principle as well as authority that the State Government is competent in suitable circumstances to recall its invalid or erroneous order, but it is impossible to lay down in general terms what precise circumstances must be established to justify the exercise of that power and that matter, in my opinion, must be left to be decided in each individual case. I would, therefore, say in answer to the third question that the State Government is not debarred from recalling an invalid or unjust and erroneous order made by it previously, and that the further question, whether in a particular case such recall was or was not justified would depend on the circumstances of that case.

There are, we gather, other questions involved in the petitions and the petitions must, therefore, go back to the Single Bench for final disposal in the light of our answers.

Mehar Singh, J.—I agree.

R. P. Khosla, J.—I agree and have nothing to add.

B. R. T.

APPELLATE CIVIL

Before K. L. Gosain and Harbans Singh, JJ.

BHAGAT RAM,—*Appellant.*

versus

AJUDHIA PARKASH AND OTHERS,—*Respondents.*

Regular First Appeal No. 366 of 1950

1959

Feb., 4th

Hindu Law—Debts incurred by father—Decree obtained by creditor—In execution of the decree the property of joint Hindu family attached—Sons filing a suit for declaration that joint Hindu family property was not liable and

the debts on the basis of which decrees were obtained never existed—Sons—Whether entitled to challenge the existence of debts.

Held, that—

(1) On the principles of Hindu Law, on which the pious duty of the sons to discharge the personal debts of their father is based, the sons are not precluded from challenging the existence of the debt, when they are called upon to discharge the same and there is no warrant or justification for the proposition that the decree against the father by itself creates a debt which they are bound to discharge.

(2) The balance of the judicial opinion is definitely in favour of conceding such a right to the sons. When the sons are called upon to discharge a decree passed against their father on the basis of an alleged personal debt of his, they are entitled to show that the debt aforesaid was non-existing, fictitious or illusory. The mere fact that the father had suffered a decree being passed against himself, cannot be a ground for denying the sons this right.

(3) Father while defending a suit filed against him by a creditor for recovery of a debt, not incurred by him for the benefit of the family, does not represent his sons, not even *qua* the plea of non-existence of the debts, which may or may not be raised by him, and the sons are not bound by the decree, in respect of this plea under the principles embodied in Explanation VI of section 11 of the Civil Procedure Code.

(4) This right to challenge the existence of the debt, if conceded to the sons, does not work any hardship on the creditor because he can, by impleading the sons in the suit brought against the father, have this matter adjudicated upon in the presence of the sons.

Entire Case Law Reviewed.

First Appeal from the decree of the Court of Shri Ram Singh Bindra, Sub-Judge, 1st Class, at Dasuya, District Hoshiarpur, dated the 24th day of July, 1950, granting the plaintiff a decree for a declaration as prayed for with costs against defendant No. 1.

M. R. AGGARWAL and R. K. AGGARWAL, for Appellant.

D. N. AGGARWAL and R. N. AGGARWAL, for Respondents.

JUDGMENT

Harbans Singh, J.

HARBANS SINGH, J.—On 28th of September, 1942, two pronotes and two receipts were executed by Kundan Lal, father of the plaintiffs-respondents, in favour of Bhagat Ram for Rs. 1,900 and 2,000, respectively. Ram Lal and Shib Dass were the attesting witnesses to these documents. On 1st of October, 1945, Bhagat Ram filed a suit against Kundan Lal for the recovery of a sum of Rs. 4,953 on the basis of the above two pronotes. The pleas taken up by Kundan Lal were that these two pronotes and the receipts were never executed by him and that these were forgeries. The suit was dismissed by the trial Court on 8th of April, 1947, holding that the execution was not proved. The appeal filed by Bhagat Ram was accepted by the District Judge on the 29th of June, 1948, and a decree for the entire amount claimed was passed. Kundan Lal's appeal in the High Court, Regular Second Appeal No. 771 of 1948, was dismissed on 7th of May, 1953. In execution of the decree passed by the District Judge, the property of the Joint Hindu family, including the share of Kundan Lal's sons, was attached by the decree-holder and later sold.

On 23rd of August, 1949, the suit, out of which the present appeal has arisen, was filed Ajudhia

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Parkash, Brij Mohan and Yashpal, minor sons of Kundan Lal, for a declaration that the properties in dispute are not liable to sale in execution of the decree aforesaid obtained by Bhagat Ram against Kundan Lal on the ground that the father constituted a joint Hindu family with the plaintiffs and the properties belonged to the joint family and that the debts on the basis of which the decree had been obtained never existed and were never incurred by Kundan Lal and that, in any case, they were raised by Kundan Lal for illegal and immoral purposes. The suit was resisted by defendant Bhagat Ram who denied the existence of the joint Hindu family or that the properties in dispute belonged to the coparcenery. He further pleaded that the factum of the debt could not be gone into and that consequently the plaintiffs were barred from challenging the existence of the debts. It was further stated that the debts were not incurred for immoral or illegal purposes and, inasmuch as during the pendency of the suit the property had already been put to sale, it was urged that a declaratory suit did not lie. As a result of these pleadings the following issues were settled :—

(1) Whether the plaintiffs are sons of defendant No. 2 ?

(2) Whether the plaintiffs do not constitute joint Hindu family with defendant No. 2 ?

(3) Whether the properties in dispute belong to the joint Hindu family of the plaintiffs and defendant No. 2?

(4) What is the effect of sale of the suit properties during the pendency of the suit?

(5) Whether defendant No. 2 owed any debts to defendant No. 1?

(6) Whether in face of the decree the plaintiffs cannot deny the factum of the debts?

(7) Whether the allegations made in para 3 of the plaint exist in respect of the debts in dispute and are the debts, on that account, not binding on the plaintiffs?

(8) Whether the plaintiffs are mere figure heads and whether defendant No. 2 is getting the suit going? If so, what is its effect?

(9) Relief.

Issues Nos. 1 to 3 and 8 were decided in favour of the plaintiffs and it was further held that the sale of the suit properties during the pendency of the suit did not affect plaintiffs' right and that the plaintiffs could challenge the existence of the debts which formed the basis of the decree. On merits it was found that no debt was, in fact, due from Kundan Lal to Bhagat Ram and that there was no proof of immorality or illegality. In view of these findings the trial Court granted a decree to the plaintiffs as prayed. Being dissatisfied with the decree of the Court below Bhagat Ram has filed this regular first appeal.

We have carefully gone through the evidence with regard to the existence or otherwise of the debt. Out of the two attesting witnesses, Shiv Dass appeared as D.W. 6 and categorically stated that Kundan Lal did not raise any debt from Bhagat Ram in his presence, or execute any pronote or receipt and hand over the same to Bhagat Ram and that he attested these documents at the

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request of Bhagat Ram when he brought the same to him. Ram Lal, the other attesting witness, is said to be dead. A statement made by him in the previous case was sought to be brought on the record. This was rightly not allowed to be done. We were referred to no provision of the Indian Evidence Act under which such a previous statement would be admissible. This statement was made not in a suit inter parties and does not fall either under section 32 or section 33 of the Indian Evidence Act. We are, therefore, left with the statement of Bhagat Ram himself as D.W. 4. On his own admissions in cross-examination it is proved that he is not a reliable person and did actually make additions and alterations in other documents executed by Kundan Lal relating to the pronotes. This is what he stated:—

> I had secured an agreement from Kundan Lal regarding the giving of *dasti* notice in respect of pronotes. The agreement was got written in 1941. Copy thereof is marked Exhibit P. 1. The said pronotes had not been executed at that time. They were got executed in 1942. This agreement in respect of the pronotes was in favour of my son. I made an addition therein in my own hand with regard to the pronotes of 1942. But signatures of Kundan Lal were not secured on the said addition."

Some facts were also brought out in cross-examination indicating that Bhagat Ram was probably not in a position in the year 1942 or thereabout to advance any substantial sum of money. He was in the Police Department and was dismissed from service. In this respect he stated as follows:—

> "I was dismissed from service. I was not dismissed in a bribery case. I was in

search of employment in Delhi during the days. I secured the pronotes from Kundan Lal. I did not owe Rs. 5,000/ 6,000 to Faqir Chand in those days by way of debt. I do not remember whether I owed one before that or not. I had a partition case with my brothers in 1939. * * * * In 1939-40, I made a statement in that case that I owed Rs. 5,000/6,000 to Faqir Chand. That statement was correct. I do not remember when that amount was paid; probably it was paid in 1940."

This shows that Bhagat Ram did not hesitate to deny the fact that he owed Rs. 5,000 or Rs. 6,000 to Faqir Chand at any time, although he had to admit this when he was specifically confronted with a statement made by him in a previous case. He made similar unsatisfactory statements about various other matters affecting his credit as a truthful witness and a man of character. For example he stated as follows:—

"During the days that I brought the suit against Kundan Lal no case was pending against me in respect of charging more price for jaggery. A case was certainly brought, but I do not know when. I was, of course, fined therein."

This evidence of Bhagat Ram is highly unsatisfactory and the learned trial Court has rightly discredited the same. Both the parties examined handwriting experts. A. B. Bal was examined on behalf of the defendant and A. S. Kapur on behalf of the plaintiffs. These experts have given opinions in favour of the respective party calling them. The learned trial Judge found that a comparison of the writing on the pronotes with the

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sample writing of Kashmiri Lal showed that the opinion of the plaintiffs' expert that the writing on the pronotes is in the handwriting of Kashmiri Lal and not that of Kundan Lal, is correct. Even if the evidence of the handwriting expert is left out of consideration, the execution of the pronotes by Kundan Lal is not proved at all and the finding on issue No. 5 that Kundan Lal, in fact, owed no debt to Bhagat Ram must be confirmed.

The main arguments urged before us were on the legal question whether, in face of the decree, the plaintiffs can urge that the debts on the basis of which the decree was passed against their father did not, in fact, exist. The learned trial Court held this issue in favour of the plaintiffs on the basis of the Full Bench decision in *Maha Deo* v. *Ranbir Singh* (1), in which the majority of the learned Judges (Din Mohammad and Sale, JJ), held that the sons can go behind the decree and can challenge the factum of the debt, in addition to showing that the debt, if existing, was incurred for illegal and immoral purposes. Teja Singh J., however, took a contrary view and held that so far as the factum of the debt is concerned, the sons are bound by the decree passed against the father. In *Surindra Nath* v. *S. H. M. School* (2), Kapur J., after referring to a number of decided cases, felt that the majority view was not sound. However, the learned Judge did not finally decide the point which, in fact, it was not necessary to do, in that case and observed as follows:—

> "The point having been raised, I have indicated my own view about it and it may have to be referred to a bigger Bench

(1) A.I.R. 1944 Lah. 220
(2) A.I.R. 1950 E. Punj. 282

at some subsequent time. The case can be decided on the question of onus.

Even if it was open to the sons to challenge a decree on the ground of existence or non-existence of a debt, a view with which I am unable to agree, in my opinion, it will be for the sons to show that the debt as a matter of fact never existed and the onus will not be on the decree-holder or on the alienee of the property but on the sons."

After discussing the merits of the case the learned Judge reduced the decree which was for Rs. 8,258 by Rs. 616-11-0. Ahhru Ram, J., expressed no views with regard to the legal point discussed but merely concurred with the decree proposed by Kapur J.

The point arises directly in the present case and in view of the observations of Kapur J., we have heard the counsel for the parties at length and have carefully gone through the authorities dealing with this question, directly or indirectly, with a view to examine the correctness or otherwise of the majority view in the Full Bench case of *Maha Deo.* (1).

In the dissentient judgment Teja Singh J. took the view that the debt or the obligation need only exist *qua* the father and not *qua* the sons and the learned Judge, therefore, felt that the existence of a judgment debt against the father is sufficient to make the sons liable on account of their pious obligation. This also appears to be the *ratio decidendi* of a number of other rulings on the point which seem to take the view similar

(1) A.I.R. 1944 Lah. 220

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to that expressed by Teja Singh J., Dhavle J., in an unreported case of Patna High Court—First Appeal No. 158 of 1935 decided on the 15th of August, 1940 (referred to by Sinha J. in *Firm Pirthiraj* v. *Kishun Lal,* (1) observed as follows:—

> "I am, however, by no means satisfied that as regards the antecedant judgment-debts the appellants were entitled to go behind the decrees. Apart from fraud or collusion, which can always be proved under section 44, Evidence Act, * * * * the decrees would themselves seem to create or constitute debts which would be binding on the judgment-debtors' sons by reason of thier pious obligation unless it is shown that the loans were contracted for immoral and illegal purpose."

We were also referred to the observations of Mukerjee J. delivering the judgment of the Supreme Court in *Sidheshwar* v. *Bhubneshwar*, (2), to the following effect:—

> "Be that as it may, the money decree passed against the father certainly created a debt payable by him. If the debt was not tainted with immorality, it was open to the creditor to realise the dues by attachment and sale of the sons' co-parcenary interest in the joint property * * * * "

In that case a personal debt was incurred by the father who was a junior member of the coparcenary. In the execution proceedings some property was attached and sold. Neither in the suit nor in

(1) A.I.R. 1946 Pat. 338
(2) A.I.R. 1953 S.C. 487

the execution proceedings the sons were made parties. The question that arose for decision was whether the Court sale in the above-mentioned execution proceedings conveyed to the purchaser only the share of the father or also the share of his sons in the property. It was, however, found as a matter of fact that the creditor intended to attach and sell the interests of the sons as well and unless, therefore the sons succeeded in showing that the debts were such as they were not obliged to pay under Hindu law, the fact that they were not made parties to the proceednigs was altogether immaterial. At page 489 of the report it was observed that:—

> "If the debts have been contracted by the father and they are not immoral or irreligious, the interest of the sons in the coparcenary property can always be made liable for such debts.
>
> We do not find any warrant for the view that to saddle the sons with this pious obligation to pay the debts of their father it is necessary that the father should be the manager of 'Karta' of the joint family, * * * * Where a debt is incurred for necessity or benefit of the family, the manager, whether he be the father or not, has the undoubted power to alienate any portion of the coparcenary property for the satisfaction of such debts, irrespective of the fact as to who actually contracted the debts."

Then at page 490 it is further stated as follows:—

> "Such family debt, however, stands on quite a different footing from a personal debt contracted by the father

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which does not benefit the family. The liability of his sons to pay such debt does not rest on the principle indicated above, according to which the junior members of a family are made to pay the family debts. It is a special liability created on purely religious grounds and can be enforced only against the sons of the father and no other coparcener."

Still further the distinction between the right of a father who is a junior member of the coparcenary to alienate the share of the sons and the right of the creditor to proceed against the sons' share to recover the debts incurred by the father, was brought out and it was observed as follows:—

"It cannot be laid down as a proposition of law that the creditor's power of proceeding against the sons' share in the joint estate for recovery of the debt due by the father is co-extensive with the father's power of disposal over such interest. * * * * If the creditor's rights are deemed to be based exclusively upon the father's power of disposition over the son's interest such rights must necessarily come to an end as soon as the father dies, or there is a partition between him and his sons. It is settled law that even after partition the sons could be made liable for the pre-partition debts of the father if there was no proper arrangement for the payment of such debts at the time when the partition was effected, although the father could have no longer any right of alienation in regard to the separated shares of the sons."

All this discussion clearly shows that in the above-mentioned case the existence of the debt was taken for granted by their Lordships of the Supreme Court and the observations quoted above, on which reliance was placed by the learned counsel for the appellant, must be taken in the context of the case. This judgment of the Supreme Court is certainly no authority for the proposition that once there is a decree passed against the father, the sons are debarred from challenging, in a suit of their own, the existence of the debt.

As is apparent from the observations quoted above, in *Sidheshwar Mukerjee's case,* (1) sons can become liable in two different ways for the debts incurred by their father. If the father happens to be a *karta* of the joint Hindu family and he incurs debts for the benefit of the family, he binds all the members of the coparcenary. This right to bind the interests of other coparceners vests not only in the father but also in the manager or the *karta* of the family, of whatever relation he may be to the junior members. By the *karta* incurring a debt for the benefit of the family, he can make the shares of all the coparceners liable for the satisfaction of that debt. In such a case, even where the *karta* happens to be a father, the liability of the sons is in the nature of legal liability for discharging the debt incurred for their common benefit. The *karta* may alienate the property straightaway or he may incur a money debt for the benefit of the family, and in such a case a decree obtained by the creditor against the *karta*, will be binding on all the members of the coparcenary and will not be assailable. On the other hand, the father may incur a debt not for the benefit of the family but for

(1) A.I.R. 1953 S.C. 487

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his personal benefit. There is no legal liability of the sons to discharge such a debt because the same was not incurred for their benefit. Under the Hindu law, however, the sons have a pious obligation to discharge such a debt and the basis for this obligation is that if debts incurred by the father are not discharged his soul will be tormented in the hell after his death or he will be reborn as a slave or an animal. It is to save the soul of their father from such torments that the sons ore under a pious obligation to discharge his debts. However, if the debts have been incurred for immoral or illegal purposes, the sons are discharged from their pious liability because there could be no pious liability for discharging the debts which are illegal or "*avyavaharika*" or as Colebrook puts it "repugnant to good morals." The other limitation that has been added is that the liability of the sons is not personal but is only to the extent of the joint family property received by them. Apart from such pious obligation the sons would certainly be not liable for the debts incurred by their father for his personal benefit and not for the benefit of the family, because the sons do not claim a share in the joint family property through their father and in that sense would not be the representatives of the father. A Hindu son or grandson gets a share in the coparcenary property by his birth, by his very status of being a coparcener. The question that arises, therefore, is whether there could be any pious obligation on the sons to discharge a debt which does not, in fact, exist but in respect of which, somehow or the other, the creditor gets a decree against the father. Though a decree may wrongly be granted by a judicial Court because the father either failed to produce proper evidence or was not properly advised, and such a decree may be binding as against the father, as a judgment-debtor, under

the laws enforced in this world, yet it is obvious that in the other world the truth is known and the non-payment, by the father, of such a "decretal debt" would not result in his soul being tormented in hell. Sinha J. in *Pirthi Raj's case* (1), noted above observed as follows at page 342 of the report:—

> "This liability of the sons is based on the doctrine of Hindu law which enjoins it as the 'pious obligation' of the sons to pay their father's debt so as to avoid his being thrown into hell. But it cannot be said that simply because a judgment had been recovered against the father for payment of money, the sons are bound by that judgment in the sense that the father fully represented them for all purposes. If that were so, many a designing professional money-lender could recover judgment against a foolish and negligent father by questionable methods, and enforce that judgment against his sons, who will be left helpless in the matter except where they can prove the illegality or immorality of the debt, which is not an easy matter. In any case, it may be easier for the sons to allege and prove that there was no debt than to prove that the debt had been incurred and the money thus borrowed spent upon illegal or immoral pursuits."

Din Mohammad J., in the *Full Bench case of Maha Deo* (2), referred to the text of Yajnyawalkya, at page 187, which runs as follows:—

> "The father being gone to a foreign country, or deceased naturally or civilly, or

(1) A.I.R. 1946 Pat. 338
(2) A.I.R. 1944 Lah. 220

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wholly immersed in vices, the sons, or their sons, must pay the debt; but, if disputed, it must be proved by witnesses."

The commentary attached to it says:—

> "The son does not know that his father had contracted a debt from that man; or he knows it, but conceals his knowledge. in these cases, 'it must be declared by witnesses;' it must be established by the evidence of witnesses."

The learned Judge further referred to Colebrook's translation of "a Digest of Hindu Law on Contracts and Successions" and repelled the argument that the proof of the debt against the father meets the requirements of pure Hindu law and observed as follows:—

> I am, however, inclined to think that the commentary at para 187 may safely be interpreted to mean that the proof is to be tendered *qua* the person who raises the contest and if the sons dispute a certain debt, it is they who are to be satisfied and not the father. But even if this be not so there is nothing in pure Hindu Law which bars the sons from resisting a claim made from them on the ground of want of consideration."

A consideration of the judicial decisions also points to the same effect. The difficulty has mainly arisen from the observations made in Mayne's Treatise on Hindu law in para 334 at page 431 of the 10th Edition where it is stated as follows:—

> " * * or when in execution of a decree for money or on a mortgage by the father,

> the ancestral property is sold, the sons, not being parties, are entitled to have the nature of the debts tried in a suit of their own."

There is a note of the Editor at pages 431-432 to the following effect:—

> "Some of the dicta of the Privy Council and of the Courts in India would entitle the son to dispute the facts of the debt also. 13 I.A. 1 at page 18=13 Cal. 21, 21 Mad. 222 at page 226 34 Cal. 735 at page 742. It is fairly clear from the more recent decisions that in a suit upon a debt against the father, he represents the sons when they are not made parties so far as the factum of the debt is concerned and the judgment against the father itself creates the debt. Fraud or collusion, of course, will always be an exception. When a decree is passed against the father for a debt proved against him, it is not easy to see how the sons can dispute the father's liability under it except, of course, in respect of the nature of the debt regarding which the father could not represent the sons."

These observations were noted and the authorities on the point elaborately discussed by Sinha J. (Manohar Lall J. concurring) in *Pirthiraj's case*, (1), mentioned above and the learned Judge observed:—

> On a consideration of these authorities the balance of the judicial opinion is in favour of the view * * * that it is open to the sons to challenge not only

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the nature but also the factum of the debt alleged to have been the foundation of a decree passed against the father alone."

Before us reliance was placed, among others, on the observations of their Lordships of the Judicial Committee of the Privy Council in *Nanomi Babuasin* v. *Modum Mohun*, (1). Lord Hobhouse delivering the judgment of the Judicial Committee made the following observations at page 35 of the I. L. R. :—

> "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decision have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality."

It was stressed that the above observations support the contention of the learned counsel for the appellant that the sons can resist the decree-holder creditor only if the debt is tainted with immorality and not otherwise. It, however, appears that the question whether the sons could challenge he factum of the debt was not under consideration by their Lordships while making these observations. This is clear from another observation made in the course of the same judgment, at page 36, which runs as follows:—

> "The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings

(1) I.L.R. 13 Cal. 21=13 I.A. 1

against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious."

Thus it is clear that, while making the earlier observations at page 35, their Lordships did not mean to lay down that sons were debarred from challenging the factum of the debt, forming the basis of a decree against their father. In fact, this point was specifically left open, because its decision was not necessary in that case.

Reference was also made to *Kesar Chand* v. *Uttam Chand* (1). In that case one Uttam Chand stood surety in the execution proceednigs for his Nephew Hans Raj and others, judgment-debtors, and created a charge over his immovable property for making good the deficiency if the sale-proceeds of the property were not sufficient to meet the decretal amount. There being a shortfall, the decree-holder took out execution against the property of Uttam Chand including that which was given by way of security and the properties were in due course sold. A suit was brought by the sons of Uttam Chand seeking to set aside the sale and for possession of the property on the ground that the same was ancestral and was not liable to be taken in execution against their father. The High Court interpreted the surety bond as creating a personal liability of Uttam Chand and observed as follows:—

"The executing Court acted on the assumption "that Uttam Chand had undertaken a personal liability and *this assumption does not appear to have been*

(1) A.I.R. 1945 P.C. 91

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challenged at any stage of the proceedings."

With reference to this, their Lordships of the Privy Council observed as follows:—

> "But it must be noticed that the sons and grandson of Uttam Chand have a vaild right of challenging that assumption by instituting a suit if they can make out a proper case."

Their Lordships of the Privy Council, however, felt that on a true interpretation of the security bond there was no personal liability of Uttam Chand and at page 94 of the report it is observed as follows:—

> " * * * their Lordships hold that as it is not shown that Uttam Chand has made himself personally liable for the amount that remained due to the decree-holder there was no debt due from him. * * * * * Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property."

In the above noted case there was no decree against the father which was being challenged by the sons. However, one thing is significant that though in the proceedings before the executing Court to which Uttam Chand was a party, it was assumed that personal liability did exist and Uttam Chand did not challenge this fact at any stage of the proceedings yet their Lordships of the Privy Council held that the sons had a

right of challenging the same by instituting a suit of their own and making out a proper case. This would show that though in some proceedings to which the father was a party it has been finally held against the father that a debt or an obligation exists, yet such a finding is not ultimately binding on the sons when they are sought to be made liable by sale of their share in the property. It is proper to note that the decision of the Privy Council did not proceed on any question of immorality or illegality of the debt incurred.

In addition to the above decisions, reference was made to the observations of their Lordships of the Privy Council in a number of cases to the effect that the sons can challenge a decree based on a debt incurred by their father, only on the ground that the debt was tained with immorality or illegality. In this respect see *Girdharee Lall and Muddan Thakoor* v. *Kantoo Lall* (1), *Bhagbut Pershad* v. *Mt. Girja Keer* (2), *Sripat Singh* v. *Prodyot Kumar* (3), *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh*, (4), *and Brij Narain* v. *Mangal Prasad*, (5). We have carefully gone through all these cases and find that in none of these the question, now under discussion, was directly involved and the observations therein proceeded on the assumption that the debt was in existence. in *Girdharee Lal and Middan Thakoor* v. *Kantoo Lal* (1), the two plaintiffs challenged sales effected by their fathers for discharging certain previous debts. They did not question the existence of the debt. At page 332 of the report it is stated as follows:—

> " * * * * it was proved that the purchase-money for the estate was paid into the

(1) 1 I.A. 321
(2) I.L.R. 15 Cal. 717
(3) I.L.R. 44 Cal. 524
(4) I.L.R. 47 Cal. 924
(5) I.L.R. 46 All. 95

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"bankers of the fathers, and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers and partly to pay Government revenue."

The real question involved in this case was whether, under Mithila law, the ancestral property was exempt from liability to pay a person's debts because a son is born to him. Sir, Barners Peacock, delivering the judgment of the Judicial Committee, observed at page 331 of the report as follows:—

> "The rule is, as stated by Lord Justice Knight Bruce (in *Hanooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1). 'The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt.'
>
> It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shown that the

(1) 6 Moore's Ind. App. 421

> "bond upon which the decree was obtained was given for an immoral purpose; * * *".

It is thus obvious that, according to the facts proved in the case, not only the existence of the debt was not challenged by the sons but also the debt was found not to have been incurred for immoral or illegal purposes.

In *Bhaghut Pershad's case* (1), the son had challenged certain alienations by the father. The allegations in the plaint are given at page 718 of the report as follows:—

> "The plaint alleged that the income of the ancestral estate was sufficient for the family, and that there was no necessity for the loans contracted by the father; but that the latter by dissipation and extravagance wasted the income, and had taken loans on the security of the ancestral estate, the mahajuns having lent without due inquiry."

The trial Court which held that it had not been proved that the monies borrowed were applied for immoral purposes, however, came to the conclusion that the loans were not incurred for any legal necessity and, therefore, granted relief *qua* the sons who were in existence at the time of the alienations in dispute. Thus the real matter before their Lordships of the Privy Council was as to whether a son is liable for a debt incurred by the father otherwise than for legal necessity and the question whether the son could challenge the factum of the debt or not was not in dispute.

(1) I.L.R. 15 Cal. 717

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In *Sripat Singh's case* (1), while the joint family property was being put to sale in execution of a mortgage decree against the father, the order for sale was amended on the objection of the sons by adding the words "right, title and interest" of the judgment-debtor as indicating what was to be sold. The property was later on sold and purchased by the decree-holder. In a suit brought by the sons for a declaration that only the share of the father passed by the sale, the Courts in India found that the debts were for legal and necessary purposes. The trial Court held that though the entire joint family property would have been liable to sale in execution of the decree yet because of the specific order of the executing Court only the "right, title and interest" of the father, judgment-debtor passed by the sale. The High Court reversed the decree and their Lordships of the Privy Council held as follows:—

> "* * * the proper construction of the order for sale, as amended, was that, if the plaintiffs succeeded in establishing that the debts had been incurred for immoral purposes, only one-third of the property would be effected by the sale, while if hey failed in that contention the whole of the property would be held to have passed by the sale."

This case, therefore, did not deal with the matter before us at all.

Similarly *Ganpat Lal's case* (2), is also besides the point. In that case also joint property was sold in execution of a mortgage decree and the sons later on tried to exercise their right by

(1) I.L.R. 44 Cal. 524
(2) I.L.R. 47 Cal. 924

bringing a separate suit for redemption of their share on the ground that they were not parties to the suit. The suit of the sons was dismissed on the short ground that they could not claim the relief without impeaching the mortgage decree and the sales which had taken place.

In *Brij Narain's case* (1), Lord Dunedin, while delivering the judgment of their Lordships of the Privy Council, after considering all the previous authorities laid down the following propositions:—

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

(2) If he is the father, and the other members are his 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 proceedings upon a decree for payment *for that debt.*

(3) If he purports to burden the estate with a mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest.

(4) Antecedent debt mean 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 burdens the estate, is alive or dead."

(1) I.L.R. 46 All. 95

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Stress was laid on the second proposition given above. The words "by incurring debt" and "for that debt", however, make it quite clear that the pious obligation of the son arises only where the father has actually incurred a debt and the mere existence of a decree against the father does not establish conclusively that he has incurred a debt. It may also be mentioned that in *Brij Narain's case* (1), the minors challenged the decree passed against their father on the basis of a mortgage and "the plaint alleged that the mortgage had been executed by their father upon the joint family property without necessity so as to bind them * * * * * * The mortgage was upon ancestral property of the joint family and was expressed to be made in order to discharge certain mortgages upon the same property made in 1905 and 1907 by Sita Ram (father); it was found by the High Court that the whole of the sum advanced had been applied to that purpose." In this case, therefore, not only the existence of the debt was not challenged but, on the other hand, it was found that the debt forming the basis of the decree was actually advanced and utilised for discharging other antecedent debts.

The point arose directly in *Beni Parshad and others* v. *Puran Chand* (2). In that case Prinsep and *Ghose,* JJ. came to the conclusion that the sons, questioning the existence of the debt, on the basis of which the reversioners had obtained a decree against their father in the year 1875, were not precluded from doing so, by the existence of the decree, and on a consideration of the evidence, led in that case, it was held that the plaintiff's father was not, in fact, liable for the mesne profits for which a decree had been passed against him. A later decision of the Calcutta High Court reported as *Chander Pershad* v. *Sham Koer* (3), which is

(1) I.L.R. 46 All. 95
(2) I.L.R. 23 Cal. 262
(3) I.L.R. 33 Cal. 676

one of the rulings relied upon by the Editor of the Mayne's Hindu Law at pages 431 and 432 (10th Edition), did not directly deal with the point involved in this case.

There are three decisions of the Madras High Court which have got some bearing on the question before us. The view taken by Shephard and Devies JJ. in *Ramasamayyan* v. *Viraswami* (1), conforms to that taken by the majority in the Full Bench of the Lahore High Court in *Maha Deo's case* (2). In that case there was a mortgage decree against the father and his two sons and another son was held entitled to have the question tried whether there was really a debt owed by the father to support the mortgage. In the second case, *Ramasami Nadan* v. *Ulaganatha Goundan*, (3), a suit had been brought by the creditor impleading not only the father but his sons also, whom it was sought to make liable on the ground that the debts were incurred for the benefit of the family, but actually the creditor did not obtain a decree against the sons. The objection raised was that the sons's liability did not arise till after the death of the father. The question referred to the Full Bench was as follows:—

> "Whether the plaintiffs (creditor) could have prosecuted the claim against the sons of T and have obtained a decree making their shares in the family property liable for T's debt?"

The question was answered in the affirmative. Subramania Ayyar J. at page 66 of the report observed as follows:—

> "It is impossible to hold under the law, * * * * that a creditor suing a Hindu for

(1) I.L.R. 21 Mad. 222
(2) A.I.R. 1944 Lah. 220
(3) I.L.R. 22 Mad. 49 (F.B.)

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his personal debt is not entitled to include, as defendants in the suit, the debtor's sons. For, in cases like the present, the sons, as persons likely to be affected by proceedings taken against their father, have an undoubted right to raise questions as to the *existence or the character of the debt, not withstanding any decree passed against the father without the sons having been made parties*, and to raise such questions during the lifetime of the father. How could the other party (creditor), * * * be held to be precluded from calling upon his adversary (son) * * * to raise any objection he wishes to urge against the creditor's claim to recover his debt even against the adversaries share of the estate, so as to guard against further litigation which might arise * * if a decree is obtained against the father alone. * * * for the due protection of the rights of the class of creditors and debtors under consideration and on general principles (creditor) is entitled to make the sons defendants in the suit for the father's debt, even when it has not been incurred for the benefit of the family."

From the words underlined it is obvious that the right of a son, who is not made a party to the suit in which a decree is passed against the father, to challenge the existence and character of the debt in a subsequent proceeding was clearly envisaged by the eminent Judge. Benson J. also made similar observations. A discordant note was, however, struck by Bhashyam Ayyangar J. in *Periasami Mudaliar* v. *Seetharama Chettiar*

(1), at page 251 of the report the learned Judge observed as follows:—

> "There is no reason whatever for holding that under the Hindu Law Judgments given by the Sovereign or by judicial tribunals established by him are less solemn or less obligatory by their own force than they are under the English Jurisprudence. A Hindu father, therefore, against whom a decree has been passed for a sum of money is under no less obligation—legal and religious—to obey the decree and discharge the debt thereby imposed upon him than to discharge debts 'contracted' by him; and the pious obligation of the son to discharge his father's debts extends as much to the one as to the other. The whole of the joint family property in the hands of the son must be held liable to satisfy the debt imposed upon the father by the judgment, as a solemn debt of record, quite independently of the original cause of action or alleged debt on which the suit against the father had been brought."

These observations, made as they are, by an eminent Judge like Bhashyam Ayyangar J., are entitled to very great weight and respect. However, it must be stated that the question with which we are concerned was not raised or argued in that case. In execution of a decree, obtained against the father, the joint family property was sought to be attached. This was, however, refused and thereupon a second suit was instituted against the whole family including the sons, after

(1) I.L.R. 27 Mad. 243 (F.B.)

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the death of the father. The question in controversy was whether the second suit was in time and maintainable and it was held, by the Full Bench, that the cause of action in the suit was not the original transaction but the decree against the father, which by its own force created a debt as against the father which his sons were under an obligation to discharge, unless they showed that the debt was illegal or immoral. The observations, therefore, were really made while considering the question whether a decree passed against the father provided a fresh starting point, for the purposes of limitation to the creditor who wanted to make the sons also liable. With respect, it must be said that the question whether the sons could raise the point in defence that the debt was non-existent was not mooted and was not required to be decided. It may further be mentioned that *Rama Samayyan* v. *Vira Swami*, (1), referred to above, which seems to have taken the opposite view so far as the question of son's right to challenge the existence of a debt is concerned, was not referred to.

Coming next to Allahabad High Court, *Karan Singh* v. *Bhup Singh* (2), *Inder Pal* v. *Imperial Bank Ltd.* (3), *Mohan Lal* v. *Balaprashad* (4), and *Abdul Karim* v. *Ram Kishore* (5), are amongst the authorities relied upon by the Editor of the 10th Edition of Mayne's Hindu Law for the latter part of his note reproduced in the earlier part of the judgment. In none of these cases, however, the exact question now before us was in controversy.

In *Karan Singh etc.* v. *Bhup Singh* (2), joint family property was attached by the decree-holder in execution of a decree obtained by him

(1) I.L.R. 21 Mad. 222
(2) I.L.R. 27 All. 16 (F.B.)
(3) I.L.R. 37 All. 214
(4) I.L.R. 44 All. 649
(5) I. L.R. 47 All. 421

against the father. A suit was brought by the sons and grandsons of the judgment-debtor seeking a declaration that their interest in the property was not liable in execution of this decree. While dealing with the facts of the case the Full Bench observed as follows:—

> "There is no allegation * * * that the debt in respect of which execution proceedings were had was for immoral purposes * * * * The lower Courts, however, have come to the conclusion that the debt was a personal debt of Tota Ram and that his sons and grandsons were not liable in respect of it. * * * * This was not a debt which was contracted for the benefit of the joint family."

Following the decision of the Privy Council in (1), and *Mst. Nanaumi's case* (2), it was held that the interests of the sons can only be exempted if the sons can show that the debt in respect of which such decree was obtained was tainted with immorality or was such a debt as it was not the poius duty of the sons to pay. It is, therefore, clear that in this case the sons never disputed the factum of the debt and their right to do so was not under consideration by the Full Bench.

In *Inder Pal etc.* v. *Imperial Bank,* (3), the real question involved again was whether a creditor having obtained a decree against the father was entitled to put to sale the share of the sons in the joint family property. In a suit brought by the sons to challenge the liability of their share in the property to be taken in the execution of such a

(1) 16 Indian Appeals 1
(2) 13 I.A. 1
(3) I.L.R. 37 All. 214

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decree, the plea taken was that the property attached fell to the share of the sons on partition. On evidence it was held that the partition was bogus and a faked affair. At page 218 of the report Tudball J. observed as under:—

> "A creditor having obtained a decree against the father * * * * is entitled to put to sale the family property, i.e. the Court can "do that which the father himself would be empowererd to do under the law. The son whose interests are threatened is entitled to an opportunity of contesting both the factum and the nature of the debt and there is nothing in law to prevent him from coming into Court in the execution department and preventing, if possible, on these two grounds the passing of his interests to the auction purchaser. If the points are decided against him, the Court in execution can put the property to sale."

Piggott J., while concurring, also made similar observations:—

> "If execution had been taken out in the first instance against the shares of the father and the sons, I do not see how the sons could have avoided execution except on proof of the non-existence of the debt or of its being tainted with immorality."

No doubt in this case no plea of immorality or non-existence of the debt was taken and there was nothing in the suit to raise even a suspicion as to the factum or the nature of the debt, yet these observations, far from denying the son's right to

challenge the factum of the debt on which a decree has been passed against their father in a suit of their own, rather support this right and the right, according to these observations, can even be exercised by taking objection in execution proceedings. In *Mohan Lal* v. *Bala Prasad and another*, (1), and *Abdul Karim* v. *Ram Kishore and others* (2), the only question was whether the sons' share could be attached and sold by a decree-holder in execution of a decree obtained by him against the father. The sons did not challenge the factum of the debt and the observations made in both these cases, to the effect that such a decree could be executed against the whole of the joint family property unless the sons could show that the debt was incurred for illegal or immoral purposes, must be taken to have been made on the assumption that the debt exited. It may further be noted that Piggot J. who clearly recognized the right of the sons to challenge the factum of the debt in Inder Pal's case, was a party to both these *cases of Mohan Lal.* (1), *and Abdul Karim,* (2).

Thus none of the cases relied upon by the Editor, for the latter part of his note, really supports that note. On the contrary, the observations of Tudball and Piggot JJ. in *Inder Pal's case* (3), rather support the opposite view that the sons can challenge the factum of the debt, on which the decree against the father is based,

In the 11th Edition of Mayne, *Chanderdo Sahi* v. *Suraj Bali Rai* (4), is the only Allahabad authority cited by the learned Editor in this context. In this case joint property was sold in execution of a decree against the father, based on five simple money bonds executed by him. In the suit brought

(1) I.L.R. 44 All. 649
(2) I.L.R. 47 All. 421
(3) I.L.R. 37 All. 214
(4) A.I.R. 1947 All. 184

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on behalf of the sons *inter alia* the factum of the debt was contested. After referring to the Full Bench decision of the Lahore High Court in *Maha Deo's case* (1), Full Bench decision of Madras High Court *Periasami Mudaliar* v. *Seetharama Chettiar* (2), and Full Bench decision of Allahabad High Court in (3), and the observations of Mayne in Hindu Law, a Division Bench of the Allahabad High Court, consisting of Waliullah and Bennett JJ. observed as follows:—

> "The trend of the more recent decisions, * * * seems to be in favour of the view that the father represents the sons so far as the factum "of the debt is concerned and the judgment against the father itself creates a debt."

Apart from the fact that there is no discussion of the authorities, these observations were unnecessary for the decision of the case because of the finding of the learned Judges, that on the evidence led, the sons had not succeeded in discharging the onus, which lay upon them, of establishing either that there was no debt owed by their father or that any of the debts incurred was tainted with illegality or immorality. This case, therefore, also cannot be held to be an authority on the point.

So far as the Lahore High Court is concerned, besides the two cases referred to above, refrence may be made to another case decided by the Chief Court in which the decision was in accordance with the majority view in *Maha Deo's case* (1). In *Kasturi Mal* v. *Lajju Ram* (4), Chevis, J.

(1) A.I.R. 1944 Lah. 220
(2) I.L.R. 27 Mad. 243
(3) I.L.R. 27 All. 60
(4) 60 I.C. 751

held that the mere existence of a decree against the father is no evidence against his son who was not a party to the suit in which the decree was obtained and that the creditor must prove the existence of a debt in order to render the son liable. For the contrary view reliance was placed on *Prithi Raj* v. *D. C. Ralli* (1). In this case, however, the question was one under the Court-fees Act. Relying on a Full Bench decision of the Lahore High Court, *Mt. Zeb-ul-Nisa* v. *Din Mohammad* (2), it was held that the sale or mortgage of the joint family property, effected by the manager of the joint Hindu family, was binding on the other members of the family unless and until it is set aside and that the mortgage decree against the father must be got set aside by the son as consequence to the declaration claimed that the same is not binding on him and that *ad valorem* court-fee has to be paid under section 7(iv)(c) of the Court-fees Act. This case, therefore, does not deal with the point before us.

As already stated, so far as Patna High Court is concerned *Firm Pirthiraj's case* (3), is the only direct case on the point wherein Sinha J., after elaborately discussing the case law, opproved the view taken by the majority in the Full Bench case of the Lahore High Court. Earlier, in a case in which the point, however, was not directly involved (First Appeal No. 158 of 1935 decided on 15th of August, 1940). Manohar Lal J. took the same view as was arrived at by the Division Bench in Pirthiraj's case though Dhavle J. did not concur with this view. No other case directly dealt with the point.

Following *Pirthiraj's case* (3), a Division Bench of the Kerala High Court in *Lakhsman*

(1) A.I.R. 1945 Lah. 13
(2) A.I.R. 1941 Lah. 97
(3) A.I.R. 1946 Pat. 338

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Dass v. *Karamkaran* (1), also came to the same conclusion.

Judicial decisions discussed above, do not seem to establish that the sons, when called upon to discharge the decretal debt of their father, under their pious obligation, are precluded from challenging the factum of the debt on which the decree is based. There is no decision of the Privy Council or of the Supreme Court in which this point was directly involved. Same is the case with Allahabad High Court. However, Tubdall and Piggot JJ., in *Inder Pal's case* (2), clearly recognised the right of the sons to have the question of the existence of the debt determined in a suit of their own. In Madras High Court Shephard and Davis JJ. in *Ramasamayyam* v. *Viraswami* (3), and Subramania Ayyar and Benson JJ, in *Ramaswami Nadan's case* (4), also recognized this right. In the only two cases from the Punjab in which this point directly arose for decision, Chivis, J. of the Punjab Chief Court in one case and Din Mohammad and Sale JJ. of the Punjab High Court in the other, held in favour of the sons. This view has been followed by Patna High Court and recently by Kerala High Court, in the cases arising there. Thus we find that apart from the dissentient judgment of Teja Singh J. in *Maha Deo's case* (5), and the *obiter dicta* of Bhashyam Ayyanger J. in *Periasami Mudaliar's case* (6), there is no authority for the opinion expressed by the learned Editors of Mayne's Hindu Law (10th and 11th Editions) that according to the more recent decisions the decree against the father itself creates a debt which the sons are bound to discharge.

(1) A.I.R. 1957 Kerala 126
(2) I.L.R. 37 All. 214
(3) I.L.R. 21 Mad. 222
(4) I.L.R. 22 Mad. 49
(5) A.I.R. 1944 Lah. 220
(6) I.L.R. 27 Mad. 243

There is one other argument that is put forward in support of the view that sons cannot be allowed to challenge the factum of the debt. It is urged that if the father contests the suit filed by the creditor for "the recovery of the debt in dispute then the father, in those proceedings, represents the sons so far as the plea of non-existence of the debt is concerned. The argument is that though the defence of the debt being immoral or illegal is not open to the father, yet the plea that the debt does not exist is open, both to the father as well as to the sons and that consequently any decision given by the Court, against the father as regards the existence of otherwise of the debt should be treated as binding on the sons. In other words, the principle of *res judicata* embodied in section 11 of the Code of Civil Procedure is sought to be made applicable in such a case. It is conceded that the main provisions of section 11 do not apply and that the principles embodied in the section would be applicable only by bringing in explanation VI which runs as follows:—

> "Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

It is, however, difficult to understand how the father, while defending a suit in regard to a debt incurred by him, not for the benefit of the family but for his own personal benefit, can be said to be litigating in respect of a right common to him and his sons. The main and primary liability for the discharge of such a debt is that of the

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father. Sons are not really concerned with the same unless and until the father not only fails to resist the claim on the basis of any defence open to him under law, but is also unable to discharge the decree, when passed, out of his own share of the property. As already indicated, sons get a right in the joint coparcenary property by their birth and do not claim through their father. If the debts were incurred for the benefit of the family then the suit brought against the father would be in a representative capacity because he incurred the debts not only for his own benefit but also for the benefit of his sons and, therefore, he litigates in respect of a right common to him and his sons, while defending the suit and in execution of the decree obtained against the father the entire joint family property, including the share of the sons, can be attached and sold. In such a case the liability of the sons to pay the debt is a legal one. On the other hand, when the debt is incurred by the father of his own personal benefit, there is no legal liability of the sons to discharge the same out of their share of the coparcenary property. The obligation of the sons to discharge the debt either during the life time or even after the death of the father, is merely a pious obligation, to save the soul of their father from being tormented in hell or being reborn as a slave or an animal. It is obvious that certain defences which are open to the sons against the recovery of the debt by the creditor from the property, namely, illegality or immorality of the debt, are not available to the father. The argument that if the father takes up the defence of the non-existence of the debt, then to the extent of such a plea, which is common to him and his sons, he represents the sons, seems to be rather fallacious. It is conceded that the father does not represent the sons in such a proceeding if the

debt incurred is for an illegal purpose; nor does he represent the sons if the debt be an immoral one. One cannot, therefore, understand how he can represent the sons in regard to a debt which, in fact, did not exist at all, but in regard to which he allows a decree to be passed against him either because of his negligence or because of his inability due to some other causes, to establish the fictitious nature of the debt. So far as the father is concerned he becomes liable to discharge the decree, irrespective of the immoral or illegal nature of the debts forming the basis of the decree. This liability will be there even if the debts were fictitious, so long as there is an effective decree against him. This liability of the father is a legal one arising from his position as a judgment-debtor. The basis of the obligation of the sons to pay a personal debt of their father is not legal (which would be the case, if father had represented them in the case), but merely religious. The basis of the liability of the father and the sons is, therefore, not the same. The father cannot, consequently be said to litigate, in such a suit, in respect of a right claimed in common for himself and his sons, simply because one of the defences that can be taken by the father, is also open to the sons, if and when they are sought to be made liable by the decree-holder.

In this connection reference is made, in some decided cases, to the observations of Lord Phillimore in *Lingangowda* v. *Basangowda* (1), at page 453 of the report which are as follows:—

> "In the case of an Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again,

(1) I.L.R. 51 Bom. 450 (P.C.)

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and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to the explanation 6 of section 11 of the Code of Civil Procedure to see whether or not the leading member of the family has been acting either on behalf of mionrs in their interest, or if they are majors, with the assent of the majors."

The facts of this case were entirely different. In a previous suit father sought a declaration that the property in dispute was exclusively owned and possessed by him and the defendants had no share therein, being illegitimate. The suit was dismissed on the finding that defendants were legitimate. Minor sons, in a subsequent suit, claimed that they were not bound by the decision in the previous suit, as their father had not sued on behalf of the family with due care. This contention was repelled and it was held by their Lordships of the Privy Council:—

> "It seems clear that the plaintiff in the previous suit was acting on behalf of himself and his minor children to try to exclude a collateral branch from a share of the family property. If he had succeeded, the judgment would have inured for the benefit of the children, and as he has failed, they must take the consequences."

There can be no manner of doubt that the father in the previous case was litigating with regard to a claim common to him and his sons and the observations of their Lordships had relation to the facts of that case and have no bearing on the

point before us. In any case, the test, as laid down by their Lordships, would still remain, as to whether "the leading member of the family has been acting on behalf of the minors in their interest and if they are majors with the assent of the majors." How could the father be taken to be acting either on behalf of the minors or in their interest in conducting proceedings relating to his own personal debt? And if the sons are major and are not impleaded by the creditor, how can their consent be presumed? The only way for the creditor to have the question of existence of debt decided once for all and to avoid botheration of being faced with the suit brought by the sons later, challenging the existence of the debt, which he had already established against the father, is to implead the sons as parties to the suit against the father, if the creditor feels that the sons are also liable to pay the debt either because the same was incurred for the benefit of the family or because of the pious obligation of the sons. As was observed by Subramania Ayyar, J., in *Ramasami Nadan's case* (1), it is open to the creditor to implead the sons to have the question of existence or the character of the debt, thus, settled for all times. In *Lakshmadu* v. *Ramudu* (2), the question arose as to when does the father represent the family and Abdur Rehman J., delivering the judgment of the Division Bench, observed at page 871 of the report as follows:—

> "The argument is that although the father might have been debarred from raising a question of his immorality or illegality, yet he was not debarred from raising the question of the want of consideration and as a decree, either *ex parte*

(1) I.L.R. 22 Mad. 49
(2) A.I.R. 1939 Mad. 867

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or otherwise, was passed against Appanna, it was no longer open to his sons, * * * *, to contest that there was "no consideration for the mortgage deed. Had the decree not been passed against the father who occupied a special position as a *karta* of joint Hindu family with regard to his sons, the answer would have been simple enough. But the contention is that a Hindu father represents his sons even when they have not been impleaded so far as the factum of the debt is concerned and that they cannot dispute the existence of the debt after the decree, * * * * * It assumes in the first instance that the father was sued in a representative capacity.

We do not see any reason why the father should be held to have represented his sons in any greater degree in regard to the factum of the debt then he could have done in case the debt had been attacked as immoral or illegal. * * * * (The sons cannot be held liable) unless it is shown that the father was being sued in a representative capacity. In the absence of an express declaration that he was being sued in that capacity, this can only be established by proving that a debt existed in point of fact. The sons * * * * were no parties to the action. If the sons are not allowed to question the existence of the debt in a subsequent suit how and when would it be possible for them to contend that the debt was never actually incurred by their father? * * * * * It is only

> "after the debt has been proved to exist and found not to have been immoral or illegal that the father could be said to have been sued in a representative capacity. As long as these questions remain undecided, in spite of the challenge by the sons, it cannot be said that the father had been sued in a representative capacity."

In *Pirthiraj's case* (1), Manohar Lal J., while dealing with this aspect of the case observed at page 347 of the report as follows:—

> "The rule of *res judicata* cannot apply in such cases, because the son does not claim through his father and I know of no principle under which it has been suggested in some cases that so far as the factum of the debt is concerned, the father must be taken to represent the whole family. With great respect the father may be taken to represent the whole family only when there is in fact a debt incurred for the purposes of the family. But where a debt does not exist in fact how can it be suggested that for the purposes of that suit in which the son is not a party it must be held or assumed that the father represented the son so that a decision that there was a debt is binding upon the son?"

Teja Singh J. in his dissentient judgment besides placing reliance on the observations of Lord Phillimore J. in *Lingangowda's case* (2), discussed above, also referred to Full Bench case of the Allahabad High Court reported in

(1) A.I.R. 1946 Pat. 338
(2) I.L.R. 51 Bom. 450 (P.C.)

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Thakur Din v. *Sita Ram* (1), and Full Bench case of Madras High Court reported as *Venkatanarayana* v. *V. Somaraju* (2). In the Allahabad case in execution of a decree obtained against father the family house was attached. The father raised an objection under section 60(1) (c) of the Code of Civil Procedure, on the ground that the same was exempt because he was an agriculturist. The suit was dismissed and the property sold. The suit brought by the sons seeking an injunction restraining the decree-holder from interfering with their possession of the house was held not maintainable. The reasons given by the Full Bench were two-fold as is clear from the observations at page 400 of the report to the following effect:—

> "Now in the present case there can be no doubt whatever that in the execution proceedings which were initiated by Sita Ram an interest of the joint family was directly involved, namely the ancestral house. The father * * * * in opposing the sale of the house in execution of the decree against him must be held to have represented not only his own interest but the interest of the other members of the joint family."

Then again —

> "It is well settled that the *karta* or a head of a joint Hindu family represents the interests of all the members of the family in a litigation in which an interest of the family is involved * * * "

There is no quarrel with the proposition laid down in this authority. As already discussed if the matter about which the father is litigating is one

(1) A.I.R. 1939 All. 399 (F.B.)
(2) A.I.R. 1937 Mad. 610 (F.B.)

in which the entire family is interested as, for example, in this reported case, the family house was to be protected from being sold by the decree-holder, the father or even the *karta*, who may be some other relation, represents all the members of the coparcenary. Such cases fall under the first category, where the father is either sued for a debt incurred in the interest of the family or where the father undertakes a litigation for the protection of the joint family property. Similarly, the Madras case was also one in which the father was sued in a representative capacity. Head-note makes it quite clear —

> "Where a father is sued as a representative of a joint Hindu family in respect of a joint family liability, the other members of the family must be held to be substantially parties to the suit through him."

This case or any propositions of law that were laid down in this ruling, have, thus, no bearing whatever, on the question whether father would represent the sons, while defending a suit brought against him, on the basis of a personal debt, alledged to have been incurred by him.

As a result of the discussion above, we arrive at the following conclusions:—

(1) On the principles of Hindu Law, on which the pious duty of the sons to discharge the personal debts of their father is based, the sons are not precluded from challenging the existence of the debt, when they are called upon to discharge the same and there is no warrant or "justification for the proposition

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that the decree against the father by itself creates a debt which they are bound to discharge.

(2) The balance of the judicial opinion is definitely in favour of conceding such a right to the sons. When the sons are called upon to discharge a decree passed against their father on the basis of an alleged personal debt of his, they are entitled to show that the debt aforesaid was non-existing, fictitious or illusory The mere fact that the father had suffered a decree being passed against himself, cannot be a ground for denying the sons this right.

(3) Father while defending a suit filed against him by a creditor for recovery of a debt, not incurred by him for the benefit of the family, does not represent his sons, not even *qua* the plea of non-existence of the debt, which may or may not be raised by him, and the sons are not bound by the decree, in respect of this plea under the principles embodied in Explanation VI to section 11 of the Civil Procedure Code.

(4) This right to challenge the existence of the debt, if conceded to the sons, does not work any hardship on the creditor because he can, by impleading the sons in the suit brought against the father, have this matter adjudicated upon in the presence of the sons.

In view of the above, therefore, we feel that in the present case the plaintiffs were fully entitled to challenge the existence of the debts and

they have been able to establish that the debts forming the basis of the decree against the father were non-existent and that the suit of the plaintiffs was rightly decreed by the Court below and there is no force in this appeal and the same must be dismissed with costs, and we order accordingly.

B.R.T.

APPELLATE CIVIL

Before G. L. Chopra, J.

RAM SINGH,—*Appellant.*

versus

JASMER SINGH AND ANOTHER,—*Respondents.*

Regular Second Appeal No. 282 of 1954.

1959

Feb. 11th

The Indian Registration Act (XVI of 1908)—Section 77—Suit under—Pre-requisites of—Application made under section 36 for summoning the document and the executant returned to be refiled with the document—Whether amounts to an order refusing to register the document—Appeal under section 72 and suit under section 77—Whether competent—Decree obtained in a suit under section 77—Whether can be challenged subsequently by persons not parties to the suit—If so, on what grounds.

Held, that to confer jurisdiction on the Court to entertain a suit under section 77 of the Indian Registration Act, 1908, it is necessary that there should have been a refusal by the Registrar to register the document under section 72 or section 76 and the suit must be instituted within thirty days of the order of refusal. So long as there is no such order, no suit under the section would be competent.

Held, that where an application was made under section 36 of the Act to the Sub-Registrar for summoning the document and the executant and the same was returned to be refiled accompanied by the document, it cannot be said