in the event of a suit being brought against either of those authorities challenging its right to impose the tax.

As regards the defendant Committee the question arises whether we should look to the form or to the substance, and while there is no doubt that the tax as imposed in 1940, was imposed by the Delhi Municipal Committee under the procedure and form of a new tax, it was undoubtedly merely a continuation of the old tax, which in fact was still to be levied under the old notification until the 21st of July, 1940, of more than three months after the date of the notification, after which the terminal tax was to be levied under the new notification. In these circumstances I should be very reluctant to hold that the terminal tax as levied by the Delhi Municipal Committee as from the 21st July, 1940, was a new tax and not a continuation of the levying of the terminal tax which had been in force from 1916 onwards.

The result is that I would accept the appeal and restore the decree of the trial Court dismissing the plaintiff's suit, but in view of the nature of the point involved I consider that it is a suitable case in which the parties should be left to bear their own costs throughout.

KHOSLA, C. J.—I agree.

CHOPRA, J.—I agree.

B. R. T.

APPELLATE CIVIL

Before D. Falshaw, G. L. Chopra and A. N. Grover, JJ.

FAQIR CHAND,—*Appellant.*

versus

SARDARNI HARNAM KAUR AND ANOTHER,—*Respondent.*

Regular First Appeal No. 63-D of 1957.

1960

March, 25th

Hindu Law—Joint Hindu family consisting of father and sons—Father creating mortgage of joint family property—

Mortgagee obtaining a decree on the basis of the mortgage—Sons—Whether can challenge the mortgage and the decree—If so, when and on what grounds?

Held, that in the case of a Hindu joint family consisting of a father and sons when a mortgage has been created by the father of joint property, and a decree has been obtained on the basis of the mortgage, the only ground on which the sons can challenge the mortgage and the decree is that the debt was incurred for illegal or immoral purposes and that for this purpose it is immaterial whether the mortgaged property has actually been brought to sale in execution of the decree or not.

Regular First Appeal from the decree of Shri P. Singh, Sub-Judge, 1st Class, Delhi, dated 22nd March, 1957; dismissing the suit.

Claim: For declartion and injunction.

Claim in Appeal: For reversal of the order of the lower Court.

D. K. KAPUR and HARNAM DASS, for the Appellant.

MASTAN CHAND and BK. MEHTAB SINGH, for the Respondent.

JUDGMENT

Falshaw, J. FALSHAW, J.—The facts from which this reference has arisen are as follows.

Murari Lal, who formed a Joint Family along with his son Faqir Chand, mortgaged certain property on the 7th of June, 1949, with Shrimati Harnam Kaur for Rs. 75,000, the mortgage deed containing a clause to the effect that if the mortgagee had to bring a suit for the recovery of the money and the entire claim was not satisfied from the mortgaged property, the mortgagee could recover the balance from his person and all other property belonging to him and the joint

family. The suit was instituted by the mortgagee in which, on the 20th of April, 1953, a preliminary decree for Rs. 95,000 was passed.

About a month before the decree was passed Faqir Chand, the son of the mortgagor, instituted a declaratory suit challenging the mortgage by his father on the grounds that the mortgaged property was joint family property and that the mortgage was without legal necessity, and that in fact the debt was incurred for illegal and immoral purposes. The passing of the decree materially changed the situation and consequently, in June, 1954, an amended plaint was filed in which, in addition to a declaration that the mortgage was bad, a declaration was also sought that the decree obtained by the mortgagee was not binding on the plaintiff, and as a consequential relief an injunction was sought restraining the mortgagee from proceeding with the sale of the mortgaged property in execution of the decree.

The suit of Faqir Chand was dismissed by the trial Court on the ground which was conceded by the plaintiff that there was no evidence that the mortgage debt was incurred for illegal or immoral purposes, and on the finding that once a decree had been obtained on the basis of the mortgage the plaintiff could not challenge it merely on the ground that it was not for legal necessity.

When the plaintiff's appeal came before Bishan Narain and S. B. Capoor JJ., on the 3rd of April, 1959, they thought it necessary to refer it to a Full Bench in view of the fact that there appeared to be a conflict of authority, and although no question has been formulated by

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them, the question which we are required to answer may be formulated as follows:—

> "Whether when a mortgage has been created on Joint Family property by a father who constitutes a Joint Hindu Family along with a son or sons, and a decree has been obtained by the mortgagee on the basis of the mortgage, it is open to a son to challenge the mortgage and the decree merely on the ground that the debt was incurred without legal necessity, or whether he must prove that the debt was incurred for illegal or immoral purposes."

The starting point of the argument may be said to be the decision of their Lordships of the Privy Council in *Brij Narain* v. *Mangla Prasad and others* (1). In that case the managing member of a Joint Hindu Family governed by Mitakshara law and consisting of himself and two minor sons mortgaged part of the ancestral property in 1908, the mortgage having been expressed to have been executed in order to pay off two prior mortgages on the same property executed in 1905 and 1907. In a suit by the sons against their father and the mortgagees it was held that the liability under the earlier mortgages was an antecedent debt and consequently binding upon the sons. In reaching this decision their Lordships sought to clarify the earlier conflicts by framing the following five propositions:—

> (1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity; but

(1) L.R. 51 I.A. 129

(2) If he is the father and the other members are the sons he may be incurring a debt, so long as it is not for an immoral purpose lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdened the estate, is alive or dead.

In subsequent cases which came before the Courts in India controversy arose regarding whether the second of these propositions applied to a debt based on a mortgage incurred by a father who with his sons constituted a Joint Hindu Family, or whether mortgages were exclusively dealt with under the third proposition regardless of the constitution of the joint family. In the case of *Jagdish Prasad and others* v. *Hoshyar Singh and another* (1), there was a disagreement on this point between the learned Judges.

The facts in that case were that a decree had been obtained on the basis of two mortgages against a father who with his sons constituted a Joint Family, and when the property was about

(1) I.L.R. 51 All. 136 (F.B.)

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to be sold the sons instituted a suit for a declaration that the property was not liable to be sold in execution of the decree on the ground that there was no legal necessity for the debts and that they were contracted for immoral purposes. Apparently no question of existence of any antecedent debt arose, and both the trial Court and the Court of first appeal dismissed the suit on the ground that the plaintiffs could not succeed unless they proved that the debts were tainted with immorality, which was not established. The second appeal in the High Court was referred to a Full Bench consisting of Sulaiman, A. C. J., and Mukerji and Boys JJ. The learned Judges agreed that the appeal should be allowed and the suit of the plaintiffs decreed, but on different grounds. Mukerji and Boys, JJ., agreed in holding that the second proposition formulated by their Lordships of the Privy Council did not apply because the word 'debt' in that proposition did not contemplate a mortgage debt but only an unsecured debt. On the other hand Sulaiman, A.C.J., held that the word 'debt' in the second proposition included a mortgage debt, but at the same time he held that the proposition did not apply in that case as no auction sale had taken place and the property had not yet passed out of the family.

The question arose again in the case, *Hira Lal and others* v. *Puran Chand and others* (1). This was a suit in which a mortgage was challenged after a decree had been passed on the basis of it and the question was referred to a Full Bench in connection with the second appeal, whether the word 'debt' in the second proposition laid down by their Lordships of the Privy Council in *Brij Narain's* case refers to a simple money debt

(1) A.I.R. 1949 All. 685

or also refers to a mortgage debt. On this occasion the learned Judges, Misra, Kaul and Chandiramani JJ., agreed in answering the question as follows:—

> "The word "debt" in the second proposition laid down by their Lordships in *Brij Narain's* case covers both a simple debt and a mortgage debt."

This view seems now to be generally accepted and was accepted as correct in the decision of the Full Bench in *Abdul Hameed Sait and another* v. *The Provident Invcstment Co., Ltd and others* (1), on which reliance is mainly placed on behalf of the plaintiff in the present case because of the fact that it was also held that the operation of the second proposition should be confined only to a case where joint family property was sold in execution of a decree, whether it was a mortgage decree or a simple decree.

Before discussing this view any further I may mention that there are decisions of the Lahore High Court and this Court, which do not support this view. In *Krishna Kishore* v. *Hem Raj and others* (2), the facts were the same as in the present case, namely that a mortgage decree had been obtained on the basis of a mortgage in which there was a clause for personal liability of the mortgagors and the decree provided for a personal decree in the event of the sale-proceeds proving insufficient to satisfy the mortgage amount and the declaratory suit had been brought by the sons of the mortgagors and it was held by Shadi Lal, C. J. and Dalip Singh, J:—

> "A money decree against the father of a joint family in satisfaction of debt not

(1) A.I.R. 1954 Mad. 6961
(2) A.I.R. 1928 Lah. 815

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incurred for an illegal or immoral purpose is binding on the son and where a mortgage decree provides for the recovery of the balance due from the mortgagors if the mortgaged property was found insufficient to discharge the decretal amount there is a declaration in the decree that a debt is due from the mortgagor to the mortgagee for which mortgagor's son can be made liable."

In *Joginder Singh and others* v. *Punjab and Sind Bank Ltd., Amritsar and others.* (1), it was held by Addison and Ram Lall JJ., that the second of the propositions laid down by their Lordships was applicable in a case, where the decree based on a mortgage had been obtained, but the property had not yet been brought to sale, and that the second proposition was self-contained and not subject to the provisions of the other propositions.

In *Kishan Chand and another* v. *Rakesh Kumar and others* (2), G. D. Khosla J., after a consideration of the case law, came to the following conclusion:—

"Where a father effects a mortgage of coparcenary property and the money which he raises is not raised for an immoral purpose, a distinction must be made between cases in which the mortgagee has filed a suit on the basis of the mortgage and obtained a decree and cases in which no such decree has been obtained. If the mortgagee has obtained a decree on the basis of the mortgage the sons cannot challenge the

(1) A.I.R. 1939 Lah. 585
(2) A.I.R. 1957 Punj. 39

> decree on the ground that there was no necessity. All that the mortgagee or the decree-holder need prove is that the debt was not immoral. But where no suit has been filed by the mortgagee and no decree has been obtained, it is a case of simple alienation and the sons can say that they are not bound by the alienation, because there was no necessity for it."

In view of the fact that it is not even now contended on behalf of the plaintiff that the second proposition formulated by their Lordships does not apply to debt based on a mortgage, the controversy is narrowed down to the question of the stage at which the proposition becomes applicable to a mortgage debt, the plaintiff's contention being that it only applies to such a debt after the mortgaged property has been sold and there is in existence a personal decree against the father, while the defendant's case is that it applies, where a decree has been obtained on the basis of the mortgage, but the property has not yet been brought to sale.

The first view in plaintiff's favour is that expressed in *Jagdish Prasad's* (1), case by Sulaiman, A.C.J. After holding that the word "debt" in the second proposition did include a mortgage debt he went on :—

> "I am inclined to interpret the expression" "lay the estate open to be taken in execution proceedings upon a decree for payment of that debt" as the equivalent of "make it liable to be sold at auction in execution of the decree," which to my mind means that as soon as the property

(1) I.L.R. 51 All. 136(F.B.)

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has been sold at auction the transaction cannot be impeached without showing immorality. The clause does not necessarily mean that after the decree and before the sale the sons cannot, by obtaining a declaratory decree in a separate suit, say that the transaction is not binding on them, and thus prevent the sale. That the expression does not mean that the passing of the decree itself prevents the sons from challenging the debt, will be obvious if we apply proposition No. 2 to the case of a simple money debt. Surely the debt creates no charge on the estate. The decree on the foot of such a simple money debt also creates no lien or charge upon the estate. So long as the property has not been attached in execution of such a simple money decree, the family is at liberty to transfer it so as to place it out of the reach of the creditor. The decree by itself has no special efficacy. The position of the creditor remains the same as it was when the debt was contracted or when the suit was instituted. The liability of the estate to pay off this debt is also not altered materially by the passing of a simple money decree. Such being the case, it cannot be said that the mere passing of the decree lays the estate open to be seized by the decree holder in the literal sense. The expression quoted by me above is a paraphrase of another expression used by their Lordships at page 101. "It may become liable by being taken in execution on the back of a decree

obtained against the father"—which means that the estate can be purchased in execution of such a decree."

In *Bharmappa Murdeppa Soppin* v. *Hanmantappa Tippanna Belludi and another* (1), Beaumont C. J., and Weston J., preferred the view of Sulaiman A.C. J., to that expressed by the learned Judges of the Lahore H. C., in *Joginder Singh's* (2), case and held :—

"The second proposition deals with recovery of a debt, not in its character as a mortgage debt, but as a debt for which a decree has been obtained, and the decree is being executed. Where a mortgage is created not for necessity, or for payment of an antecedent debt, it binds only the father's interest in the property, and it is only that interest which can be sold under a mortgage decree. But if the debt is not for immoral purposes, the sons are liable, and if a personal decree is obtained against the father, then that decree can be enforced by sale of the sons' interest in the property. There must, however, be a personal decree against the father for payment of the debt, and not merely a decree for payment of the debt by sale of the mortgaged property."

In the course of his judgment Beaumont, C.J. observed :—

"No doubt, there is a certain attraction about the Lahore view, because the opposite view involves really recovering the debt in two stages against two

(1) A.I.R. 1943 Bom. 451
(2) A.I.R. 1939 Lah. 585

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undivided interests in the property, unless the creditor chooses to abandon the mortgage; for, unless he does that he must enforce the mortgage against the father's interest in the property, and then obtain a personal decree and execute that against the son's interest in the property, and two undivided interests may sell for considerably less than the entire estate. Under the Lahore view you can sell the entire estate under the one decree, the mortgage decree. But it seems to me that in law the Lahore view cannot be supported, because, there is no debt enforceable in execution against the sons".

In *Ganpati Pandurang and another* v. *Rameshwar Motiram and others* (1), the Bombay view was approved and it was held that the sons who were not parties to the mortgage and who were not parties to the suit on mortgage were not precluded from challenging the mortgage on the ground of want of legal necessity, particularly when the mortgaged property had not gone out of the family and was still to be sold and the case being one where no personal decree had been passed against the father, the mortgage decree could be enforced only against the father's share. It is, however, to be noted in this case that the Joint Family consisted of the plaintiffs, their father and two brothers of the father and the mortgage had been executed by the plaintiff's father and one of his brothers. This alone takes the case out of scope of the second proposition, which deals only with Hindu families consisting of a father and sons.

(1) A.I.R. 1947 Nag. 69

Finally there is the Madras case in which three questions were referred to a Full Bench:—

(1) whether a mortgage decree for sale simpliciter, without any personal liability, obtained against a father alone on a mortgage of the joint family property created by him for a purpose not binding on the family, is binding on the sons' share by the application of the principle of pious obligation;

(2) whether a sale held of the joint family property in execution of such a decree is binding on the sons' share; and

(3) what is the period of limitation for the son's suit to set aside the said decree and the sale held in execution thereof?"

It will thus be seen that in the suit in which the reference arose the property had already been sold in execution of the mortgage decree a fact which makes the opinion relied on by the plaintiff an *obiter dictum*. The following passage in the judgment of Subba Rao, J. starts from para (72) at page 977:—

"The law on the subject may now be summarised. A mortgage decree is a debt within the meaning of the second proposition laid down by the Judicial Committee in *Brij Narain's* case viz., that if he is the father and the reversioners are the sons he may by incurring a debt, so long as it is not for an immoral purpose lay the estate open to be taken in execution proceedings upon a decree for payment of the debt. The decisions do not speak in one voice on the

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interpretation of the word "debt". But the majority and the finally established view is that the word "debt" includes both the mortgage debt as well as a money debt. But the conflict still subsists on the question whether the proposition would apply to a case where the joint family property was not sold in execution of the decree.

It is true that the word "debt" is comprehensive enough to take in both a simple debt and a mortgage debt for even in the latter case, a debt is involved in the mortgage. But the said interpretation does not afford an adequate answer to the question whether the mortgage decree against the father '*qua*' mortgage decree is binding on the son's interest in the family property. The proposition in terms applies to a case only where the estate is taken in execution proceeding upon such a decree. But I cannot agree with the learned Judges, who held that the mortgage decree '*qua*' mortgage decree would be binding on the interests of the son in joint family property, for by so holding, I would be effacing the distinction between a mortgage and an alienation in discharge of that mortgage. By the merger of the mortgage in a mortgage decree, the characteristics of the mortgage are not lost. If the mortgage is not binding on the sons for the reason that it was not for necessity or was not in discharge of an antecedent debt, the same infirmities

would continue to attach to the mortgage decree. I would, therefore, confine the operation of the second proposition only to a case where joint family property is sold in execution of a decree, whether it is a mortgage decree or a simple decree. So construing, I further hold that by reason of that express proposition it is not now open to us to go behind it—the son cannot question the sale held in execution of a mortgage decree unless he alleges and proves that the debt involved in the mortgage was incurred for illegal and immoral purposes."

With the utmost respect for these views I find myself so unable to understand, how, if the view is correct, as it undoubtedly is, that the word "debt" in the second proposition includes a debt incurred by a father on a mortgage, it necessarily follows that in the case of the mortgage debt the property must have been sold in execution of the decree before the son is called upon to prove that the debt was incurred for immoral purpose. It seems to me that the clear meaning of the words "lay the estate open to be taken in execution proceedings upon a decree" is that in a case of a simple money debt the estate is laid open to be taken in execution proceedings the moment any of the property is attached, and, in the case of a mortgage debt, the moment a decree, whether preliminary or final, has been passed, and that for the proposition to apply in either case it is not necessary that the property should have actually been sold and passed out of the possession of the family.

I venture to suggest that the meaning of their Lordships might have been more clearly

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expressed in *Brij Narain's* case if the order after the first proposition had been altered so that the present No. 3 appeared as No. 2 and No. 2 as No. 3. The propositions would then read:—

(1) the managing member of a joint undivided estate cannot alienate or burden the estate *'qua'* manager except for purposes of necessity;

(2) if he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate; but

(3) if he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

In other words whereas the original first and third propositions are generally applicable to the managing members of joint families, the second proposition is intended to lay down an exception in the case of joint families consisting only of a father and sons in consequence of the well established doctrine of the pious liability of Hindu sons to pay their father's just and untained debts a liablility which subsists during the lifetime of the father as well as after his death.

It seems to me that the only logical and consistent position to adopt is either that adopted by the majority in *Jagdish Pershad's* (1) case, namely that all mortgages by a managing members even if he is a father with only sons as other members of the joint family are governed by the third proposition, and that the word 'debt" in the

(1) I.L.R. 51 All. 136 (F.B.)

second proposition does not include a mortgage debt, or else that, if the word "debt" in the second proposition also includes a mortgage debt, the third proposition does not apply in such a case where the joint family consists of a father and sons as was the view of the learned Judges in *Joginder Singh's* case (1).

It will be noted that in the Madras case Subba Rao, J. held that the operation under second proposition was confined only to cases where joint family property was sold in execution of the decree whether it was a mortgage decree or a simple decree. I do not, however, think that this view is shared by anybody as regards a simple money decree and indeed it is quite usual with the sons when family property is attached in execution of a money decree against the father to file objections under Order 21, Rule 58, Civil Procedure Code, and if these objections are overruled a suit under Order 21, Rule 63, Civil Procedure Code, before the property is sold. The sale is in fact sometime stayed till the decision of such a suit by a temporary injunction. There does not seem to be any doubt about the fact that in such a suit the sons would have to establish that the debt was contracted for illegal or immoral purposes, but I am not aware that it has ever been held, except in the opinion expressed by Subba Rao, J., that the sons cannot bring such a suit to prevent the sale taking place and can only file the suit challenging the sale after it has taken place. This clearly shows that the general view is, as I expressed it above, that the property is laid open to be taken in execution proceedings as soon as the decree-holder obtains an order of attachment against it. I cannot see why the words should be given a much more restricted meaning in the case of a mortgage decree, and

(1) A.I.R. 1939 Lah. 585

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should only come into operation after the mortgaged property has actually been sold once it is conceded that a debt includes a debt due upon a mortgage.

The difficulty seems to have arisen partly because of the view that unless and until the mortgaged property has been sold without realising sufficient discharge of the mortgage debt there is no personal decree against the father. Here again I feel unable to understand the necessity for the personal decree actually to have come into existence as long as the threat of it exists in the preliminary decree, which in the present case provided in the usual form that, "if the money realised by the sale of the property shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance." As I have pointed out at the outset the mortgage in the present case does make a provision for the personal liability of the mortgagor in the event of the claim not being satisfied out of the mortgaged property, and in fact it provides for the recovery of the balance from the mortgagor and all other property belonging to him and the joint family. On this matter I am in respectful agreement with the decision of Shadi Lal, C. J. and Dalip Singh, J. in *Krishna Kishore's* case (1) that where a mortgage decree provides for the recovery of the balance due from the mortgagors if the mortgaged property was found insufficient to discharge the decretal amount there is a declaration in the decree that a debt is due from the mortgagor to the mortgagee for which mortgagor's son can be made liable.

(1) A.I.R. 1928 Lah. 815

In the circumstances I am of the opinion that in the case of a Hindu joint family consisting of a father and sons when a mortgage has been created by the father of joint property, and a decree has been obtained on the basis of the mortgage, the only ground on which the sons can challenge the mortgage and the decree is that the debt was incurred for illegal or immoral purposes and that for this purpose it is immaterial whether the mortgaged property has actually been brought to sale in execution of the decree or not.

CHOPRA, J.—I agree.

GROVER, J.—I agree.

B. R. T.

FULL BENCH

Before S. S. Dulat, Mehar Singh and K. L. Gosain, JJ.

AMAR SINGH AND OTHERS,—*Appellants.*

versus

SEWA RAM AND OTHERS,—*Respondents*

1960

May, 25th

Regular First Appeal No. 206 of 1951

Hindu Succession Act (XXX of 1956)—Section 14—Alienation effected prior to the enforcement of the Act, by an intervening female heir who, at the time of the alienation, held only a widow's estate—Whether can be challenged by a reversioner after the enforcement of the Act by filing a suit or continuing a suit already filed—Invalid adoption and invalid gift—Difference between.

Held, per Full Bench—that it is not correct to say that the Hindu Succession Act has done away with the rights of the reversioners as a class. The rights of the reversioners, both under the Hindu Law and the Custom, to impugn the alienations made by a person with controlled and restricted power of alienation remain the same as before the enforcement of the said Act. Where a limited owner alienated the