting judicial decisions on the subject, the appellants cannot properly be blamed for not raising this point again in the execution proceedings. We think that they should now be given an opportunity to do so. The result is that we set aside the judgments of the courts below and direct that the case should be heard *de novo* by the Subordinate Judge and that the appellants should be given an opportunity to put in a fresh petition of objection under section 47 of the Civil Procedure Code raising such points as they are competent to raise. The decree-holder would have the right to reply to the same. The court shall, after hearing such evidence as the parties might choose to adduce, decide first of all whether the property attached is the ancestral property of the appellants and is liable to pay the just debts of their father. It will consider in this connection whether the debts are illegal or immoral and as such not payable by the sons. If this question is answered in favour of the appellants, obviously the execution petition will have to be dismissed. If on the other hand it is found that the sons are liable for this debt, the other question for consideration would be whether there was any proper arrangement made at the time of the partition for payment of the debts of the father. The court below will decide these questions in the light of the principles which we have indicated above and will dispose of the case in accordance with law. In the event of the appellants being held liable for payment of the decretal debt, it would be open to the executing court to make an order that the decree-holder should in the first instance proceed against the separate property of the father which was allotted to him on partition and which after his death devolved upon the sons ; and only if such property is not sufficient for satisfaction of the decree, then the decree could be executed for the balance against the ancestral property in the hands of the appellants. There will be no order for costs up to this stage. Further costs will follow the result.